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SUPREME COURT OF NORTH CAROLINA

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3. Appointed and sworn in 27 May 1994 to replace Jerry Cash Martin who went to superior court 4 March 1994.
4. Appointed and sworn in 29 June 1994 to replace Benjamin D. Haines who resigned 31 January 1994.
5. Appointed and sworn in 20 May 1994 to replace Ronald Wayne Burris who went to superior court 16 March 1994.

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RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 14th day of January, 1994 and said person has been issued certificate of this Board:

DAVID T. BOLGER ..... Downingtown, Pennsylvania
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 18th day of January, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 7th day of January, 1994 and said person has been issued license certificate.

THOMAS W. PREWITT ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 19th day of January, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 28th day of January, 1994 and said person has been issued license certificate.

MICHAEL L. FALIVENE ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 8th day of February, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners

on the 18th day of February, 1994 and said persons have been issued certificates of this Board:

PAUL H. ANDERSON ..... Raleigh
Applied from the State of Virginia
MARVIN L. ROGERS ..... Charlotte
Applied from the State of Texas
THOMAS CLARK O'BANNON ..... Charlotte
Applied from the State of Texas
LINDA CAROL ROBERSON ..... Cary
Applied from the State of West Virginia
NANCY R. GAINES ..... Salisbury
Applied from the District of Columbia
CHARLES THOMAS CUNNINGHAM ..... Clemmons
Applied from the State of West Virginia
DAVID WHIT OWENS ..... Chapel Hill
Applied from the State of Wisconsin
DIANNE UPSON ..... Fleetwood
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 25th day of February, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 25th day of February, 1994 and said persons have been issued certificates of this Board:

LYNANNE BUTCHER WESTCOTT ..... Philadelphia, Pennsylvania
Applied from the State of Pennsylvania
JOSEPH A. MILLER ..... Portsmouth, Virginia
Applied from the State of Virginia
DANIEL RICHARD GIGLER ..... Pittsburgh, Pennsylvania
Applied from the State of Pennsylvania
JOSEPH M. SCHAPPERT ..... Columbus
Applied from the State of New York
PAUL CHRISTOPHER LAWRENCE ..... Charlotte
Applied from the State of Pennsylvania
GEORGE WILLIAM BIRKHEAD ..... Norfolk, Virginia
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 11th day of March, 1994.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 19th day of March, 1994 and said persons have been issued license certificates.

DEBBI LANDSBERG ABERMAN ..... Greensboro
DONNELL G. ADAMS, JR. ..... Pinehurst
HOLLY HARRIS ALDERMAN ..... Chapel Hill
MARGARET DILLARD ANAGNOS ..... Charlottesville, Virginia
GLEN RAMAGE BAKER ..... Lansing, Michigan
PATRICK WARREN BAKER ..... Durham
KEITH ERIC BELL ..... Philadelphia, Pennsylvania
KEITH OTTIS BOWLES II ..... Hillsborough
WILLIAM PARKS BRAY ..... Charlotte
BRIAN KEITH BROOKS ..... Pembroke
ANITA ROSE BROWN-GRAHAM ..... Sacramento, California
JAMES DARREN FLYERS ..... Winston-Salem
STEVEN CARR ..... Raleigh
JAMES REECE CAVINESS ..... Chadbourn
JOSEPH ALLEN CHEEK ..... Charlotte
JULIE CHRISTINE CHIU ..... Huntersville
TERRY ALLEN CLARK ..... Winston-Salem
MACON ANTHONY CLARK ..... St. Petersburg, Florida
THOMAS HAL CLARKE, JR. ..... Charlotte
DAVID BRENT CLONINGER ..... Mt. Pleasant
HELEN MARIE CORCORAN ..... Charlotte
TERRY LYNN CRANDALL ..... Durham
C. OPHELIA CRAWFORD ..... Winston-Salem
SHERMAN LEE CRINER ..... Raleigh
DALE STEVEN DAVIDSON ..... Kinston
KRISTIN DELANI DECKER ..... Winston-Salem
LOUIS J. DEROSE ..... Pineville
PAUL ROBERT DICKINSON, JR. ..... Charlotte
KURT LAURENCE DIXON ..... Raleigh
SUSAN LEE DUNN ..... Greensboro
THERESA DENISE EDWARDS ..... Raleigh
SANYA TASSIA ELLER ..... Fayetteville
JAMES L. EPPERSON ..... Alexandria, Virginia
CAROLINA J. ESTRADA ..... Raleigh
DELORES D. BENTON EVANS ..... Durham
MARK IRA FARBMAN ..... Charlotte
ROBERT LEE FENNER II ..... Charlotte
CAROLE A. GARDINER ..... Miami, Florida
FREDERICK RICHARD GILBERT ..... Utopia, New York
AMY RUTH GILLESPIE ..... Durham
MATTHEW FLEMING GINN ..... Concord
JEFFREY W. GLENNEY ..... Charlotte
RUTH EUDENE GORMAN ..... Charlotte
CECILIA RICHARDS GRAY ..... Fayetteville
NICOLETTE G.K. HAHN ..... Durham
ROBERT SEAMAN HAIGHT, JR. ..... Myrtle Beach, South Carolina

Scott Edward Hanf	Charlotte
Christopher Edward Hannum	Charlotte
Kristin Lynn Harmon	Carrboro
Lee Allison Harmon	Monroe
Cassandra Dawn Harris	Charlotte
Jeff Todd Harris	Charlotte
Carroll Chris Haston	Durham
Elizabeth Anne Silane Haughton	Jacksonville
Richard Eugene Hayber	Cromwell, Connecticut
Thomas Karl Hoops	Greensboro
Kevin Patrick Hopper	Raleigh
Debbie Renee Huggins	Advance
Martha Diane Jenison	Charlotte
Patricia Cramer Jenkins	Wilmington
Sean Andrew Iredell Johnson	Durham
Jacqueline Jarvis Jones	Charlotte
Sean Michael Jones	Charlotte
Jennifer Adams Jordan	Durham
Eric Charles Kaminetzky	Durham
Inga Floyd Kear	Winston-Salem
Tonya Marie Lacewell	Holly Springs
Patrick Henry Lambert	Cherokee
Laura Jean Lamkin	Raleigh
Rachel C. Lapidus	Poughkeepsie, New York
Yong-Shik Lee	Raleigh
Richard A. Linley	Asheville
John Charles Livingston	Raleigh
Gabriel Locklear	Pembroke
Charles Edward Lohmeyer	Virginia Beach, Virginia
Mary M. Markovich	Chapel Hill
Allison Michele Mathews	Raleigh
Bryce Boyd Mayberry	Kernersville
William Caner Mayberry	Charlotte
Marilyn Ennis Maynard	Raleigh
Roy Thornton McDaniel, Jr.	Tavernier, Florida
Emanuel Dubois McGirt	Chapel Hill
David I. Mellinger	Sunrise, Florida
Edward Alexander Meyer	Sacramento, California
Robert Blakeney Meyer	Charlotte
Robert Ashley Meynardie	Raleigh
Louis Martin Montgomery	Winston-Salem
Sherry M. Morris	Greensboro
George R. Morrow	Forest City
Karen Bernetta Musgrave	Fayetteville
Roberto Rene Mussenden	Alexandria, Virginia
Mary Margaret Ogburn	Winston-Salem
James Thomas Oxendine	Pembroke
Sondra Cheryl Panico	Raleigh
Rose Ann Pardi	Raleigh
Clayton E. Parham	Southern Pines
Laurie Pearlman Park	Greensboro

LICENSED ATTORNEYS

KATHLEEN D.H. PAWLOWSKI ..... Wilmington
ADRIAN A'LIESE PHILLIPS ..... Mebane
P. LEWIS PITTS, JR. ..... Durham
CHARLES W. PORTER ..... Charlotte
DAVID REAVES REYNOLDS ..... Raleigh
DONALD R. REYNOLDS ..... Raleigh
ROBERT MCKENNA RICHARDS, JR. ..... Asheville
DION FRANCIS RICHARDSON ..... Virginia Beach, Virginia
JENNIFER LEIGH RIERSON ..... Durham
MICHAEL RIFKIN ..... Chapel Hill
J. NEAL RODGERS ..... Charlotte
CHRISTOPHER CALDWELL SANDERS ..... Charlotte
BEVERLY A. SCARLETT ..... Durham
MARY ELIZABETH SHARP ..... Aiken, South Carolina
LISA CARYL SHERMAN ..... Winston-Salem
THOMAS HAYNES SHORES, JR. ..... Hickory
ALBERT JAMES SIEMENS ..... Chapel Hill
JENNIFER LYNNE SKORD ..... Pittsboro
GARY MICHAEL SMITH ..... Raleigh
ROBERT JAMES SMITH ..... Ann Arbor, Michigan
JERRY ANDREWS SMITH, JR. ..... Wilson
JAMES DWIGHT STACY, II ..... Beckley, West Virginia
EVAN LEE STAPLER ..... Bremen, Georgia
JONATHAN LEE STIEBER ..... Oceanside, California
DIANA KEEN STRAUGHAN ..... Durham
ANNETTE ELIZABETH TARNAWSKY ..... Hendersonville
BONNIE M. THOMAS ..... Fayetteville
JOY HEATH THOMAS ..... Raleigh
NICHOLAS DAVID THOMAS ..... Raleigh
NOELL PETER TIN ..... Charlotte
ELVA PEREZ TREVINO ..... Fayetteville
MICHAEL KEITH TROUTMAN ..... Durham
WANDA MARIA TUCKER ..... Charlotte
IFEOMA ANAGAM UCHE ..... Upper Marlboro, Maryland
CONNIE J. VETTER ..... Charlotte
LOIS EILEEN WAGMAN ..... Raleigh
DICKY SINGH WALIA ..... Raleigh
BRYAN EDWARD WARDELL ..... Chapel Hill
SCOTT A. WELTZ ..... Fayetteville
VIKI MELISSA WEST ..... Mooresville
JAMES ADAMS WHITLOW ..... Charlotte
LEONARD LAMONT WIGGINS ..... Rocky Mount
BENSON REID WILCOX, JR. ..... Greensboro
ROGER NEAL WILES ..... Jamestown
GAIL GONYA WILLARD ..... Raleigh
CHRISTOPHER M. WOOD ..... Virginia Beach, Virginia
J. KIM WRIGHT ..... Hillsborough
STACY LAUREN YODER ..... Winston-Salem
TERRY COURTNEY TERRELL ZICK ..... Rockport, Massachusetts
TERESA MAXINE DE LA MATA ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 7th day of April, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners, on the 8th day of April, 1994 and said persons have been issued certificates of this Board:

GEORGE R. HAMO ..... Flint, Michigan
Applied from the State of Michigan
EDDIE W. WILSON ..... Virginia Beach, Virginia
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 11th day of April, 1994.

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 8th day of April, 1994 and said persons have been issued license certificates.

MILTON REID ACREE, JR. ..... Raleigh
THOMAS ARMSTRONG ..... Long Beach, California
TIMOTHY PAUL BAYNHAM ..... Winston-Salem
JOHN SCOTT BUTLER ..... San Bernardino, California
MARTHA LYNN CLARK ..... Charlotte
GUY F. CLERICI ..... Charlotte
RONALD DORRESTEIN ..... Hillsborough
THOMAS E. DUDLEY III ..... Greenville, South Carolina
VIRGINIA DUQUET ..... Concord
SUSAN MATTHEWS EPSTEIN ..... Bahama
CYNTHIA FENIMORE ..... Winston-Salem
MAUREEN GERGHTY ..... Winston-Salem
ESTEN HARDEE GOLDSMITH ..... Bethesda, Maryland
JOHN KEVIN GOMULKA ..... Goldsboro
VICTORIA SULAY GONZALEZ ..... Charlotte
KIMBERLY ALEXANDER HARDAWAY ..... Enfield
THEODORE RAYMOND HARPER ..... Apex
MINZHI HE ..... Athens, Georgia
BILLYE LYNN HIGDON ..... Greensboro

ELIZABETH COONER HIGH ..... Raleigh
MARK LAYNE JENKINS ..... Lake Junaluska
JENNIFER M. JONES ..... Charlotte
PAUL A. JONES ..... Durham
WADE MIDLAM KENNEDY ..... Charlotte
WILLIAM W. KOHLER ..... Charlotte
JOHN LEE ..... Winston-Salem
BRADLEY WRIGHT MATSIK ..... Charlotte
MARTHA MCKEE-SHARPE ..... Durham
ROBERT SAVAGE MCLEAN ..... Charlotte
SHAVAUGHN NEAL ..... Greensboro
LORITA KAYE PINNIX ..... Raleigh
ERIC DAVID PLACKE ..... Greensboro
SCOTT WOODARD STEVENSON ..... Charlotte
DIRK PETER TISCHER ..... Birmingham, Michigan
HOWARD ARTHUR VANDINE III ..... Columbia, South Carolina
BRIAN LEE WHISLER ..... Charlotte
DANIEL J. WHITTLE ..... Carrboro
KATHLEEN NOWACK WORM ..... Raleigh

Given over my hand and seal of the Board of Law Examiners this the 19th day of April, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15th day of April, 1994 and said persons have been issued certificates of this Board:

PAUL A. LOGAN ..... King of Prussia, Pennsylvania
Applied from the State of Pennsylvania
ROBERT J. CAMPBELL ..... Arlington, Virginia
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 25th day of April, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examination of the Board of Law Examiners as of the 6th day of May, 1994 and said person has been issued license certificate.

JOSEPH L. EDWARDS, JR. ..... Lawrence, Massachusetts

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 6th day of May, 1994 and said persons have been issued certificates of this Board:

ALFRED D. COOPER, SR. ..... Elmont, New York
Applied from the State of New York
CAROLYN SIEVERS REED ..... Concord
Applied from the State of Illinois
MARY BEIRNE NUTT ..... Charlotte
Applied from the State of New York
DEAN MICHAEL BEER ..... Huntersville
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 16th day of May, 1994.

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 examination of the Board of Law Examiners as of the 22nd day of April, 1994 and said persons have been issued license certificates.

GREGORY ELIAS BENNETT ..... Savannah, Georgia
KENNETH BERNARD DARTY ..... Winston-Salem
LISA LORANNE ELWELL ..... Tampa, Florida
J. RICK TACHE ..... Charlotte
JAMES ROBERT WILLS III ..... Kitty Hawk

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 22nd day of April, 1994 and said persons have been issued certificates of this Board:

ROBERT ARNOLD LEFKOWITZ ..... Winston-Salem
Applied from the State of Virginia
JOHN CLIFFORD LINDSEY ..... Cary
Applied from the District of Columbia
CHARLES EVERETT ROBINSON ..... Rocky Mount
Applied from the States of Oklahoma and Tennessee

Given over my hand and seal of the Board of Law Examiners this the 23rd day of May, 1994.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 10th day of June, 1994 and said persons have been issued certificates of this Board:

RICHARD STEVEN DEGEORGE ..... Charlotte
Applied from the State of Ohio

MARK S. TRUSTIN ..... Durham
Applied from the State of Nebraska

BERNARD KAELIN MEYER ..... Wilmington
Applied from the State of New York

MARGARET GENEVIEVE DEAN ..... Chapel Hill
Applied from the State of Connecticut

KATHRYN SMITH DRAKE ..... Wake Forest
Applied from the State of Kentucky

WILLIAM MICHAEL LEDERER ..... Greenville
Applied from the State of Colorado

SANDY THOMAS TUCKER ..... Richmond, Virginia
Applied from the State of Virginia

BRUCE STEUART AMBROSE ..... Wake Forest
Applied from the State of West Virginia

MARK SHERIDAN BRENNAN, SR. ..... Richmond, Virginia
Applied from the State of Virginia

WILLIAM EARL CRAIN ..... Pownal, Maine
Applied from the State of New York

RACHEAL DECICCO ..... Drexel Hill, Pennsylvania
Applied from the State of Pennsylvania

MICHAEL V. MARSTON ..... GrossePointe Farms, Michigan
Applied from the State of Michigan

ROBERT JOSEPH DAUTRICH, JR. ..... Germany
Applied from the State of Virginia

Given over my hand and seal of the Board of Law Examiners this the 29th day of June, 1994.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 1st day of July, 1994 and said person has been issued license certificate.

TAMMIE JEAN THOMAS ..... Spartanburg, South Carolina

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

STATE OF NORTH CAROLINA v. RENWICK GIBBS

No. 1A92

(Filed 5 November 1993)

1. Criminal Law § 353 (NCI4th) — first-degree murder — defendant in handcuffs — juror excused — other prospective jurors not examined or cautioned

The trial court did not err in a first-degree murder prosecution where a prospective juror was asked, in the presence of two other prospective jurors, whether he accepted the principle that defendant was presumed innocent; the prospective juror indicated that he had seen defendant in handcuffs and this caused him to believe defendant was dangerous, needed the handcuffs, and, therefore, was guilty; the court excused that juror; defendant did not request curative instructions or move for a mistrial but merely excepted to the court's excusing that prospective juror; and the court did not give any remedial, curative, or cautionary instruction to the other prospective jurors. The court had excused the prospective juror, thereby repelling any inference that the court concurred with his opinion that defendant was guilty, and the judge then asked the two remaining prospective jurors whether they had any opin-

ion which would affect their ability to render a fair and impartial verdict.

Am Jur 2d, Criminal Law §§ 844-846; Jury § 294.

2. **Jury § 102 (NCI4th)— first-degree murder—prospective juror with opinion—excused—remaining prospective jurors not instructed—no error**

The trial court did not err during jury selection in a first-degree murder prosecution by failing to give a cautionary instruction to the remaining venire after a prospective juror with an opinion on guilt or innocence was excused. Defendant did not request any instruction and the court's excusal of the prospective juror repelled any inference of concurrence with his opinion.

Am Jur 2d, Jury §§ 294-305.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 ALR4th 969.

3. **Jury § 102 (NCI4th)— first-degree murder—jury selection—preconceived opinion—excusal without determination of whether opinion could be set aside—no error**

The trial court did not err during jury selection in a first-degree murder prosecution by excusing a prospective juror for cause on its own motion where the juror stated that she had formed an opinion about the case. Although defendant contended that the court failed to exercise its discretion by failing to determine whether the juror could lay aside her opinion and render a verdict based on the evidence, the statement of the prospective juror that she had formed an opinion about the case supported the finding by the court that she could not be impartial.

Am Jur 2d, Jury §§ 294-305.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. 50 ALR4th 969.

4. **Jury § 227 (NCI4th)— death qualifying jury—opposition to death penalty—excusal for cause—no error**

The trial court did not err during jury selection in a first-degree murder prosecution by excusing for cause a pro-

spective juror whose responses indicated that she opposed the death penalty and that her view would interfere with the performance of her duties as a juror in the sentencing phase.

Am Jur 2d, Jury §§ 289, 290.

Comment Note—Beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR3d 550.

5. **Jury § 217 (NCI4th)— first-degree murder—jury selection—death qualifying—minister excluded—no error**

The trial court did not err during jury selection in a first-degree murder prosecution by excusing for cause a Pentecostal minister whose bias against the death penalty was shown with unmistakable clarity.

Am Jur 2d, Jury §§ 289, 290.

Comment Note—Beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR3d 550.

6. **Jury § 227 (NCI4th)— first-degree murder—jury selection—death qualifying—excusal for cause**

The trial court did not err during jury selection in a first-degree murder prosecution by granting the State's motion to excuse a juror for cause due to her views on capital punishment where some of her answers were equivocal, but her views on capital punishment would have substantially impaired her ability to perform her duties as a juror in accordance with her oath.

Am Jur 2d, Jury §§ 289, 290.

Comment Note—Beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR3d 550.

7. **Jury § 226 (NCI4th)— first-degree murder—jury selection—death qualifying—no opportunity to rehabilitate**

The trial court did not err during jury selection for a first-degree murder by denying defendant the opportunity to rehabilitate two prospective jurors, Moore and Boston, excused for cause based on their answers to death qualification questions where defendant does not argue and the record does

not show that the court made a blanket refusal to permit rehabilitation of any jurors; defendant made no showing in the trial court and does not show on appeal how further questioning would have elicited different answers from Moore; and Boston's unequivocal answers compel the conclusion that further questioning would not have elicited different answers.

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. **Criminal Law § 832 (NCI4th)— first-degree murder—instructions on accomplice testimony—erroneous—no plain error**

There was no plain error in a first-degree murder prosecution where the prosecutor asked several questions related to accomplice testimony during jury selection; the court on its own motion gave an erroneous instruction which equated the interest of an accomplice with that of any other witness; defendant failed to object; the court correctly instructed the jury on how to consider testimony pursuant to a plea arrangement before the accomplice testified; and, the court instructed correctly on how to consider accomplice testimony and again on how to consider testimony pursuant to a plea arrangement when charging the jurors prior to their deliberations on guilt. Viewing the entire record, defendant has failed to show plain error arising from the court's preliminary instruction on accomplice testimony.

Am Jur 2d, Trial §§ 1167, 1225.

9. **Jury § 147 (NCI4th)— first-degree murder—jury selection—statements by prosecutor involving possibility of penalty phase—no gross impropriety**

There was no gross impropriety during jury selection in a first-degree murder prosecution where defendant argues that language prefacing some of the prosecutor's questions constituted a comment that there was a good possibility the defendant would be found guilty but the prosecutor never stated that the sentencing phase was certain to be reached; defense counsel elicited from most seated jurors an understanding that the penalty phase would not necessarily be reached; and the court repeatedly instructed the venire and the jury that there

would be a separate sentencing proceeding only if defendant was convicted. A fair reading of the prosecutor's statements shows that, like those of the court, they simply refer to the conditional nature of bifurcated capital prosecutions; nothing in the statements themselves suggests that the prosecutor was attempting to place before the venire prejudicial matters by injecting his own beliefs or personal opinions unsupported by evidence; and, after reviewing the entire *voir dire*, the Supreme Court was satisfied that the repetitions did not constitute such an attempt.

Am Jur 2d, Jury § 203.

Propriety and effect of asking prospective jurors hypothetical questions, on voir dire, as to how they would decide issues of case. 99 ALR2d 7.

10. Jury § 118 (NCI4th)— first-degree murder—jury selection—prosecutor's comments—no prejudice

Defendant did not show either an abuse of discretion or prejudice arising therefrom in a first-degree murder prosecution where defendant contended that the court erred during jury selection by twice overruling his objection to the prosecutor's language, which allegedly implied that the jurors could not be fair to their country and state and also be fair to the defendant.

Am Jur 2d, Jury §§ 201, 202.

11. Criminal Law § 412 (NCI4th)— first-degree murder—opening statements—prosecutor's comments—no error

The trial court did not abuse its discretion in a first-degree murder prosecution by permitting the prosecutor in his opening statement to imply twice that the jurors could not be fair to both the defendant and the State.

Am Jur 2d, Trial §§ 522, 544, 554.

12. Constitutional Law § 262 (NCI4th)— first-degree murder—Sixth Amendment right to counsel—attachment at first appearance

The trial court did not abridge a first-degree murder defendant's Sixth Amendment right to counsel by denying defendant's motion to suppress where suppression hearing testimony showed that defendant agreed to undergo a polygraph

examination and went with two officers to be tested on the morning of 31 May 1990; defendant confessed to the polygraph operator within minutes of having completed the test; defendant confessed to the two officers shortly thereafter and assisted them in recovering a rifle; defendant returned with the officers to the police department in Washington, where, beginning about 3:45 p.m., he sat in an interview room with an agent; hair samples and fingerprints were taken, and defendant was told at 6:32 p.m. that he was going to be charged with the murders; defendant was not questioned while sitting in the interview room; there was conversation unrelated to this crime and other agents went in and out of the interview room; defendant was permitted to use the toilet and provided with a soft drink upon his request; he was taken to the magistrate's office soon after 6:32 p.m., where arrest warrants were served on him, and then returned to the police department; the SBI agent who had sat with defendant testified that defendant asked if he had to get an attorney about 15 minutes before he was taken to the magistrate's office; defendant was told that getting an attorney would be his decision and that an attorney would be appointed upon his request if he could not afford one; defendant was read his rights at about 8:15 and waived those rights; and defendant called officers to his cell on 3 June, waived his rights again, and made a detailed confession. The Supreme Court elected to consider defendant's Sixth Amendment arguments in the exercise of the utmost diligence in a capital case even though they were not raised at trial. Defendant's Sixth Amendment right to counsel attached during his first appearance on 4 June, when the State's position against him solidified as to the murder charges and counsel was appointed, and the interviews on 31 May and 3 June were not protected by the Sixth Amendment right. N.C.G.S. § 15A-601.

Am Jur 2d, Criminal Law §§ 732 et seq., 967 et seq.

Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.

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

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 18 L. Ed. 2d 1420.

13. Evidence and Witnesses § 1252 (NCI4th)— first-degree murder—Fifth Amendment right to counsel—invocation

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress confessions on the grounds that the confessions were admitted in violation of defendant's Fifth Amendment right to counsel where the State concedes that defendant was in custody; the trial court found that defendant was not interrogated at the time he asked about an attorney; defendant must have known arrest was imminent; the SBI agent with defendant made no attempt to dissuade defendant from exercising his right to have an attorney present during custodial interrogation; and defendant did not ask for an attorney when told the court would appoint an attorney to represent him if he asked for one. Based on the entire context in which defendant's inquiry was made, he did not invoke the right to counsel.

Am Jur 2d, Criminal Law §§ 732 et seq., 967 et seq.

Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.

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

Accused's right to counsel under the Federal Constitution—Supreme Court cases. 18 L. Ed. 2d 1420.

14. Conspiracy § 38 (NCI4th)— conspiracy to commit first-degree murder—evidence sufficient

The trial court did not err by failing to dismiss a charge of conspiracy to commit burglary where defendant was also charged with conspiracy to commit first-degree murder and defendant contended that the evidence showed one agreement to commit multiple offenses, but the evidence, taken in the light most favorable to the State, showed a separate agreement to commit burglary.

Am Jur 2d, Conspiracy § 29.

15. Conspiracy § 14 (NCI4th)— conspiracy to commit first-degree murder and first-degree burglary—instructions—no plain error

There was no plain error in the court's instructions on conspiracy to commit first-degree murder and first-degree burglary where the court told the jury that defendant had

to have agreed with at least one other person to commit each crime instead of the person named in the indictment, but there was no basis to believe the error had a probable impact on the verdicts.

Am Jur 2d, Conspiracy § 10.

16. Conspiracy § 43 (NCI4th)— conspiracy to commit burglary—instructions—misstatement—no plain error

There was no plain error where the trial court, when instructing on conspiracy to commit first-degree burglary, twice referred to conspiracy to commit first-degree murder, with which defendant was also charged, but acknowledged the error and gave a correct instruction.

Am Jur 2d, Trial § 1481.

17. Conspiracy § 39 (NCI4th)— conspiracy to commit first-degree murder—instructions on felony murder—no prejudice

There was no prejudice where defendant contended that the trial court erroneously instructed the jury that it could convict him of conspiracy to commit murder if they found an agreement to commit felony murder, but the jurors eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which they convicted defendant when they found an agreement to kill. Moreover, since the jurors also found defendant guilty of three counts of murder by reason of premeditation and deliberation, there is no rational basis for suggesting they could have found that the murders which occurred during the burglary were unintentional felony murders.

Am Jur 2d, Trial § 1482.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

18. Burglary and Unlawful Breakings § 165 (NCI4th)— first-degree burglary—misdemeanor breaking or entering as lesser offense—not submitted—no error

The trial court did not err by refusing to instruct on misdemeanor breaking or entering as a lesser offense to first-degree burglary where, notwithstanding defendant's after-the-fact assertions, overwhelming evidence showed that defendant

had decided to kill his estranged wife's family prior to breaking into the house and there is no before-the-fact evidence to which defendant's statements afterwards could lend credence. There was no evidence from which a rational trier of fact could have concluded defendant did not possess the intent to commit murder.

Am Jur 2d, Trial § 1427.

Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.

19. Burglary and Unlawful Breakings § 151 (NCI4th)— burglary—instructions—intent—no plain error

There was no plain error where the burglary indictment charged that defendant broke and entered with the intent to commit the felony of first-degree murder, defendant argues that the court erroneously instructed that the State would have met its burden of proving the element of intent as to burglary if felony murder were proven by the State, and the jurors found defendant guilty of premeditated and deliberated murder.

Am Jur 2d, Burglary § 69.

20. Criminal Law § 1355 (NCI4th)— first-degree murder—mitigating circumstances—no significant history of prior criminal activity

The trial court did not err at a sentencing proceeding for first-degree murder by not submitting the mitigating circumstance of no significant history of prior criminal activity where the record shows that defense counsel stated that no evidence of defendant's criminal history was presented by the defense or the State and the defense had chosen not to request submission of the circumstance. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law § 598 et seq.

21. Criminal Law § 1362 (NCI4th)— first-degree murder—mitigating circumstances—age of defendant—no error

Defendant could not have been prejudiced when being sentenced for first-degree murder by the court's instruction on the age of defendant at the time of the crime, which defendant contended limited the circumstance to his chronological

age, twenty-six, because the jurors found that this mitigating circumstance existed. N.C.G.S. § 15A-2000(f)(7).

Am Jur 2d, Criminal Law § 598 et seq.

22. Criminal Law § 1339 (NCI4th)— first-degree murder—aggravating circumstances—multiple circumstances—separate evidence

The trial court did not err when sentencing defendant for first-degree murder by submitting as aggravating circumstances for each murder both that the murder was committed during the course of a felony (burglary), and that it was part of a course of conduct which involved commission of other crimes of violence against other persons. Different evidence supported each aggravating circumstance and, on the peculiar facts of the instant case, the two circumstances were not inherently duplicative. N.C.G.S. § 15A-2000(e)(5); N.C.G.S. § 15A-2000(e)(11).

Am Jur 2d, Criminal Law § 598 et seq.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-Gregg cases. 67 ALR4th 887.

23. Criminal Law § 1344 (NCI4th)— first-degree murder—aggravating circumstances—especially heinous, atrocious or cruel—evidence sufficient for submission

The evidence was sufficient in a first-degree murder sentencing proceeding to support submitting to the jury the aggravating circumstance that the killing of Shamika Farris was especially heinous, atrocious, or cruel where the murders were committed according to a calculated plan; the victims, including Shamika, were part of defendant's extended family; defendant's statements showed that while Shamika's mother pleaded with defendant not to hurt them, invoking the family relationship, her daughter yelled and cried louder and louder; defendant caused the two women to be tied and gagged; and Shamika, her ankles bound and her hands tied behind her back, continued to cry. The evidence tends to show Shamika was helpless and in terror; she could not plead for her life with words after being gagged, but the evidence shows she was suffering under knowledge that her death was imminent. It is difficult

to perceive how she could have imagined anything different when defendant, standing within a few feet of her, placed the muzzle of his 30-30 rifle on her forehead. Evidence that defendant shot Shamika because her crying made him nervous is evidence that he acted in a conscienceless, pitiless manner in killing her. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law § 598 et seq.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

24. Criminal Law § 465 (NCI4th)— first-degree murder—mitigating circumstances—emotional disturbance—low mentality—prosecutor's argument

There was no prejudicial error in a sentencing proceeding for first-degree murder where two of the mitigating circumstances were that the capital felony was committed while defendant was under the influence of mental or emotional disturbance and that defendant had an I.Q. of 61, and the prosecutor argued that low mentality is not a defense to a criminal charge, that evidence of low mentality is irrelevant, and that the test of accountability is whether a defendant has the ability to distinguish right from wrong. The principle that low mentality is not a defense to a charge is irrelevant to sentencing; however, there was no prejudice because the jury found the statutory circumstance that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance and the nonstatutory circumstance that his I.Q. was in the borderline mentally retarded range of intelligence. Although the prosecutor quoted irrelevant law, he repeatedly reminded the jury that they were being asked to consider whether the mitigating circumstances reduced defendant's culpability and the reference to irrelevant law was fleeting; defense counsel emphasized over and over that mitigation is not justification; and the court correctly instructed the jurors. N.C.G.S. § 15A-2000(f)(2).

Am Jur 2d, Criminal Law § 598 et seq.

25. Criminal Law § 465 (NCI4th)— first-degree murder—low mentality and emotional disturbance—prosecutor's argument—no prejudice

There was no prejudice in a first-degree murder sentencing proceeding where the judge remained silent after the prosecutor asked, "You don't think that's the law? Ask the Judge. He'll tell you," after defendant objected to the prosecutor's argument that the test of accountability does not depend on intelligence or general mental capacity. Although defendant argued that the court implied approval of the prosecutor's argument by its silence, the jurors found the existence of the nonstatutory mitigating circumstance of borderline retardation, defense counsel was permitted to argue at length that mitigation is not justification, and the court correctly instructed the jurors on the circumstance.

Am Jur 2d, Trial § 640.

Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury. 67 ALR2d 245.

26. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—no prejudice

There was no prejudice in a first-degree murder sentencing proceeding where the prosecutor's argument linked defendant and a codefendant. The capital sentencing statute does not provide for an aggravating circumstance based on a defendant associating others in the capital felony, but this does not mean that no mention may be made of a codefendant actively involved at the scene of the crime. The State presented extensive evidence of the codefendant's involvement in the crimes to prove the noncapital felonies of conspiracy to commit murder and conspiracy to commit burglary; while the proper focus of sentencing is the defendant's individualized conduct, there was no prejudice in light of the jury's extensive knowledge of the codefendant's involvement.

Am Jur 2d, Trial § 627.

Prejudicial effect of prosecuting attorney's argument or disclosure during trial that another defendant has been convicted or has pleaded guilty. 48 ALR2d 1016.

27. Criminal Law § 438 (NCI4th)— first-degree murder—mitigating circumstance of adaption to prison environment—prosecutor's argument

A prosecutor's argument in a first-degree murder sentencing proceeding was not so grossly improper as to require intervention by the court where, in response to the nonstatutory mitigating circumstance that defendant had shown the ability to conform and adapt to the prison environment, the prosecutor told the jurors, "You watched them bring him in, bring him out. He's been under guard." The thrust of the prosecutor's argument against finding the circumstance was directed to recapitulating evidence that defendant's dangerousness in the future could not be predicted; nevertheless, the jury was entitled to consider also that while incarcerated, defendant had little opportunity to do anything other than cooperate with his jailors.

Am Jur 2d, Trial § 614.

28. Criminal Law § 468 (NCI4th)— first-degree murder—aggravating circumstances—killing committed during burglary—prosecutor's argument

There was no gross impropriety in a first-degree murder sentencing proceeding where the prosecutor argued that the jurors had found the existence of the aggravating circumstance that the murder was committed during a burglary by finding defendant guilty of first-degree burglary. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Trial § 625.

29. Criminal Law § 468 (NCI4th)— first-degree murder—aggravating circumstance—especially heinous, atrocious, or cruel—prosecutor's argument

There was no gross impropriety in a first-degree murder sentencing proceeding where defendant contended that the prosecutor misstated the law by arguing that evidence of premeditation and deliberation also constituted evidence that the murders were especially heinous, atrocious, or cruel, but the prosecutor did not mention premeditation and deliberation and the thrust of the argument was that the cold calculation with which defendant executed the victims tended to prove defendant's cruelty and depravity of mind and his intention

that the victims be subjected to mental suffering. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Trial § 614.

30. Criminal Law § 455 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—deterrent value of death penalty—no gross impropriety

There was no gross impropriety in a first-degree murder sentencing proceeding from the prosecutor's argument that the jurors should recommend death because "[i]t's the only way that you can be assured that he won't do it again." The North Carolina Supreme Court has previously held that the prosecutor may argue for death because of its deterrent effect on the defendant personally, *e.g.*, *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979).

Am Jur 2d, Trial § 572.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty. 78 ALR Fed. 553.

31. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's Biblical references—no gross impropriety

There was no gross impropriety in a first-degree murder sentencing proceeding where the prosecutor quoted from the Sixth Commandment because the comment was not outside the wide latitude permitted by *State v. Artis*, 325 N.C. 278.

Am Jur 2d, Trial § 569.

32. Criminal Law § 1334 (NCI4th)— first-degree murder—sentencing—disclosure of aggravating and mitigating circumstances—not required

The trial court did not err in a first-degree murder sentencing proceeding by denying defendant's motion for disclosure of aggravating and mitigating circumstances.

Am Jur 2d, Criminal Law § 598 et seq.

33. Criminal Law § 1343 (NCI4th) — first-degree murder — aggravating circumstance — especially heinous, atrocious, or cruel — not impermissibly vague

The aggravating circumstance that a killing was especially heinous, atrocious, or cruel is not impermissibly vague on its face or as applied.

Am Jur 2d, Criminal Law § 598 et seq.

34. Criminal Law § 1327 (NCI4th) — first-degree murder — sentencing instructions — aggravating and mitigating circumstances balanced

The trial court did not err by instructing the jurors in the penalty phase of a first-degree murder prosecution that they were to consider whether to recommend death if they found the aggravating and mitigating circumstances in equipoise.

Am Jur 2d, Criminal Law § 598 et seq.

35. Homicide § 724 (NCI4th) — first-degree murder — failure to set aside burglary conviction — no error

The trial court did not err in a first-degree murder sentencing proceeding by refusing to arrest judgment on defendant's conviction of first-degree burglary.

Am Jur 2d, Homicide § 549 et seq.

36. Criminal Law § 1373 (NCI4th) — first-degree murder — death sentence — not disproportionate

The record of a first-degree murder sentencing proceeding supports the jury's finding of aggravating circumstances, there was nothing in the record to suggest that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentences of death were not excessive or disproportionate, considering both the crimes and the defendant, where the salient characteristics of defendant's case include (i) murders of three members of a family, a mother and her children who were also defendant's mother-in-law, sister-in-law, and brother-in-law, preceded by defendant's threats, made to his wife, to harm the family; (ii) a calculated plan of attack by defendant, including efforts to disguise his identity; (iii) fear on the part of the victims, who recognized defendant and were bound and gagged; and (iv) as to the first victim, a conscienceless and pitiless shooting found to be especial-

ly heinous, atrocious, or cruel by the jury, which also found the subsequent shootings especially heinous, atrocious, or cruel.

Am Jur 2d, Criminal Law § 628.

37. Criminal Law § 1135 (NCI4th)— consolidated convictions— aggravating factors—not duplicative

The trial court did not err when sentencing defendant for first-degree burglary, conspiracy to commit burglary, and conspiracy to commit murder by finding in aggravation that defendant induced others to participate in the commission of the offense and occupied a position of leadership or dominance of other participants where there was separate evidence to support each factor. N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law § 598 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing three death sentences entered by Beaty, J., at the 21 October 1991 Special Session of Superior Court, Beaufort County, on jury verdicts finding defendant guilty of three counts of first-degree murder. Execution was stayed 6 January 1992 by this Court pending defendant's appeal. Defendant having also been found guilty of one count each of first-degree burglary, conspiracy to commit first-degree murder, and conspiracy to commit first-degree burglary, the trial court consolidated these three offenses for judgment and imposed a term of imprisonment of fifty years. On 9 September 1992 this Court granted defendant's motion to bypass the Court of Appeals as to his two convictions of conspiracy and his conviction of first-degree burglary. Heard in the Supreme Court 15 March 1993.

Michael F. Easley, Attorney General, by Joan Herre Byers, Special Deputy Attorney General, for the State.

James R. Parish for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally for the murders of Louise Farris and her children, Shamika Farris and William Earl Farris, Jr.; and pursuant to the jury's unanimous recommendation was sentenced to death for each of the three murders. For the reasons set out herein, we conclude the jury selection, guilt-innocence, and

sentencing phases of defendant's trial were free from prejudicial error and the death sentences are not disproportionate.

State's evidence tended to show defendant was married to Ann Gibbs, whose mother and siblings were the murder victims. The families lived in Washington, North Carolina. Defendant and Ann were married 2 December 1985 but the marriage was marked by discord; Ann testified that within weeks after her marriage she discovered defendant was engaged in a relationship with Yvette Gay. Defendant later had two children by Yvette; their relationship continued up to the time defendant was arrested for the murders of Ann's family. Ann left defendant many times during their marriage and sometimes returned home to stay with her parents and siblings. Once she went to live with her mother's sister in Virginia, but defendant traced her there. In early May 1990 Ann again left defendant and went to stay in a battered women's shelter. She testified that in the past defendant had threatened to harm her family and she returned to him out of fear that he would carry out his threats. She knew defendant owned firearms and once saw two rifles in the trunk of his car. She testified defendant said they were for her if she ever left him. When she left defendant in May, she went to the shelter to protect the Farris family from defendant's harassment of herself and them.

Ann testified further that at the time of the murders she worked the midnight to 8:00 a.m. shift at National Spinning in Washington. She mostly used her father's blue 1982 Pontiac station wagon to drive to work, but on 29 May 1990 she had his red Ford Falcon. Around 11:30 p.m. she drove the Falcon to her parents' house, and her father drove her to work in the Pontiac wagon. After she had been at work about ten minutes, defendant appeared and attempted to persuade her to return to him. Ann testified she had told her supervisor she was afraid of defendant but "for some reason the guard would not keep Renwick out of the plant." Ann told defendant to go back to his new wife, Yvette. In the past when Ann had left defendant he became angry and sometimes threatened or physically assaulted her, but on this night he was calm. Her supervisor saw defendant and asked him to leave, and defendant did so.

William Earl Farris, Sr., Ann's father, testified that at the time of the murders his family lived at 1403 John Small Avenue in Washington. John Small Avenue is also North Carolina Highway

264; a short lane leads from the highway to the house. His wife, Louise, was forty years old; his daughter, Shamika, was sixteen; and his son, William Earl, Jr., was thirteen. The father worked in Greenville, North Carolina. He testified further that after taking Ann to work around midnight on 29 May, he returned home on 30 May, set his alarm clock, and went to sleep. He arose about 3:45 a.m., reset the alarm for 4:45 a.m., and dressed. Driving the Pontiac wagon, he left for Greenville. He did not return until around 1:00 p.m. on 30 May, when he saw a crowd of people at the front of the lane leading to his house.

Deborah Blount, defendant's sister, testified that she lived in Harris Acres, a trailer park in Chocowinity, where she kept defendant and Yvette's two children. Defendant lived in a trailer nearby, and around 9:30 a.m. on 30 May she saw him there. He seemed nervous and in a hurry. In the past defendant had asked her to help him persuade Ann to reconcile with him; this day he made a similar request. Defendant and Deborah drove to Washington, where she intended to do several errands. About 11:30 a.m., defendant met Deborah again at their uncle's store. Defendant laughed and joked with some other people in the store and bought an artificial rose for Ann. Defendant said he wanted Deborah to go with him to the Farrises' house to talk to Ann, and Deborah agreed to go. When they arrived at the house, Deborah knocked on the door, but no one answered, so she walked back towards defendant's car. He asked if she had looked in the window and she said she had not. Defendant went under the carport on the west side of the house, and Deborah started to follow him; but he turned back and came running past her. Screaming and pulling at his face, he ran into the front yard. Deborah was frightened and wanted to run away; but she went under the carport towards a side door and began calling out for Ann. In the house, Deborah looked down a hallway and saw a woman's pocketbook on the floor. In the hallway she turned and saw William Earl Farris, Jr., lying on the floor and another head to one side of him. Leaving the house, she ran down the lane to a florist's shop on Highway 264 and asked that authorities be called. When she returned to the house, defendant was still outside screaming and pulling at his face.

First to arrive at the crime scene were Officer David Sparrow and Detective Mary Ann Buck, both of the Washington Police Department. Sparrow testified that he noticed the window in the door under the carport was broken. In a bedroom he saw two bodies

lying face down and another leaning against a bed. Rescue squad personnel arrived and checked the bodies, and then the area was secured with yellow boundary tape. Sparrow then summoned Eric L. Tellefsen, Special Agent with the State Bureau of Investigation, and the Bureau assumed control of the investigation.

About 2:35 p.m., Special Agent Dennis G. Honeycutt, mobile crime laboratory operator, arrived at the scene. He testified at length about his observations and illustrated his testimony with photographs. All the victims' bodies were bound and gagged. The body of Shamika Farris, clad in a blue tee-shirt and white panties, was sitting on the bedroom floor, her back and head supported by the bed. A gag in her mouth was secured by a sock tied around her head, her wrists were tied behind her, and her ankles were tied together. Her skull had been split by a gunshot wound. Tissue and blood spilled out onto the floor, and a piece of her skull plate lay beside her. The body of William Earl Farris, Jr., clad only in white undershorts, was lying face down on the floor. He also was gagged, his hands were tied behind him, and his ankles were tied together. There was a round gunshot wound in his upper left back and a small hole in the floor just above his head. Louise Farris, fully clothed, was lying face down on the floor, similarly gagged and bound. By her head was a bullet hole in the bedroom floor. She had suffered a large wound in her chest and another wound in her left wrist. Honeycutt recovered four spent 30-30 shell casings from the bedroom and a piece of a brown paper bag with letters glued on to form the message, "i told you about slappeing my Mother" [sic]. Honeycutt also observed that the drawers had been pulled out of a table in the master bedroom. In the same room the bottom drawer of a large chest had been pulled out and other drawers were open. He also saw an alarm clock set for 4:58 a.m.; the alarm had been turned off. Outside the house Honeycutt observed that some wires in the telephone junction box had been loosened and others cut.

State's evidence also included a series of statements defendant made to investigating officers. SBI Agent Kent Inscoe testified that around 5:30 p.m. on 30 May he interviewed defendant at the Washington Police Department. Defendant stated that he had last seen his wife around midnight at National Spinning. He left National Spinning and spent the night at a converted school bus where Yvette Gay lived with her twin sister Doris. On the morning of 30 May, Doris woke defendant because she needed a ride to work.

He took her to work sometime around 7:30 a.m.; went to the home of his sister, Alice; and then returned to the bus. Telling Yvette he was going back to National Spinning to see Ann, defendant left the bus again about 7:55 a.m. When he arrived at National Spinning, Ann had already left. Defendant returned to the bus, lay down for a while, and then went to his trailer in Chocowinity, where he persuaded Deborah to go to Washington with him. Later, when he and Deborah went to the Farrises' house, he went inside and called out for his wife and children. Upon seeing the bodies, he recognized Junior and Shamika, ran outside, and went into shock.

Defendant's next statement was made around 1:40 p.m. on 31 May to SBI Agent Tim Batchelor. Batchelor testified defendant stated that on 30 May he woke up around 5:00 a.m. He drove to the Farrises' house and broke in; he was wearing gloves. Louise Farris gathered her children in one bedroom, and when defendant entered the bedroom, Louise tried to grab the 30-30 rifle he was carrying, but he pushed her to the floor. Shamika began screaming. She and Louise were making a lot of noise and Louise was talking to defendant constantly. Because the women were making so much noise, defendant directed Farris, Jr., to gag them and tie them up. After this, defendant gagged and bound Farris, Jr. Shamika was screaming, and defendant shot her. Then he panicked and shot Louise and Farris, Jr. After taking Doris to work, defendant threw the rifle into the woods on a side road off River Road in Washington. He denied any knowledge of the note found in the bedroom. He said he took Deborah with him to the Farrises' house the next day because he needed a witness to verify that the family were already dead when discovered. After making this statement defendant took Agents Batchelor and Tellefsen to the place where he had discarded the rifle, and the agents recovered the rifle.

Around 8:00 p.m. on 31 May defendant made another statement to Agent Batchelor. Defendant described his relationship with Yvette and stated that Ann was aware of the relationship. He stated that he and Ann had been separated four to six times and that during the separations Ann's family refused to tell him where she was. When he telephoned the Farrises' house to speak with her, whoever answered the telephone would hang up. Defendant described his movements on the night of the murder in great detail and added that he took the rifle to keep William Farris, Sr., "off of him." Defendant had bought the rifle from a Beaufort County

man who also provided a number of shells for it. When defendant broke into the Farrises' house, Louise Farris called him by name. She asked him what he wanted and he said he wanted to see Ann. Louise said Ann was not there; defendant asked where Ann was; and Louise said she would not tell him, since Ann would not even tell her mother where she was staying. Louise asked defendant what her family had done to him and whether they had ever hurt him. Defendant replied they had not. Louise told defendant she would not hurt him and did not want him to do anything crazy. Shamika started crying but Louise continued to talk over the noise. Louise asked defendant if he remembered her helping him at an earlier time, and defendant said he did. Shamika was yelling and crying louder and louder. It was at this point that defendant directed Farris, Jr., to tie up and gag his mother and sister. In spite of the gags, both women continued to talk and make a lot of noise. The noise made defendant very nervous, and he shot them to stop the noise. At first defendant said he was standing in the bedroom doorway when he shot the victims, but later he said he might have been closer to them. Defendant also said his purpose in going to the Farrises' house was to try to talk with Ann; he never intended to shoot anyone. He had never threatened to kill Ann or harm her family. He never told Ann he would kill her if she left him or hurt the people who meant most to her. Defendant again denied any knowledge of the note but said he was the only person responsible for the murders and neither of the Gay twins was involved.

On 3 June, defendant made a fourth and final statement about the murders. He admitted that Yvette Gay was with him; he told her she had better go with him or else. He had struck her once before when she did something he did not like. The two traveled in Yvette's Buick Regal automobile to the Farrises' house. Although Yvette carried a .22 caliber rifle, she did not see defendant shoot the family because he made her stand watch. In addition, Doris Gay was with him afterwards and saw him dispose of some evidence. Defendant told her to keep her mouth shut and not say anything. Defendant stated he had bought bullets for the 30-30 rifle about a month before the murders; he bought bullets for the .22 rifle about three weeks before. Before breaking into the house, he saw William Earl Farris, Sr., driving away. Defendant went to the telephone junction box and tried to cut the wires. He worked some wires loose by hand. In addition, defendant had written the note

the night before, and glue found by officers in his car had been used to make the note.

Doris Gay testified for the State pursuant to a plea arrangement. She said that two or three weeks before the murder defendant told her to go to a discount store in Greenville and buy bullets for him, and she did so. On the night of 29 May defendant went to pick Yvette up from work and the two arrived at the bus around 11:30 p.m.; but defendant left again, saying he was going to see Ann at work. He returned around 12:30 a.m. and said Ann had told him Yvette was going to be his new wife. Defendant was very angry and said he was going to kill Ann and her people. He told Doris to wake him at 3:30 a.m. Around 3:30 a.m., defendant arose and told Yvette to get up. He told Doris to get his hat and a flashlight for him and told Yvette to find a brown piece of paper with some words on it. Yvette got the paper out of the pocket of a black coat and gave it to defendant. Doris testified that two to three weeks before the murders, when she and Yvette were with defendant at his trailer in Chocowinity, they saw defendant create the note. He did this by cutting letters out of a magazine and pasting them to part of a paper bag. He asked Doris to spell some words for him. Although Doris could not remember what defendant said he planned to do with the note, he said then that he was going to kill the people. Doris testified further that defendant dressed and put on a stocking mask and blue knit cap. Yvette also wore a stocking mask and a knit cap. Defendant told Doris to get the bullets she had bought earlier and one of his guns for him, and she did so. The bullets were still in the bag in which they came from the store. Defendant took the bag and two guns with him around 4:00 a.m.,when he and Yvette left the bus, and they left in Yvette's car. Defendant and Yvette returned to the bus before light and defendant asked Doris if she smelled anything on their clothes. Doris said she smelled gun smoke. Defendant told Yvette to remove her clothes, undressed himself, and put their clothing in a bag. Defendant and Yvette went to bed, but later Doris told defendant she needed to go to work. Although she was supposed to be at work at 6:00 a.m., defendant did not arise until between 7:00 and 7:30 a.m. Defendant dressed, got the bag of clothing and a gun, and put them in his car, a grey Chrysler Cordoba. First he drove to a service station and convenience store, where he purchased some gasoline and threw the two hats away in a trash collector. Defendant then drove along River Road, told

Doris to roll down her window, and threw out the discount store bag, which contained bullets. After driving further, defendant threw out first a black coat, then a sweater, then a bag, and then some shoes. Defendant turned the car around, retraced his route, stopped near a trailer, and threw out the 30-30 rifle. He then drove towards Washington and stopped at a pay telephone, saying he was going to call Ann. After this, defendant drove to National Spinning, looked for Ann but could not find her, and then drove Doris to work.

Dr. Page Hudson also testified for the State and was accepted by the court as an expert in forensic pathology. As to Shamika, Dr. Hudson said her ankles and wrists were bound with knotted socks and she had sustained a massive gunshot wound to the head. Tearing around the wound indicated it was a contact wound, that is, that the muzzle was in contact with her hair and scalp when the gun was fired. A piece of her skull plate was lying on the floor, and this was also characteristic of a contact wound. She was incapacitated and dead almost instantly after being shot. As to Louise, Dr. Hudson observed a contact wound to her upper chest, an exit wound in her upper left back, and a separate wound on her left wrist. She was shot either sitting or standing, the contact chest wound caused her death, and she was incapacitated quickly and unconscious within a minute and dead soon after. As to Farris, Jr., gunshot residue stippling on his back indicated the gun muzzle was at most three feet away; and due to a high spinal cord injury, he lived at most only minutes after being shot.

At the close of State's evidence defendant moved to dismiss all the charges against him; the trial court denied the motion. Defendant did not present evidence in the guilt-innocence phase. The jurors found defendant guilty on all counts as charged. On the three murder charges the jury found defendant guilty on the theories of both premeditation and deliberation and felony murder.

In the sentencing phase the State did not present additional evidence. Defendant's evidence included the testimony of several jail ministers, who said that while in jail awaiting trial defendant repented and turned to God and was sincere in his religious beliefs. Several of defendant's family members testified about difficulties he encountered while growing up, including poverty, a broken home, the death of his mother, inability to perform well in school, emotional instability, and bouts of depression.

Defense witness Brad Fisher was accepted by the court as an expert in clinical psychology. He interviewed defendant on 16 and 17 January 1991 and 24 October 1991 and also reviewed defendant's school, medical, and mental health records. Fisher opined that defendant suffered from borderline mental retardation and personality disorder. The retardation, however, was a small component of defendant's overall personality dynamic, his major disability being personality disorder. Defendant's personality disorder caused him to be (i) unable to cope with stress and (ii) aggressive towards others. Fisher opined further that defendant would probably do well in the structured environment of prison. On cross-examination Fisher said that repeated threats by defendant to kill his wife and her family would be consistent with Fisher's evaluation of him. Defendant's conduct in preparing the note, engaging Doris to buy bullets, and taking his sister with him to discover the bodies showed ability both to think and to think ahead. In addition, despite his retarded level of cognitive ability, defendant knew the difference between right and wrong.

As to each murder charge, three aggravating circumstances were submitted to the jury: First, the murder was committed while defendant was engaged in committing a burglary. N.C.G.S. § 15A-2000(e)(5) (1988). Next, the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). Last, the murder was part of a course of conduct which included defendant's commission of crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11). The jury found the existence of all three circumstances as to each murder.

Four statutory mitigating circumstances were submitted: First, the murder was committed while the defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2) (1988). Second, defendant's capacity to appreciate the criminality of his conduct or conform it to the requirements of law was impaired. N.C.G.S. § 15A-2000(f)(6). Third, the age of the defendant at the time of the crime. N.C.G.S. § 15A-2000(f)(7). Last, any other circumstance arising from the evidence which the jury deemed to have mitigating value. N.C.G.S. § 15A-2000(f)(9). The jury found the existence of only three circumstances, (f)(2), (f)(7), and (f)(9), specifying as to the last that defendant during his formative years did not receive help sufficient to overcome his mental inadequacies.

Sixteen nonstatutory mitigating circumstances were also submitted. Of these, the jury found three: Defendant had "an I.Q. of 61, which is in the borderline mentally retarded range of intelligence"; he lacked "education"; and while in jail he professed Christian faith and "accepted Christ as his Lord and Savior."

Pursuant to N.C.G.S. § 15A-2000(b)(2), the jury unanimously found beyond a reasonable doubt that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found. Further, considered with the mitigating circumstances, the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty. *See* N.C.G.S. § 15A-2000(b)(3). Consequently, their recommendation was that defendant be sentenced to death.

JURY SELECTION ISSUES

[1] Defendant first contends the trial court erred in failing to (i) inquire of two prospective jurors if they had seen defendant in handcuffs and (ii) caution them to disregard the handcuffs. We disagree with this contention.

During jury selection, in the presence of prospective jurors Truslow and Hobbs, the court asked prospective juror Sykes whether he accepted the principle that defendant was presumed innocent. The following exchange then took place:

> THE COURT: You understand that it is a two-stage proceeding to the extent that first you will be concerned with whether or not the defendant is guilty or innocent of first degree murder. You understand that?
>
> A. Yeah, but over the course of—well, I've been here three days. Seen him come and go and he has the handcuffs on. Well, if he was innocent until proven guilty, handcuffs wouldn't be on him. . . .
>
> . . . .
>
> THE COURT: You understand that there has been no evidence presented at this point and under our law the [S]tate has the burden of proving guilt beyond a reasonable doubt. And at this point under the law the defendant is presumed to be innocent. Do you understand that?
>
> A. I understand that law, what you are saying about the law, but I—but then I see him. And when I see that he comes

in with handcuffs on, obviously I feel like he needs the handcuffs on.

THE COURT: I'll excuse you for cause.

Defendant argues before this Court that after Sykes indicated he saw the handcuffs and this caused him to believe defendant was dangerous, needed the handcuffs, and, therefore, was guilty, the court on its own motion should have instructed Truslow and Hobbs so as to correct any similar misconceptions on their part. Defendant argues further that the court's failure to give any remedial, curative, or cautionary instruction to these other prospective jurors resulted in prejudicial error because the judge's inaction implied concurrence with Sykes' opinion. We do not find these arguments persuasive.

In capital cases, trial judges are vested with discretion to regulate and supervise jury selection. *State v. McDowell*, 329 N.C. 363, 379, 407 S.E.2d 200, 209 (1991) (stating basis for discretion is judge's opportunity to see and hear jurors and observe their demeanor on *voir dire* and judge may excuse a juror although neither party has offered a challenge).

This Court has previously addressed "whether a mistrial is required because jurors had an opportunity to see an accused in handcuffs while being escorted from the jail to the courthouse." *State v. Montgomery*, 291 N.C. 235, 250, 229 S.E.2d 904, 913 (1976). Where some jurors momentarily view a defendant in handcuffs being escorted from a separate jail building to the courthouse, a trial judge does not err in denying a motion for mistrial. *Id.* at 252, 229 S.E.2d at 914.

In an analogous case, *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983), a venireman stated he had been following the case in the newspapers and had formed the opinion that defendant was guilty. Defendant's motion for a mistrial was denied. Although defendant's subsequent motion to excuse this prospective juror for cause was denied, he was eventually excused for cause on other grounds. On appeal defendant argued that the prospective juror's remark that he believed defendant guilty so prejudiced defendant's defense that he could not receive a fair trial from the jury eventually impanelled. This Court disagreed, stating as follows:

Defendant assumes that the remark of one prospective juror before jury selection was completed so infected the ability

of the remaining prospective jurors to exercise their own judgment that a mistrial ought to have been granted.

"[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L. Ed. 2d 751, 755 (1961). Generally, a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve. N.C. Gen. Stat. § 15A-1212(6) (1978). The defendant must prove the existence of an opinion in the mind of a juror that will raise a presumption of partiality. *Murphy v. Florida*, 421 U.S. 794, 800, 44 L. Ed. 2d 589, 595 (1975).

> . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. . . .

Irvin v. Dowd, supra, 366 U.S. at 722-23, 6 L. Ed. 2d at 756.

> Defendant has failed to establish that the mere fact that one prospective juror who was later excused for cause stated that in his opinion defendant was guilty caused the remaining prospective jurors to become unable to render a verdict based on the evidence presented in court. Defendant has presented no evidence that [the prospective juror's] opinion carried *any* weight with the jurors selected.

Corbett, 309 N.C. at 386-87, 307 S.E.2d at 143.

Thus under *Corbett*, even when a defendant moves for mistrial, the court is not required to caution other prospective jurors if one has expressed an inability to follow the presumption of innocence based on news reports. In the instant case, defendant did not request curative instructions or move for a mistrial but merely excepted to the court's excusing Sykes.

After the exchange with Sykes, the court excused him, thereby repelling any inference that the court concurred with his opinion that defendant was guilty. Afterward the court addressed Truslow and Hobbs as follows:

> As I said to the other two jurors, to the extent the matter has been addressed, do you feel that you have any opinion at this point that would affect your ability to sit on this case

> and render a fair and impartial trial [sic] considering that this is a case for which the defendant could receive or could be exposed to the penalty of death or life?

Hobbs first answered that she had seen defendant on television and had no conscious memory of what was said about the case but did not know what might be in her subconscious. Asked if she could not sit on the jury and render a fair and impartial verdict, she answered that she was willing to listen to the evidence. She also said she had not made up her mind as to what the outcome should be as to either guilt or punishment. Under these circumstances, we hold the trial judge did not err by failing to give remedial, curative, or cautionary instructions on his own motion after excusing Sykes.

[2] Defendant's second contention is that the court failed to give curative instructions in another, similar situation during jury selection. Again, we do not agree.

Responding to the court's asking the members of the venire whether they had heard or read anything about the case, Hicks said, "On TV." Asked whether he had formed an opinion about defendant's guilt or innocence, Hicks answered, "Guilty, I feel right now, the way I feel." Asked to state only whether he had formed an opinion, Hicks said he had, and the court excused him.

Again defendant argues the trial court erred by failing to give a cautionary instruction to the rest of the venire, thereby implying concurrence with Hicks' opinion. Defendant, however, did not request any instruction, and the court's excusing Hicks repelled any inference of concurrence with his opinion. We conclude, therefore, that the court did not err in failing to give an instruction.

[3] Defendant next contends the court erred in excusing on its own motion and for cause prospective juror Dawson, who stated she had formed an opinion as to the innocence or guilt of the defendant. Defendant argues this was error under *Irvin v. Dowd*, 366 U.S. 717, 6 L. Ed. 2d 751 (1961), and that in failing to determine whether the juror could lay aside her opinion and render a verdict based on the evidence, the court failed to exercise its discretion. We disagree.

The determination by the trial court that the prospective juror could not be impartial was based on the statement of the prospective juror that she had formed an opinion about the case. This

statement supported the finding. Therefore, the court did not err in excusing Dawson. *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991).

[4] Defendant next contends the trial court erred in granting State's motions to excuse for cause three jurors whose opposition to the death penalty would not have substantially impaired their ability to be fair and impartial. Again we disagree.

> The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *accord, State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

State v. Syriani, 333 N.C. 350, 369-70, 428 S.E.2d 118, 128, *cert. denied*, --- U.S. ---, 126 L.Ed.2d 341 (1993); *see also State v. Brogden*, 334 N.C. 39, 42, 430 S.E.2d 905, 907 (1993) (reiterating *Witt* standard). Where a person's responses reveal he does not believe in the death penalty and that his belief would interfere with the performance of his duty at the guilt-innocence or sentencing phase, these responses demonstrate that he cannot fulfill the obligations of a juror's oath to follow the law in carrying out his duties as a juror; and the trial court does not err in excusing him for cause. *Syriani*, 333 N.C. at 371, 428 S.E.2d at 129. Jurors must be able to " '*state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.*' " *Brogden*, 334 N.C. at 43, 430 S.E.2d at 907-908 (alteration in original) (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986)).

In the instant case, the record shows that prospective juror Barbara Malpass first said the capital nature of the case would not affect her ability to sit on the jury. Immediately after this, however, she said, "I don't think I would vote death penalty, if there was any other choice." Although she next indicated to the court that she had not made up her mind that the penalty should be death or life, when asked by the prosecutor if she could vote to impose the death penalty upon defendant's conviction, she said, "I don't think so" and "I don't think I would. I don't know. Like I say I don't know until I hear the case." The following exchange then took place:

Q. You have indicated that you do not think that you could do that.

A. Right.

Q. And would that be so no matter what the evidence might show, Ms. Malpass, that you could not under any circumstances vote to impose a sentence of death on Renwick Gibbs or anybody else; is that what you are saying to me?

A. That I could not vote? I did not say that I could not vote. I said I would rather not do it. I prefer not to sentence a person to death, if I have another choice, no matter what he did.

. . . .

Q. . . . [I]f satisfied from the evidence and beyond a reasonable doubt pursuant to the law as the judge explains it to you, could you and would you in that instance vote—

A. Well, to answer your question now before the trial, the best I can answer you is no I would not.

Q. So you are at this time are [sic] committed to—automatically committed at this time not to impose a sentence of death?

A. Yes, sir.

Q. And is that so no matter what the evidence might be or what the law is?

A. No, I didn't say that.

. . . .

Q. Are you saying that there are no circumstances under which you could impose a sentence of death on Mr. Gibbs or anyone else for that matter?

A. I think I'm saying that, yes.

Q. Under no set of circumstances?

A. I don't think I could.

After these exchanges, Malpass indicated that to the contrary, she would not vote for the "death penalty without going through the trial or whatever, without knowing the circumstances or anything about it," and her decision to "give the death penalty would be

based on the evidence we get, and the crime, and the situation." Nevertheless, upon further questioning by the State, Malpass said, "[L]ife is precious and I would not want to, if I had any other choice, to vote death penalty for someone." Asked if she would always choose to vote for a life sentence, she answered, "Normally I would. I would say yes." Asked if she could "say to Renwick Gibbs that he should be put to death," she answered, "No. . . . I could decide if I felt he was guilty or not, but I don't think I would vote to put him to death, no."

Malpass's responses indicated she opposed the death penalty and her view would interfere with the performance of her duties as a juror in the sentencing phase. Pursuant to *Witt*, we conclude the court did not err in granting the State's for-cause challenge and excusing her.

[5] Venireman Nelson Simpson, a Pentecostal minister, said that according to his religious beliefs, imposing the death penalty "would put me in a very bad situation. I would not like to have that imposed on me to try to have to make that kind of a decision." If called upon to vote for the death penalty, he "wouldn't like to, no sir." Later he said,

> Let me put it this way, I mean the way that I feel, the way that I see the things as they are. I know you have to have laws. I believe in these. We have to have man-made laws as well as God's laws. But if it was left up to me, personally, there wouldn't be any death penalty. Maybe life, but no death penalty, if it was personally left up to me.

Following this statement the court questioned him as follows:

> THE COURT: Are you saying that you could consider the penalty of death and the penalty of life based upon the circumstances of any particular case?
>
> A. No, not really, I just think life is precious and I would not want to feel like that I had anything to do with someone else's losing theirs.
>
> THE COURT: Are you saying at this time that you would automatically vote against the imposition of the death penalty, if you were called upon to do that based upon the law and the evidence in the case?

A. In this case, probably I would, yes, sir. Because I've tried to explain my situation and I believe I would not—it doesn't mean that I wouldn't listen, doesn't mean that I wouldn't try to be fair. But I would just hate to know that under the circumstances that he could very well get death because of a vote that I made.

THE COURT: You are indicating then that opinion or having that opinion would affect your ability to sit on this case and render a fair and impartial verdict for the State and for the defendant?

A. If that is the way it has to be worded, yes, sir.

. . . .

THE COURT: Again, you are saying upon final analysis if called upon to answer that question and to make a recommendation as to life or death, you would automatically vote for the imposition of life?

A. Right, I would have to go against death, yes sir.

Simpson's bias against the death penalty was shown with unmistakable clarity. Under these circumstances Simpson could not affirm that he would follow the law in carrying out his duties during sentencing. Therefore, we conclude the court did not err in granting the State's motion to challenge him for cause and excusing him.

[6] Prospective juror Rita Barrow responded to the State's questions on *voir dire* as follows:

Q. Having those things in mind, Ms. Barrow, how do you feel about the death penalty?

A. I don't believe in it.

THE COURT: Speak up, please.

A. I don't believe in the death penalty.

Q. I take it then that you are opposed to the death penalty?

A. Yes.

Q. Certainly there are people all across the state that have different views about it. Some are for the death penalty. Some

are opposed to the death penalty. There is nothing at all wrong with that.

A. I'm opposed to it. I'm still opposed to it.

Q. Is this some religious, or moral, or personal belief that you have had, Ms. Barrow?

A. My religion.

. . . .

Q. I take it this is something, some belief, that you have held for a long time?

A. Yes.

Q. Is it true that you could not and would not ever vote to impose a sentence of death; is that correct?

A. Yes.

. . . .

Q. And would that be so no matter what the evidence or what the law is?

A. Well, yes, well, in a way I'd rather just give him life imprisonment.

Q. You would automatically vote for a sentence of life imprisonment no matter what the law was and no matter what the evidence was; is that correct?

. . . .

A. Yes.

Q. You could not under any circumstances vote to impose a sentence of death; is that correct?

A. No, I couldn't.

Based on these responses, the State moved to challenge for cause, and the court began to question Barrow. At first her answers accorded with those quoted above; but when the court asked whether her opinion about the death penalty would substantially impair her ability to render a fair and impartial verdict, she answered, "No." The court continued to question as follows:

THE COURT: The question is whether or not you feel that your opinion about the death penalty would impair, that is, adversely affect your ability to sit on this case and render a fair and impartial trail [sic] both as to guilt or innocence and as to the penalty stage?

A. No.

THE COURT: Could you then consider both life and death as possible punishments if there is a return of a verdict of first degree murder?

A. I don't know.

THE COURT: Are you indicating then that you could consider the possible punishments that may be established by the law based upon the evidence that may be presented?

A. I would have to hear the evidence first and then decide.

THE COURT: So is your mind made up at this point as to punishment?

A. Yes.

THE COURT: Are you indicating that you would automatically vote against the imposition of the death penalty, if you were called upon to do that?

A. Yes.

THE COURT: You answered earlier that you could consider life or death. I'll let you explain that to me, whether or not that is your opinion or you feel that you could not consider—

A. To tell you the truth, I really don't know. I couldn't suggest that—make up my mind, really. I might could. I might could.

Some of Barrow's responses were equivocal. Although she stated she was opposed to the death penalty and would automatically vote against imposition of it, she vacillated when asked if she could consider life or death. The answers of this prospective juror demonstrated that her views on capital punishment would have substantially impaired her ability to perform her duties as a juror in accordance with her oath. We conclude, therefore, that based on the venireperson's responses as set out above, the trial court

did not err in granting the State's motion and excusing Barrow for cause.

[7] Defendant next contends the court erred in denying him an opportunity to rehabilitate prospective jurors Moore and Boston after the State moved to excuse them for cause based on their answers to death qualification questions. Again we disagree.

In *Brogden* this Court found error where the record clearly showed (i) repeated denials by the trial court of requests to rehabilitate under the mistaken belief that such requests are to be denied as a matter of law and (ii) excusal by the trial court of a prospective juror likely qualified to be seated. *Brogden*, 334 N.C. at 53, 430 S.E.2d at 913. By contrast, where the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter. *State v. Hill*, 331 N.C. 387, 403, 417 S.E.2d 765, 772 (1992). In addition, "[t]he 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." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). Finally, in determining whether the trial court erred in denying a request to rehabilitate, this Court considers the entire *voir dire* of the prospective juror. *Brogden*, 334 N.C. at 46, 430 S.E.2d at 909.

With these principles in mind, we turn to the *voir dire* of prospective jurors Moore and Boston. Moore told the prosecutor that because of her religious beliefs she could not pass judgment on another person. She would have to abstain from voting "because the Lord said vengeance is His and I wouldn't be fair because of that." In response to questioning by the court Moore stated she could base her opinion on the evidence, "but to make a decision where he would be [sic] life, no." Her religious beliefs would prevent her from determining punishment. Only after she stated that based on her religion, she could not participate in the proceeding, did the court grant State's motion to challenge for cause. The following exchange then took place out of the presence of the venire:

THE COURT: I'll hear from you, Mr. Paul.

MR. PAUL: Thank you, your honor. Your honor, at this time the defendant would move to be able to voir dire the challenge of juror Ms. Carrie Brock Moore and the court has just sustained a motion for cause by the State. I would like to say that we understand at this point in time the law in North Carolina is as expounded by the Supreme Court in this state indicates there is no right as such to a voir dire or to rehabilitate a jury challenge for cause. As to the issue of the death qualification we submit that. We also know that the laws in the court cases, appellate cases have a way of changing and we would like to [p]reserve that for the record. We make that request.

THE COURT: I'll note that you have made that request and I'll add to the record the court inquired rather extensively of Ms. Moore as to her opinions. And Ms. Moore's opinions based upon the court's finding would substantially impair her ability to sit on this case and render a fair and impartial trial [sic].

In our view this exchange shows the trial court did not err in denying defendant's request to rehabilitate Moore. Defendant does not argue, and the record does not show, that the court made a blanket refusal to permit rehabilitation of any jurors. More importantly, defendant made no showing in the trial court and does not show this Court how further questioning would have elicited different answers from Moore. Under these circumstances, we conclude the court did not err.

In answering questions from the prosecutor, prospective juror Boston said he did not believe in the death penalty, would never vote to impose a death sentence, and would automatically vote against the death penalty. Responding to questions by the court, Boston twice repeated that he would automatically vote against the death penalty. The court excused him for cause, noting an exception for defendant. Boston's unequivocal answers compel the conclusion that further questioning would not have elicited different answers. Therefore, we conclude the court did not err in granting State's challenge for cause without permitting defendant to attempt to rehabilitate Boston.

[8] Defendant's next contention is that the court erred in instructing the venire during *voir dire* on accomplice testimony. During jury selection, the prosecutor asked several questions related to accomplice testimony. The court on its own motion instructed as follows:

> Members of the jury, you are all aware as the State has indicated that there may be what is called accomplice testimony. The [c]ourt would instruct you that at the proper time that you may consider that, but you are to scrutinize that testimony as you would any other statement in determining what credibility to give to that particular testimony if it is offered and what weight you would put to that considering all the evidence during the course of the trial.
>
> The State would acknowledge to you that there is accomplice testimony, but it would be up to you, as you [sic] have indicated, to determine what credibility to place on that witness and what weight to place on the testimony in light of all the circumstances.

Defendant concedes he failed to object but argues this Court can consider the error under Appellate Rule 10, which provides as follows:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(c)(4). Defendant argues that the court erred because it equated the interest of an accomplice with that of any other witness, but the standard for evaluating accomplice testimony is more stringent. *State v. Bailey*, 254 N.C. 380, 385, 119 S.E.2d 165, 169 (1961). We agree that the instruction given did not set forth the proper standard of evaluation; we disagree that this error constitutes plain error.

Plain error is " '*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)). Discussing the overall charge to the jury, this Court said in *Odom* that "[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." 307 N.C. at 661, 300 S.E.2d at 378-79.

In this case, in addition to the instruction during *voir dire*, immediately before Doris Gay testified for the State the court instructed the jury on how to consider testimony pursuant to a plea arrangement. Also, in charging the jurors prior to their deliberations on guilt, the court instructed correctly on how to consider accomplice testimony and again on how to consider testimony pursuant to a plea arrangement. Defendant does not contend the court erred in any of these instructions. "[E]ven 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)." *Id.* at 660-61, 300 S.E.2d at 378. Viewing the entire record, including the correct instructions given during the guilt-innocence phase, we conclude defendant has failed to show plain error arising from the court's preliminary instruction on accomplice testimony.

[9] Defendant next contends the trial court erred by failing to prevent the prosecutor from using language suggesting that in all likelihood the penalty phase would be reached. Citing *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971), a case involving jury argument, defendant argues the language was improper and the implication impermissibly prejudiced him. We do not agree.

At four different times the prosecutor prefaced questions with, "[I]f and when we pass that first stage and move into what is known as the second stage or the penalty phase of the trial." In addition, "If and when the defendant is found guilty of murder in the first degree, we would then move into what is known as the second phase or the penalty phase of the trial" or similar language was used nine times. Defendant did not object to any of the prefatory language.

Although occurring in jury selection, the prosecutor's comment defendant now challenges can be analogized to comments by a prosecutor during jury argument. This Court has held that in capital cases, control of jury arguments is within the discretion of the trial court, whose determination will not be reversed "unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). In addition, "counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not

supported by the evidence." *Id.* at 368, 259 S.E.2d at 761. Where defendant makes no objection in the trial court, gross impropriety is the standard governing appellate review of the prosecutor's jury argument in a capital case. *E.g., State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); *Johnson*, 298 N.C. 355, 259 S.E.2d 752.

In *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), this Court reviewed language used by the State during jury selection. The prosecutor asked whether "if the juror found that any aggravating factors outweighed any mitigating factors, he or she would be able to recommend death 'for what [defendant] did to this little girl.' " *Id.* at 250, 357 S.E.2d at 910 (alteration in original). On appeal defendant argued that the question (i) suggested the issue of guilt had already been decided against him and (ii) was so grossly improper as to require the court's ex mero motu intervention. *Id.* This Court held there was no gross impropriety. *Id.*

In the instant case defendant argues the prefatory language constituted a comment that there was a good possibility the defendant would be found guilty. However, the prosecutor never stated that in defendant's trial the sentencing phase was certain to be reached. In addition, defense counsel elicited from most seated jurors an understanding that the second, or penalty phase, would not necessarily be reached. The court repeatedly instructed the venire and the jury that only if defendant was convicted would there be a separate sentencing proceeding. A fair reading of the prosecutor's statements shows that like those of the court, they simply refer to the conditional nature of bifurcated capital prosecutions mandated by N.C.G.S. § 15A-2000: Only if the defendant is found guilty in the guilt-innocence phase will a penalty phase be reached. Nothing in the statements themselves suggests the prosecutor was attempting to place before the venire prejudicial matters by injecting his own beliefs or personal opinions unsupported by evidence. Moreover, after reviewing the entire *voir dire*, we are satisfied that the repetitions did not constitute such an attempt. Therefore, we conclude there was no gross impropriety.

[10] Finally, defendant contends the trial court erred during jury selection by twice overruling his objection to the prosecutor's language, which allegedly implied that the jurors could not be

fair to their country and state and also be fair to the defendant. Again we disagree.

Even if the remarks complained of gave rise to such an implication, defendant has failed to show either abuse of discretion or prejudice arising therefrom. *E.g.*, *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761. Therefore, we conclude the trial court did not err.

GUILT-INNOCENCE PHASE ISSUES

[11] Defendant first contends the court erred in permitting the prosecutor in his opening statement to imply twice that the jurors could not be fair to both the defendant and the State. Defendant's objections were overruled by the court. Defendant argues that the prosecutor's attempt to sow the seed in the jurors' minds that they could not be fair to both parties "improperly prejudiced the defendant." We do not find this argument persuasive.

Control of the parties' opening statements is within the discretion of the trial court. *E.g.*, *State v. Thacker*, 301 N.C. 348, 357, 271 S.E.2d 252, 257-58 (1980); *see also State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 520 (1988) (reviewing for gross impropriety where defendant failed to object). We have carefully reviewed the record and conclude that the court's overruling of defendant's objections did not constitute abuse of discretion and that the court did not err.

[12] Defendant next contends that by denying his motion to suppress statements made by him on 31 May and 3 June, the trial court committed constitutional error. Again we disagree.

Suppression hearing testimony showed that defendant agreed to undergo a polygraph examination and on the morning of 31 May 1990 went with Agent Tellefsen and Detective Skinner to Greenville, North Carolina, to be tested. Within minutes of having completed the test, defendant made a confession to Agent Davenport, the polygraph operator. Shortly after this, defendant made to Agents Tellefsen and Batchelor the confession described hereinabove and assisted them in recovering the 30-30 rifle.

After recovery of the rifle, defendant returned with the officers to the police department in Washington, where, beginning about 3:45 p.m., he sat in an interview room with Agent Batchelor. Hair samples and fingerprints were taken, and at 6:32 p.m. Batchelor told defendant he was going to be charged with the murders. While

sitting in the interview room with Batchelor, defendant was not questioned. Batchelor testified, "There was conversation, but not related to this crime. Simply an awkward situation trying to make small talk with Mr. Gibbs basically." From time to time other agents went in and out of the interview room. Defendant was permitted to use the toilet and provided with a soft drink upon his request. Soon after 6:32 p.m. he was taken to the magistrate's office, where arrest warrants were served on him, and then returned to the police department. On cross-examination Batchelor testified that about fifteen minutes before defendant was taken to the magistrate's office, he asked if he had to get an attorney. This inquiry was the first time defendant had mentioned an attorney in Batchelor's presence. Batchelor told defendant the question of a lawyer had to be his decision and asked defendant if he could afford to hire an attorney. Defendant said he could not, and Batchelor told him the court would appoint an attorney to represent him if he asked for one. During *voir dire* cross-examination, the court questioned Batchelor as follows:

> THE COURT: . . . [L]et me just ask you, you indicated at around 6:15, when you had conversation with the defendant about an attorney, are you stating that you were advising him of his rights at that time or he was just asking about an attorney?
>
> A. No, sir, during a period of time where there was not any activity going on between Mr. Gibbs and I [sic]—we were simply sitting in an interview room—Mr. Gibbs asked me if you had to get an attorney and I advised him that that was a decision that he had to make. I was not involved in any questioning or answering and didn't intend at that point in time to interview him. So I did not advise him of his rights and didn't intend to at that point in time, because there was going to be no questioning.

On redirect-examination, Batchelor testified that defendant's remark about an attorney was not made in response to a question from Batchelor. At 8:12 on the same evening, Agent Batchelor and Detective Sergeant John Taylor of the Washington Police Department interviewed defendant. Batchelor testified that he read defendant the *Miranda* rights, and defendant signed a waiver of rights form. Further, during the interview defendant's words at times "were mis-spoken or slurred over, but he was clearly understandable in

his speech. His speech was not perfect English, but he was clearly understandable and able to convey his meaning quite clearly."

Also on *voir dire* Agent Tellefsen testified as to facts and circumstances surrounding defendant's fourth and final statement, made on 3 June. Sometime before 4:00 p.m. on that day, defendant asked someone at the Washington jail to call Agent Batchelor, who had left his business card with defendant, and summon him to the jail to talk with defendant. Agent Batchelor was not available, Tellefsen received the message, and Tellefsen and Officer Taylor went to the jail. They told defendant they were responding to his call and took him to the sheriff's office. Defendant said he wanted to talk to them. They read defendant the *Miranda* rights; he said he understood and signed the waiver form. Defendant then made the detailed confession described hereinabove.

Before this Court defendant contends his right to counsel under the Fifth and Sixth Amendments to the United States Constitution and Article I, §§ 19 and 23, of the North Carolina Constitution was violated by the interview conducted by Batchelor and Taylor on the evening of 31 May and the interview conducted by Tellefsen and Taylor on 3 June. We do not agree with this contention.

Defendant's motion to suppress stated that his statements "were obtained in violation of Defendant's right to counsel prior to and during interrogation." Defendant did not cite the Sixth Amendment or the North Carolina Constitution but merely urged that his statements were inadmissible because officers failed to advise him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). In arguing in support of the motion, defense counsel did not mention the Sixth Amendment or the North Carolina Constitution.

This Court has said that constitutional questions " 'not raised and passed upon in the trial court will not ordinarily be considered on appeal . . . [and] when there is . . . a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress . . . .' " *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)). Under *Benson*, since defendant did not cite the Sixth Amendment in his motion or arguments to the trial court, he may not properly present an argument based thereon in this Court.

Nevertheless, this Court employs utmost diligence and care in reviewing capital cases. *State v. Pinch*, 306 N.C. 1, 37, 292 S.E.2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), *and overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Smith*, 305 N.C. 691, 711, 292 S.E.2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). Therefore, we elect to consider defendant's arguments based on the Sixth Amendment. We conclude that since his Sixth Amendment rights were not abridged, there was no error in the denial of his motion to suppress.

"The initiation of judicial proceedings . . . marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby v. Illinois*, 406 U.S. 682, 689-90, 32 L. Ed. 2d 411, 417-18 (1972). In accord with this principle this Court has said that the right to counsel

> attaches and applies at and after any pretrial proceeding that is determined to constitute a critical stage in the proceedings against the defendant.
>
> . . . A preliminary hearing, though not in itself constitutionally required, is, when given, a critical stage requiring the assistance of counsel or a valid waiver of that right.
>
> . . . Once a critical stage has been reached . . . the police may not question a defendant, absent a valid waiver, without the presence and assistance of counsel . . . .
>
> . . . .
>
> . . . [T]he [first] appearance [pursuant to N.C.G.S. § 15A-601] before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken.

State v. Detter, 298 N.C. 604, 619-24, 260 S.E.2d 567, 579-82 (1979) (citations omitted); *accord State v. Nations*, 319 N.C. 318, 323-24, 354 S.E.2d 510, 514 (1987).

Following these principles, we reject defendant's argument that a Sixth Amendment right to counsel arose when he was arrested.

Defendant also argues, however, that under N.C.G.S. § 15A-601, he was entitled to a first appearance on 1 June. Further, he did

not make his first appearance within the period provided by that statute, and a Sixth Amendment right to counsel arose on 1 June, when he was entitled to a first appearance. We reject this argument.

Section 15A-601 provides that any defendant charged in criminal process with a crime in the original jurisdiction of the superior court must make a first appearance before a district court judge. Unless the defendant is released on bail, this first appearance "must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first." N.C.G.S. § 15A-601(c) (1988). In the instant case the record shows defendant made his first appearance on 4 June 1990, within ninety-six hours of 31 May, when he was taken into custody. Although the first appearance itself is not a critical stage of criminal judicial proceedings at which a defendant is entitled to counsel, *State v. Detter*, 298 N.C. at 624, 260 S.E.2d at 582, we conclude defendant's Sixth Amendment right to counsel attached during his first appearance on 4 June, when the State's position against him solidified as to the murder charges and counsel was appointed. *State v. Tucker*, 331 N.C. 12, 33, 414 S.E.2d 548, 560 (1992). Hence, under *Detter* the 31 May evening interview and the 3 June interview were not protected by the Sixth Amendment right, and the Court did not abridge defendant's Sixth Amendment right in denying the motion to suppress.

[13] We next consider defendant's contention that his confessions were admitted in violation of his Fifth Amendment right to counsel. Defendant based both his motion to suppress and his arguments to the trial court on this right. Before this Court defendant argues no evidence supported the trial court's findings that he (i) did not request an attorney on 31 May and (ii) reinitiated contact with the officers on 3 June. We hold the court did not err in denying defendant's motion to suppress.

As to the 31 May evening interview, defendant argues that his question to Batchelor constituted a request for counsel, after which all questioning should have stopped. We disagree.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d (1966), the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination gives rise to a right to the presence of counsel during custodial interrogation. *Miranda* requires that an in-custody suspect be advised of his rights to counsel and silence. *Id.* at 444, 16 L. Ed. 2d at 706-707. These rights may be

waived. *Id.* However, if during the course of a custodial interrogation a suspect requests an attorney, all questioning must cease until an attorney is present, *Minnick v. Mississippi*, 498 U.S. 146, 152, 112 L. Ed. 2d 489, 498 (1990), or "the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981); *accord State v. Allen*, 323 N.C. 208, 216, 372 S.E.2d 855, 860 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 775 (1993).

To trigger the protections of *Minnick* and *Edwards*, the right to counsel must be specifically invoked. *Edwards*, 451 U.S. at 482, 68 L. Ed. 2d at 384. Specific invocation occurs when a suspect indicates "in any manner and at any stage of the process" that counsel is desired. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707. "On occasion, an accused's asserted request for counsel may be ambiguous or equivocal." *Smith v. Illinois*, 469 U.S. 91, 95, 83 L. Ed. 2d 488, 494 (1984).

After the decision in *Smith*, this Court said

> The Supreme Court has expressly left unresolved the question of what is the appropriate response to an ambiguous invocation of counsel. The majority rule, however, appears to be that, when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent.

State v. Torres, 330 N.C. 517, 529, 412 S.E.2d 20, 27 (1992) (citations omitted). Where officers do not seek to clarify intent but instead dissuade a suspect from exercising the right to have an attorney present during interrogation, ambiguity must be resolved in favor of the suspect, and any statement made "in the absence of counsel following police-initiated custodial interrogation 'is presumed involuntary and therefore inadmissible as substantive evidence at trial.' " *Id.* at 530, 412 S.E.2d at 27 (quoting *McNeil v. Wisconsin*, --- U.S. ---, ---, 115 L. Ed. 2d 158, 167-68 (1991)). This consequence follows even if the suspect is later read the *Miranda* rights and executes a waiver; and erroneous admission of a confession presumed involuntary warrants a new trial. *Id.* In *Torres* we also said

> There are no "magic words" which must be uttered in order to invoke one's right to counsel. The crucial determination is whether the person has indicated "in any manner" a desire to have the help of an attorney *during custodial interrogation.* To require precise and exact language to invoke one's right to counsel would undermine *Miranda* by working to the disadvantage of those who arguably need its protections the most: the uneducated and those unfamiliar with the criminal justice system. *In deciding whether a person has invoked her right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.*

Id. at 528, 412 S.E.2d at 26 (emphasis added) (citation omitted).

The trial court made no finding on whether defendant was in custody when he asked about an attorney. The State concedes, however, that based on the totality of circumstances defendant was then in custody. The court did find, however, that defendant was not interrogated at the time he asked about an attorney and competent evidence supports this finding. *See State v. Nations*, 319 N.C. at 325, 354 S.E.2d at 514 ("Findings of fact concerning the admissibility of a confession are conclusive and binding if supported by competent evidence.").

Following *Torres*, we next consider the context in which defendant spoke about an attorney. Defendant had confessed to Davenport that he was involved in the murders, confessed again in greater detail to Batchelor, and led Batchelor and Tellefsen to the place where he hid the murder weapon. Having been fingerprinted and given hair samples, defendant must have known arrest was imminent. In *Torres*, this Court also said, "[A] suspect in custody can certainly *assert* her right to have counsel present during her impending interrogation prior to *Miranda* warnings and the actual onset of questioning." 330 N.C. at 526, 412 S.E.2d at 25. By contrast, in the instant case, no interrogation was impending and unlike defendant Torres, defendant Gibbs was not told he would be questioned. Moreover, Batchelor made no attempt to dissuade defendant from exercising his right to have an attorney present during custodial interrogation. Instead, Batchelor's responses to defendant's question if he had to get an attorney constituted narrow clarification questions. When Batchelor told defendant the court would appoint an attorney to represent him if he asked for one, defendant did not ask for an attorney. Based on the entire context in which

defendant's inquiry was made, we conclude he did not invoke the right to counsel. Therefore, we hold the trial court did not err in concluding that as to the interview on the evening of 31 May, defendant's Fifth Amendment privilege was not abridged.

As to the 3 June interview, defendant argues that he did not reinitiate contact with the officers. Since we have concluded defendant did not invoke the right to counsel on 31 May, however, we need not reach this issue. Noting that the trial court found defendant waived his *Miranda* rights on 3 June, we conclude the court did not err in concluding his Fifth Amendment privilege against self-incrimination was not abridged. For all the foregoing reasons we hold the trial court did not err in concluding defendant's rights under the Fifth Amendment were not violated, and, therefore, in denying the motion to suppress his 31 May and 3 June statements.

[14] Defendant's next contention is that the evidence was insufficient to convict him of both conspiracy to commit burglary and conspiracy to commit first-degree murder; consequently, the trial court erred in failing to dismiss the charge of conspiracy to commit burglary and in failing to arrest judgment on the conviction, thereby prejudicing defendant at sentencing. We find these contentions to be without merit.

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: " 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953), quoting *State v. Connor*, 179 N.C. 752, 103 S.E. 79 (1920). The conspiracy is the crime and not its execution. *State v. Lea*, 203 N.C. 13, 164 S.E. 737[, *cert. denied*, 287 U.S. 649, 77 L. Ed. 561] (1932). Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed. *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334[, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d] (1964).
>
> Once a conspiracy has been shown to exist the acts and declarations of each conspirator, done or uttered in furtherance

> of a common illegal design, are admissible in evidence against all. *State v. Gibson*, 233 N.C. 691, 65 S.E.2d 508 (1951); *see State v. Goldberg, supra; State v. Summerlin*, 232 N.C. 333, 60 S.E.2d 322 (1950). The existence of a conspiracy may be established by direct or circumstantial evidence. To this end the unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. *State v. Horton*, 275 N.C. 651, 170 S.E.2d 466 (1969)[, *cert. denied*, 398 U.S. 959, 26 L. Ed. 2d 545 (1970)]; *State v. Tilley*, 239 N.C. 245, 79 S.E.2d 473 (1954). However, "[d]irect proof of the charge [conspiracy] is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933).

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975).

In the instant case, State's evidence showed the agreement to kill the Farris family was made several weeks before the murders took place. Applying *Bindyke*, we conclude the defendant committed the offense of conspiracy to commit murder when he, Doris, and Yvette agreed to kill Ann's family. The union of wills for the unlawful purpose of killing the family having been perfected, the offense of conspiracy to commit murder was completed. However, defendant, Doris, and Yvette did not also agree to commit the crime of first-degree burglary, and Doris was not charged with this crime. For these reasons we reject defendant's argument that the evidence showed one agreement to commit multiple offenses. Instead, on the night of the murder, a separate agreement was made between defendant and Yvette. That these two first watched Farris, Sr., leave and then approached the house in the dark, early morning hours when the family was likely to be sleeping is circumstantial evidence of an agreement to commit first-degree burglary. Their subsequent acts also show their agreement: That Yvette waited while defendant loosened the telephone wires and broke the glass and then followed him into the house constitutes evidence of acts in furtherance of the conspiracy to commit burglary. Taken collectively, the acts of defendant and Yvette point unerringly to the existence of a conspiracy to commit burglary. Viewing the evidence most favorably for the State and giving the State

the benefit of all reasonable inferences, *State v. Quick*, 329 N.C. 1, 19, 405 S.E.2d 179, 190 (1991), the evidence showed defendant and Yvette engaged in conspiracy to commit the offense of burglary. Therefore, we hold that the trial court did not err in failing to dismiss the conspiracy to commit burglary charge.

[15] Defendant next contends the court erred in its instructions on both conspiracy charges. As to conspiracy to commit first-degree murder, the court instructed that the State had to prove defendant "and at least one other person entered into an agreement." Both Yvette and Doris were named as co-conspirators in the indictment for this charge, and evidence showed defendant conspired with them to kill the Farris family. As to conspiracy to commit burglary, the court instructed that the State had to prove "that the defendant and at least one other person intended" the agreement to be carried out and if the jury found that the defendant "agreed with at least one other person to commit the crime of first degree burglary," it would be their duty to return a verdict of guilty of this charge. Only Yvette was named as a co-conspirator in the indictment for this charge, and evidence showed that defendant conspired with her to commit the offense. Defendant argues that the court never informed the jury that they were required to find beyond a reasonable doubt that defendant conspired with a person named in the indictment. Defendant argues further that he was erroneously convicted of two offenses of conspiring with "at least one other person" instead of the offenses for which he was indicted.

Defendant moved to dismiss the charge of conspiracy to commit burglary, argued that no instruction on this offense should be given, and renewed the objection after the court's charge to the jury. He also objected that both conspiracy instructions were "confusing" but omitted to bring to the attention of the trial court the error he complains of before this Court. By his omission defendant failed to preserve the alleged error for review. N.C. R. App. P. 10(b)(2). Although under Rule 10(c)(4), defendant could also have argued plain error before this Court, defendant makes no such argument. Nevertheless, we are persuaded by State's argument that the error, if any, did not amount to plain error, as there is no basis to believe the error had a probable impact on the verdicts. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). State's evidence showed that only defendant and Yvette agreed to commit the burglary; there was no evidence from which the jurors could have found that "at least one other person" was

anyone other than Yvette. As to conspiracy to commit murder, there was no evidence from which the jurors could have found that "another person" was anyone other than Yvette or Doris. For these reasons we hold the errors committed by the court in instructing on the two conspiracies did not rise to the level of plain error.

[16] Defendant's next contention is that the trial court erred by misstating the elements of the crime of conspiracy to commit burglary and did not correct its error. We find that the error was cured.

In instructing on this charge, the court said, "Second, the State must prove to you beyond a reasonable doubt that the agreement was to commit *first degree murder*—strike that. The State must prove to you beyond a reasonable doubt that the agreement was to commit *first degree murder*." (Emphasis added.) Later, however, the court instructed as follows:

> Let me just go back to the first charge I instructed you on and that is the second charge, I believe, involving feloniously conspiring to commit first degree burglary. The court at that time, I believe, may have incorrectly instructed you as to what the elements of that offense were. I'll ask you to disregard that as I repeat that instruction for you solely on the charge of feloniously conspiring to commit the offense of first degree burglary. I'll give you the following instruction.
>
> The defendant has been accused of feloniously conspiring to commit first degree burglary. First degree burglary is defined as the breaking and entering the [sic] occupied dwelling house of another without his consent in the nighttime with the intent to commit a felony.
>
> Now I charge for you to find the defendant, Renwick Gibbs, guilty of feloniously conspiring to commit first degree burglary, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant and at least one other person entered into an agreement. Please recall the instructions I've given you as to how an agreement may be made under the theory of conspiracy.

> Second, the State must prove to you beyond a reasonable doubt that the agreement was to commit the offense of *first degree burglary*, as I have defined that for you.

(Emphasis added.)

Defendant failed to object to the alleged error. "Since defendant failed to object at trial on the grounds she here alleges, we review for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); N.C. R. App. P. 10(b)(2)." *State v. Allen*, 322 N.C. 176, 199, 367 S.E.2d 626, 638 (1988). In the instant case, the trial court acknowledged the error and gave a correct instruction. However, the alleged error falls far short of even that argued in *Allen*, wherein the trial court had to recall the jury to supplement his instruction. Therefore, we conclude this is not " '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." ' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

[17] Defendant next contends the trial court erred by instructing the jurors that they could convict him of conspiracy to commit murder if they found an agreement to commit felony murder. Defendant argues that since the crime of felony murder does not require that the killing be intentional, but conspiracy requires agreement, that is, intent to carry out a specific act, under the instruction given by the court an unintentional felony murder could erroneously serve as the basis for a conviction of conspiracy to commit murder. Defendant argues further that in the instant case the court's instruction lessened the State's burden of proof and thus prejudiced him. We do not find these arguments persuasive.

First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon. N.C.G.S. § 14-17 (Supp. 1992); *see also State v. Fields*, 315 N.C. 191, 199, 337 S.E.2d 518, 523 (1985) (holding statutory language "use of a deadly weapon" includes mere possession of deadly weapon). In felony murder, the killing may, but need not, be intentional. There must, however, be an unbroken chain of events leading from the attempted felony "to the act causing death, so that the homicide is part of a series

of events forming one continuous transaction." *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976).

In the instant case the court did not instruct the jurors that an unintentional killing during a felony would support a finding of first-degree murder by reason of felony murder. Rather, they were instructed that to find a conspiracy to commit murder, they must first find an agreement to commit first-degree murder. When they found an agreement to kill, the jurors eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which they convicted defendant. On the specific facts of defendant's case, therefore, the principle that felony murder includes unintentional killings during felonies is irrelevant. Moreover, since the jurors also found defendant guilty of three counts of murder by reason of premeditation and deliberation, there is no rational basis for suggesting they could have found that the murders which occurred during the burglary were unintentional felony murders. Finding no prejudice, we overrule this assignment of error.

[18] Defendant next contends the trial court erred by refusing to submit misdemeanor breaking or entering as a lesser included offense of first-degree burglary. Defendant objected to the court's refusal to give this instruction. Defendant argues there was substantial evidence showing that when he broke and entered the Farrises' house, he did not possess the requisite felonious intent. We disagree.

First-degree burglary is the breaking and entering of an occupied dwelling of another in the nighttime with the intent to commit a felony therein. N.C.G.S. § 14-51 (1986); *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). Misdemeanor breaking or entering, a lesser included offense of burglary, does not require intent to commit a felony within the dwelling. N.C.G.S. § 14-54(b) (1986); *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985).

A trial court is required to instruct on a lesser included offense only when there is evidence to support a verdict finding the defendant guilty of the lesser offense. *State v. Tucker*, 329 N.C. 709, 721, 407 S.E.2d 805, 812 (1991). " 'The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous

offense.' " *Peacock*, 313 N.C. at 558, 330 S.E.2d at 193 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

In *Peacock*, defendant was charged with first-degree burglary and that offense was submitted to the jury. On appeal defendant argued the court erred in denying his request to submit in addition the lesser included offense of misdemeanor breaking or entering, and this Court agreed. *Id.* at 557-58, 330 S.E.2d at 192-93. We said there was evidence which could have convinced a rational trier of fact that defendant did not form the requisite intent to commit larceny at the time he broke and entered. The evidence included defendant's statements that he consumed LSD and alcohol; thought about going to talk to the victim about the rent and went to her apartment; and when she did not answer the door, broke in and stood there thinking about robbing her. In addition, defendant later told a detective "that it was *after* he was inside that he decided to rob [the victim]." *Id.* at 559, 330 S.E.2d at 194. We said defendant's statement to the detective lent credence to his "argument that a juror might also infer that he broke and entered without an intent to commit larceny." *Id.* at 559-60, 330 S.E.2d at 194.

In the instant case, the indictment alleged defendant committed first-degree burglary with the intent to commit the felony of first-degree murder. Defendant argues there was substantial evidence showing that when he broke and entered the Farrises' house, he had no felonious intent: His 31 May confession to Agent Batchelor, introduced by the State, included an assertion that he went to the house to see his wife and never intended to shoot anyone. In addition, his 3 June confession also included an assertion that he did not go to the house to shoot anyone but to talk to his wife. Notwithstanding defendant's after the fact assertions, overwhelming evidence showed that prior to breaking into the house, defendant had decided to kill his estranged wife's family. He conspired with Yvette and Doris to do so; had Doris purchase bullets; prepared a note to divert suspicion from himself; told his confederates he was going to kill the people; armed himself; and gloved, masked, and capped himself to hide his identity. In his 3 June confession defendant admitted that he watched Farris, Sr., drive away from the house, and this admission negated his assertion that the firearms were to keep Mr. Farris at bay. All the evidence relevant to the time before defendant broke and entered supports an inference that defendant possessed the intent to kill the Farris family. Unlike defendant Peacock, defendant Gibbs cannot point

to any evidence tending to negate this intent. There is no before the fact evidence to which defendant's statements afterwards could lend credence. There being no evidence from which a rational trier of fact could have concluded defendant did not possess the intent to commit murder, we conclude the trial court did not err in refusing to instruct on the lesser included offense of misdemeanor breaking or entering.

[19] Finally, defendant contends the court erred in instructing the jurors on the element of intent in burglary. As discussed above, the burglary indictment charged that defendant broke and entered with the intent to commit the felony of first-degree murder. Defendant argues the court erroneously instructed that if felony murder were proven by the State, the State would also have met its burden of proving the element of intent as to burglary. Therefore, defendant argues, the instruction permitted the jurors to convict defendant for a specific intent crime, burglary, based upon a finding that a murder occurred during the perpetration of that crime, disregarding whether the murder itself was intentional. We do not find these arguments persuasive.

Defendant having failed to make any objection in the trial court, our review is limited to determining whether defendant has shown the error to be so fundamental as to have a probable impact on the verdict. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). Since the jurors found defendant guilty of premeditated and deliberated murder, it is not likely the error had any impact on the verdict. Since defendant cannot show the error had a probable impact on the verdict, we conclude the error did not rise to the level of plain error.

PENALTY PHASE ISSUES

[20] Defendant first contends the court erred in failing to submit as a mitigating circumstance, pursuant to N.C.G.S. § 15A-2000(f)(1), that the defendant had no significant history of prior criminal activity. We disagree.

At the sentencing charge conference, defendant tendered a written request for mitigating circumstances, and the following colloquy took place:

> THE COURT: *Even though there was no evidence presented up*, does the defendant have any significant prior criminal history?

MR. PAUL: Are you asking the defendant?

THE COURT: Yes, sir. That is not on your list.

MR. PAUL: It's not on the list. There is, I think, one prior conviction that the State had raised to us in 1987, I believe, of an assault charge.

THE COURT: Is the defendant not requesting that be submitted as a mitigating factor? There is one in the statutory mitigating factors.

MR. PAUL: We are aware of that. I think it is a technical reason that it's not being submitted, by not being requested. *At this point in time there is no evidence at all of any prior crime the defendant has ever been convicted of before the jury.*

THE COURT: You are saying that is a technical decision made by you along with your client?

MR. PAUL: Yes, Your Honor. *At this point in time there is no evidence of any criminal conviction* and we are not raising that issue for the State to then put in an argument that he does have one and the specifics about what that conviction was. We think that would be far more damaging than raising the issue to argue for the jury to find it's a factor.

THE COURT: All right, sir.

(Emphasis added.)

The Criminal Procedure Act provides that in capital sentencings, "[i]nstructions *determined by the trial judge to be warranted by the evidence* shall be given by the court in its charge to the jury prior to its deliberation." N.C.G.S. § 15A-2000(b) (1988) (emphasis added). In *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (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), *cert denied*, --- U.S. ---, 116 L. Ed. 2d 174 (1991), this Court stated:

> The trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance. *See State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988). The term "substantial evidence" 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). The statutory mitigating circumstance of "no significant history of prior criminal activity" is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history. *State v. Hutchins*, 303 N.C. 321, 355-56, 279 S.E.2d 788, 809 (1981), *cert. denied*, 464 U.S. 1065, 79 L. Ed. 2d 207 (1984). A silent record in this regard does not require submission of the mitigating circumstance. *Id.* An affirmative showing of a complete absence of *any* history of criminal activity need not be made, but some substantial evidence concerning the defendant's history of prior criminal activity—or lack of it—must be presented to the jury before the trial court may determine as a matter of law that the jury could reasonably find this mitigating circumstance from the evidence. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988).

Id. at 110-11, 381 S.E.2d at 626-27.

Recently, in *Delo v. Lashley*, 507 U.S. ---, 122 L. Ed. 2d 620 (1993), the United States Supreme Court revisited the issue of due process as affected by the sentencer's consideration of mitigating circumstances. Defendant Lashley was convicted of capital murder and at the sentencing conference one of his attorneys "asked the judge to instruct the jury on the mitigating circumstance that '[t]he defendant ha[d] no significant history of prior criminal activity,' Mo Rev Stat § 565.012.3(1) . . . ." *Id.* at ---, 122 L. Ed. 2d at 625 (alteration in original). Nevertheless, defense counsel repeatedly said she would not try to show that defendant lacked a criminal past. The trial court indicated defendant "would not be entitled to the requested instruction without supporting evidence." *Id.* The Supreme Court speculated that defendant's attorneys chose not to make the necessary proffer because they feared the prosecutor would be permitted to respond with evidence that defendant had engaged in criminal activity as a juvenile or because they wanted to avoid opening the door to evidence that defendant had committed other crimes as an adult. *Id.* For whatever reason, defendant presented no proof that he lacked a significant criminal history, the prosecutor did not submit any evidence that would support the mitigating circumstance, and the trial judge refused to give an instruction on it. *Id.* In a habeas corpus proceeding defendant argued the trial court's refusal to give the requested instruction violated due process, and the Court of Appeals for the Eighth

Circuit agreed, holding that the lack of any evidence whatever of defendant's prior criminal activity entitled him to the requested instruction. *Id.* at ---, 122 L. Ed. 2d at 626. The Supreme Court, however, disagreed, stating as follows:

> We have held that the sentencer must be allowed to consider in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death." Lockett, supra, at 604, 57 L Ed 2d 973, 98 S Ct 2954 (plurality opinion) (emphasis added). . . . But we never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.
>
> On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. And, answering a question expressly reserved in Lockett, we recently made clear that a State may require the defendant " 'to bear the risk of nonpersuasion as to the existence of mitigating circumstances.' " Walton v Arizona, 497 US 639, 650, 111 L Ed 2d 511, 110 S Ct 3047 (1990) (plurality opinion) (quoting Lockett, supra, at 609, n 16, 57 L Ed 2d 973, 98 S Ct 2954).

Id. at ---, 122 L. Ed. 2d at 626 (citations omitted).

In light of N.C.G.S. § 15A-2000(b), *Laws*, and *Lashley*, the question before this Court is whether defendant presented evidence of his criminal history. The record shows defense counsel stated that no evidence of defendant's criminal history was presented by the defense or the State and the defense had chosen not to request submission of circumstance (f)(1). "Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them." *Lashley*, 507 U.S. at ---, 122 L. Ed. 2d at 627. Since the record shows no evidence was offered to support an instruction on mitigating circumstance (f)(1), we hold the trial court did not err in failing to submit it.

[21] Defendant's next contention is that the court erred in instructing on circumstance (f)(7), the age of the defendant at the time of the crime, by limiting the circumstance solely to defendant's chronological age, twenty-six. We disagree. Since defendant failed

to object, our review is for plain error. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983).

The court instructed as follows:

> Number Three, you will also consider in each case, whether the age of the defendant at the time of the murder is a mitigating factor.
>
> The mitigating effect of the age of the defendant is for you to determine from all the facts and circumstances which you find from the evidence.

As noted above, the jurors found this mitigating circumstance existed. Hence, defendant could not have been prejudiced by the instruction and cannot show plain error.

[22] Defendant next contends the trial court erred by submitting to the jury as aggravating circumstances for each murder both that the murder was committed during the course of a felony (burglary), N.C.G.S. § 15A-2000(e)(5), and that it was part of a course of conduct which involved commission of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). Defendant argues that submission of both aggravating circumstances constituted impermissible and unconstitutional duplication in the evidence of aggravation. According to defendant, all the evidence supporting the former circumstance was subsumed by the evidence supporting the latter circumstance. In addition, the intent element of the burglary, intent to murder the Farris family, was identical to the intent to engage in the course of conduct, but the latter was submitted as a separate aggravating circumstance. We do not find defendant's arguments persuasive.

In a capital case the trial court may not submit multiple aggravating circumstances supported by precisely the same evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 452 (1987) (finding error in robbery-murder sentencing where court submitted that the murder was committed (i) while defendant was engaged in robbery, N.C.G.S. § 15A-2000(e)(5), and (ii) for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and same evidence supported both circumstances); *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979) (finding error where same evidence supported two circumstances submitted, that the murder was committed to (i) avoid or prevent arrest, N.C.G.S. § 15A-2000(e)(4), and (ii) disrupt or hinder the lawful exercise of any governmental function or the enforce-

ment of laws, N.C.G.S. § 15A-2000(e)(7)); *cf. State v. Vereen*, 312 N.C. 499, 515, 324 S.E.2d 250, 262 (1985) (finding nonprejudicial error in murder sentencing where court submitted two circumstances based on evidence of attempted rape, since evidence other than that of attempted rape also supported each circumstance); *accord State v. Gay*, 334 N.C. 467, 494, 434 S.E.2d 840, 856 (1993). Nevertheless, this Court has approved submitting the course of conduct aggravating circumstance where more than one victim is killed or injured. *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992) (defendant killed woman and twenty-six months later killed her sister); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (woman raped immediately after man with whom she was driving was killed by defendant), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991); *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990) (defendant fired shots endangering store customers, killed one, seriously wounded another, and committed armed robbery against store clerk); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986) (immediately after killing one victim, defendant fired gun at another), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984) (defendant killed sister, then father of estranged wife); *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (wife killed, then husband beaten), *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). In addition, when a jury finds a defendant guilty upon theories both of premeditation and deliberation and felony murder, and both theories are supported by the evidence, the felony underlying the felony murder may properly be submitted as an aggravating circumstance. *E.g., State v. Jennings*, 333 N.C. 579, 626, 430 S.E.2d 188, 213 (1993).

In *Cummings*, we also said

> In determining whether the evidence tends to show that another crime and the crime charged were part of a course of conduct, and therefore constitute a proper basis to submit the course of conduct aggravating circumstance to the jury, the trial court must consider "a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons."

332 N.C. at 509, 422 S.E.2d at 704 (quoting *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated*, --- U.S. ---, 122 L. Ed. 2d 113 (1993)).

Cummings makes clear that when an additional act of violence against the person occurs much later in time, intent of the perpetrator is relevant in determining whether all the acts, though individual, constitute a course of conduct. *See also State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, 261 (approving submitting course of conduct circumstance where acts of violence were committed within hours of each other in different towns), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

In *Jones*, a robbery-murder case, the trial court submitted as aggravating circumstances that the murder was committed (i) for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and (ii) as part of a course of violent conduct, N.C.G.S. § 15A-2000(e)(11). 327 N.C. at 452, 396 S.E.2d at 316. This Court concluded the two circumstances were not supported by the same evidence. Evidence that the murder was committed for pecuniary gain included that defendant (i) said he went to the convenience store to steal, (ii) said, "This is a stickup," upon entering, (iii) ordered the manager to open the cash register and give him money, and (iv) took the cash register from the store. Evidence that defendant engaged in a violent course of conduct included that he (i) fired shots endangering everyone in the store, (ii) killed one person, (iii) seriously injured another, and (iv) committed an armed robbery against a clerk. *Id.* at 452, 396 S.E.2d at 316-17. The Court also considered whether the two circumstances were "inherently duplicative." *Id.* Concluding they were not, the Court said, "Defendant need not have engaged in the violent course of conduct against others in order to have had pecuniary gain as a motive for the murder, and vice versa." *Id.*

In the instant case, each aggravating circumstance was based on evidence not required to prove the other. Evidence that defendant committed burglary is that he went to the house at night while the family was sleeping, broke the glass in the door, and entered. We agree with defendant's argument that proof of first-degree burglary also requires proof of an intent to commit some felony. However, proof that defendant committed *the* capital felony during the burglary did not also require proof of the commission of acts of violence towards the other victims. The (e)(5) circumstance is based on the commission of *a* capital felony during the commission of some other felony. Moreover, the course of conduct circumstance neither required nor relied on proof of burglary. Evidence that defendant engaged in a violent course of conduct is that he first shot and killed Shamika and then shot and killed her mother

and brother. This circumstance was based squarely on evidence that after the first murder, defendant immediately committed acts of violence against two other persons. Defendant need not have engaged in a violent course of conduct in order to have committed a capital felony in the course of the burglary. Concluding that different evidence supported each aggravating circumstance and that on the peculiar facts of the instant case, the two circumstances were not inherently duplicative, we hold the trial court did not err in submitting both.

[23] Defendant next contends that as to Shamika, the evidence was insufficient to warrant submission of aggravating circumstance N.C.G.S. § 15A-2000(e)(9), that the capital felony was especially heinous, atrocious, or cruel. Again, we disagree.

In determining sufficiency of the evidence to support this circumstance, the trial court must consider the evidence in the light most favorable to the State. *State v. Quick*, 329 N.C. 1, 31, 405 S.E.2d 179, 197 (1991). The State is entitled to every reasonable inference to be drawn from the facts. Contradictions and discrepancies are for the jury to resolve, and all evidence admitted which is favorable to the State is to be considered. *State v. Stanley*, 310 N.C. 332, 339, 312 S.E.2d 393, 397 (1984).

In *Stanley*, the Court said, "[P]ropriety of submitting this aggravating factor turns on 'the peculiar surrounding facts of the capital offense under consideration.' *State v. Pinch*, 306 N.C. 1, 35, 292 S.E.2d 203, 228, *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L. Ed. 2d 622 (1982)." *Id.* at 335, 312 S.E.2d at 395. Moreover, "[t]he capital offense must not be *merely* heinous, atrocious, or cruel; it must be *especially* heinous, atrocious, or cruel." *Id.* at 336, 312 S.E.2d at 396. In addition, the Court has declined to limit the scope of the circumstance to cases involving only physical injury or torture prior to death. *State v. Huffstetler*, 312 N.C. 92, 115, 322 S.E.2d 110, 125 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985); *State v. Oliver*, 309 N.C. 326, 344, 307 S.E.2d 304, 317 (1983). We have identified several types of murders which may warrant submission of circumstance (e)(9): One type includes killings physically agonizing or otherwise dehumanizing to the victim. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328 (1988). A second type includes killings less violent but "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), including those which leave

the victim in her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E.2d 837, 846 (1984). A third type exists where "the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827.

Stanley and *Hamlet* are representative of cases in which this Court has held the evidence was insufficient to support submission of the circumstance. In *Stanley*, the Court said

> [T]he evidence here is insufficient. It leaves the existence of the facts essential to support the ultimate conclusion in a state of conjecture and surmise. The evidence shows defendant fired nine shots at the victim, all in rapid succession, from an automobile which he never left. . . . There is no evidence that defendant intended that his wife suffer a prolonged, torturous death, or that she in fact suffered a prolonged, torturous death. . . .
>
> . . . [E]vidence that the victim said "Please Stan" sometime before she was shot . . . does not support a reasonable inference that the victim was mercilessly shot to death while begging for her life. What the words "Please Stan" might have referred to remains in the realm of conjecture and surmise. . . . Likewise, the evidence does not support a reasonable inference that defendant, who never left his car, heard these words uttered by the victim who was standing on the curb.

310 N.C. at 340-41, 312 S.E.2d at 398.

In *Hamlet*, the Court said

> [T]he evidence in the present case was insufficient to support the submission of the aggravating factor to the jury. The evidence showed that the defendant fired almost immediately upon the victim['s] entering the vestibule. The first shot to strike Bramlett hit him in the head. . . . The victim was unconscious and unable to feel any pain after the shot to his head. . . . Though death was not instantaneous, the victim did not linger for any extended period of time following the shooting. . . .
>
> The State also contends that there was evidence to support an inference that the victim suffered psychological torture

> prior to the killing. We disagree. The evidence in the present case tended to show that the victim was unaware of the assailant's presence until the victim entered the vestibule where he was shot immediately. There was no evidence upon which to base an inference that Bramlett was left "in his last moments as a sentient being, aware but helpless to prevent impending death."

312 N.C. at 175-76, 321 S.E.2d at 846 (quoting *Oliver*, 309 N.C. at 346, 307 S.E.2d at 318) (citations omitted).

Applying the foregoing principles of law, we conclude that in the instant case the evidence was sufficient to support submitting the (e)(9) circumstance to the jury. Ample evidence showed that the murders, including that of Shamika, were committed according to a calculated plan. The victims, including Shamika, were part of defendant's extended family. Defendant's statements showed that while Louise Farris pleaded with defendant not to hurt them, invoking the family relationship, her daughter yelled and cried louder and louder. At this point, defendant caused the two women to be tied and gagged. Shamika, her ankles bound and her hands tied behind her back, continued to cry. The evidence tends to show Shamika was helpless and in terror. She could not plead for her life with words after being gagged, but the evidence shows she was suffering under knowledge that her death was imminent. It is difficult to perceive how she could have imagined anything different when defendant, standing within a few feet of her, placed the muzzle of his 30-30 rifle on her forehead. Evidence that defendant shot Shamika because her crying made him nervous is evidence that in killing her, he acted in a conscienceless, pitiless manner. *Stanley*, wherein there was no evidence that the defendant heard his victim, is distinguishable. *Hamlet*, wherein there was no evidence that the victim was aware of defendant's presence, is also distinguishable. In *Stanley*, the Court also said that " '[i]t is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing.' " 310 N.C. at 338-39, 312 S.E.2d at 397 (quoting *Magill v. State*, 428 So. 2d 649, 651 (Fla. 1983)) (alteration in original). Viewing all the circumstances surrounding Shamika's murder, we conclude there was sufficient evidence that it was especially heinous, atrocious, or cruel. Therefore, we hold the trial court did not err in submitting aggravating circumstance (e)(9) to the jury.

[24] Finally defendant contends improprieties in the prosecutor's sentencing argument denied defendant a fair trial and viewed collectively warrant a new trial. Again we disagree.

As at trial, in capital sentencings

> counsel are allowed wide latitude in arguing hotly contested cases. *E.g., State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). "Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case." *Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123. Whether an advocate has abused this privilege is left largely to the sound discretion of the trial court. *Id.* Where the defendant has failed to object to an alleged impropriety in the [S]tate's argument and so flag the error for the trial court, an appellate court may review the argument notwithstanding. But "the impropriety . . . must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761.

State v. Artis, 325 N.C. 278, 323, 384 S.E.2d 470, 496 (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). Regarding appellate review, this Court has said

> [P]rosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty. G.S. 15A-2000(a)(4); *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980); *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Westbrook*, 279 N.C. 18, 37, 181 S.E.2d 572, 583 (1971), *death sentence vacated*, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

State v. Pinch, 306 N.C. 1, 24, 292 S.E.2d 203, 221-22, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), *and overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). With these principles in mind, we turn to defendant's arguments.

Defendant first argues that the trial court erred in overruling his objection to the prosecutor's twice quoting from *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969). Arguing against mitigating circumstance (f)(2), that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, the prosecutor stated that low mentality is not a defense to a criminal charge, evidence of low mentality is irrelevant, and the test of accountability is whether a defendant has the ability to distinguish right from wrong. Arguing against finding the nonstatutory mitigating circumstance that defendant had an I.Q. of 61, the prosecutor again stated that the test of accountability does not depend on intelligence or general mental capacity.

In *Rogers* this Court said

> It has been held that low mentality in itself is no defense to a criminal charge. *State v. Jackson*, 346 Mo. 474, 142 S.W.2d 45. Evidence of low mentality is irrelevant and its exclusion is not error. *State v. Jenkins*, 208 N.C. 740, 182 S.E. 324; *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916. The test of accountability does not depend on intelligence, education, or general mental capacity. *Young v. State*, Fla., 140 So. 2d 97 (evidence that defendant had very low I.Q. was excluded as immaterial). The true test of mental responsibility in North Carolina and in a majority of American jurisdictions is whether defendant has the ability to distinguish right from wrong at the time and with respect to the matter under investigation. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854; *State v. Scales*, *supra*; *State v. Grayson*, 239 N.C. 453, 80 S.E.2d 387; *Leland v. Oregon*, 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002, *reh'g denied*, 344 U.S. 848, 97 L. Ed. 659, 73 S. Ct. 4.

275 N.C. at 425, 168 S.E.2d at 353. The principle that low mentality is not a defense to a charge is irrelevant to sentencing, and for this reason, we explicitly reject State's argument that *Rogers* is "tangentially relevant" to a capital sentencing procedure. Instead, in a capital case, mitigating circumstances serve to reduce the

culpability of the killing, " 'making it less deserving of the extreme punishment than other first-degree murders.' " *State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984) (quoting *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586 (1982)).

Defendant argues that at sentencing, he relied heavily on impaired capacity to reduce his moral culpability and that either the prosecutor did not understand the purpose of mitigating circumstances or his argument was calculated to prejudice the jury. We do not find these arguments persuasive. Three mitigating circumstances based on mental capacity, two statutory and one nonstatutory, were submitted to the jury. Of these, the jury found one statutory circumstance, that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and one nonstatutory, that his I.Q. was in the borderline mentally retarded range of intelligence. Although in arguing against these two individual circumstances, the prosecutor quoted irrelevant law, he also repeatedly reminded the jury that they were being asked to consider whether the mitigating circumstances reduced defendant's culpability. Moreover, most of the prosecutor's argument against mitigating circumstance (f)(2) emphasized Fisher's evidence that the greater component of defendant's incapacity consisted of his personality disorder, not his low mental capacity, and that low mental capacity is not synonymous with mental disturbance. In arguing against the nonstatutory circumstance of borderline mental retardation, the prosecutor's reference to *Rogers* was fleeting. By contrast, defense counsel emphasized over and over that mitigation is not justification. In addition the court correctly instructed the jurors that a mitigating circumstance does not constitute justification but may be considered as reducing moral culpability or making a killing less deserving of the extreme punishment and instructed correctly as to circumstance (f)(2) and as to defendant's borderline mental retardation. Considering the overall factual circumstances, we conclude defendant has failed to show prejudice.

[25] Defendant's next contention relates to the prosecutor's response to defense counsel's objection to the second mention of *Rogers*. The prosecutor asked, "You don't think that's the law? Ask the Judge. He'll tell you." Defendant argues that by its silence the court implied approval of the prosecutor's argument. Again, we note that the jurors found the existence of the nonstatutory mitigating circumstance of borderline retardation, that defense

counsel was permitted to argue at length that mitigation is not justification, and that the court correctly instructed the jurors on the circumstance. Again considering the overall factual circumstances, we conclude defendant has failed to show prejudicial error.

[26] Defendant next contends the prosecutor's argument was prejudicial in that, by repeatedly linking defendant and Yvette, it encouraged the jury to return death sentences against him based on Yvette's conduct. Again we disagree.

Construing N.C.G.S. § 15A-2000(e), this Court has said that aggravating circumstances are limited to those set out in the statute. *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). The capital sentencing statute does not provide for an aggravating circumstance based on a defendant's associating others in the capital felony. By contrast, the Fair Sentencing Act provides for such factors. N.C.G.S. § 15A-1340.4(a)(1)a, -1340.4(a)(1)*l* (Supp. 1992). Nevertheless, under N.C.G.S. § 15A-2000(a)(3), all evidence submitted during the guilt-innocence phase of a capital case is competent for the jury to consider at sentencing. That capital sentencing must focus on the individual defendant, his crimes, personal culpability, and mitigation, does not also mean that no mention may be made of a co-defendant actively involved at the scene of the crime. *State v. Oliver*, 309 N.C. 326, 365, 307 S.E.2d 304, 329 (1983).

In the instant case, to prove the noncapital felonies of conspiracy to commit murder and to commit burglary, the State presented extensive evidence of Yvette's involvement in the crimes. Even though Yvette was not tried jointly with defendant, that the jury was made fully aware of her participation is shown by their having convicted defendant of the two conspiracy charges. Although defense counsel made one objection to the prosecutor's linking defendant and Yvette, before this Court defendant complains for the first time of four references to Yvette in the prosecutor's argument. While we agree that the proper focus of sentencing is the defendant's individualized conduct, in light of the jury's extensive knowledge of Yvette's involvement, we find no prejudice.

[27] Defendant's next contention relates to the nonstatutory mitigating circumstance that during incarceration after his arrest, defendant had shown the ability to conform and adapt to the prison environment. Arguing against finding this circumstance, the prosecutor told the jurors, "You watched them bring him in, bring

him out. He's been under guard." Defendant argues this statement was calculated to prejudice the jury and constituted a gross impropriety. Again, we disagree.

The thrust of the prosecutor's argument against finding the circumstance was directed to recapitulating Fisher's evidence that he could not predict defendant's dangerousness in the future. Nevertheless, the jury was entitled to consider also that while incarcerated, defendant had little opportunity to do anything other than cooperate with his jailors. For these reasons, we conclude the prosecutor's argument was not so grossly improper as to require intervention by the court.

[28] Defendant's next contention relates to aggravating circumstance (e)(5), that the capital felony was committed while defendant was engaged in the commission of a burglary. Defendant argues that the prosecutor misstated the law and impermissibly lessened the State's burden of proof by telling the jurors that since they had found defendant guilty of first-degree burglary, they also found the existence of this circumstance. Again we disagree.

In a capital sentencing proceeding, "there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment." N.C.G.S. § 15A-2000(a)(3) (1988). Applying this principle in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983), this Court noted that at trial the court fully instructed the jury on the elements of first-degree burglary, including the defense of intoxication; the jury found defendant guilty; and no additional evidence concerning intoxication was presented by the defendant in the sentencing phase. The Court stated, "It would be unreasonable to believe that the jury would have come to a different conclusion during the sentencing phase, based upon the same evidence it had previously considered and rejected." *Id.* at 73, 301 S.E.2d at 335.

In the instant case, the jurors found defendant guilty of first-degree burglary and first-degree murder by reason both of premeditation and deliberation and felony murder. Before this Court defendant does not argue that at sentencing he presented new evidence relevant to first-degree burglary. However, even if defendant's sentencing evidence included new evidence bearing on the element of intent in first-degree burglary, the jury had resolved the

issue against him by having already found him guilty of first-degree burglary. Thus the State did not commit error in arguing that having found defendant guilty of first-degree burglary, the jurors had also determined the existence of aggravating circumstance (e)(5). Therefore, we conclude there was no gross impropriety.

[29] Defendant's next contention relates to aggravating circumstance (e)(9), that the capital felony was especially heinous, atrocious, or cruel. Defendant argues that the prosecutor misstated the law by arguing that evidence of premeditation and deliberation also constituted evidence that the murders were especially heinous, atrocious, or cruel. Reading the argument in its entirety, however, we find the prosecutor did not mention premeditation and deliberation. Moreover, the thrust of the argument was that the cold calculation with which defendant undertook to and did execute the victims tended to prove defendant's cruelty and depravity of mind and his intention that the victims be subjected to mental suffering. Therefore, we conclude there was no gross impropriety.

[30] Defendant next contends it was grossly improper for the prosecutor to argue that the jurors should recommend death because "[i]t's the only way that you can be assured that he won't do it again." Defendant argues this statement was an implicit reference to parole. However, since defendant concedes that this Court has previously held that in a capital case, the prosecutor may argue for death because of its deterrent effect on the defendant personally, *e.g.*, *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), we conclude the argument was not grossly improper.

[31] Finally defendant contends it was grossly improper for the prosecutor to quote the Sixth Commandment in his argument. Defendant argues that North Carolina courts have repeatedly held that Biblical arguments are not proper. We disagree.

> Of Biblical arguments this Court has said
>
> Neither the "law" nor the "facts in evidence" include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material. *See State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551. However, this Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, *e.g.*, *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, and it has found biblical arguments

to fall within permissible margins more often than not. *See, e.g., State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988); *Brown*, 320 N.C. 179, 358 S.E.2d 1; *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. This Court has distinguished as improper remarks that state law is divinely inspired, *Oliver*, or that law officers are "ordained" by God. *State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20.

State v. Artis, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (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).

Defendant has presented no argument that the prosecutor's comment comes within the category of improper remarks precluded by *Artis*, and we are satisfied the quotation was not outside the wide latitude permitted by *Artis*. We conclude, therefore, that there was no gross impropriety.

In sum, as to defendant's contentions based on alleged error brought to the attention of the trial court, we have concluded defendant failed to show prejudice. As to errors raised for the first time in this Court, we have concluded there were no gross improprieties. We hold, therefore, that the argument, taken as a whole, was not improper.

PRESERVATION ISSUES

[32-35] Defendant raises four additional issues which he concedes have been decided against him by this Court: (i) The trial court erred by denying defendant's motion for disclosure of aggravating and mitigating circumstances; (ii) the court erred by submitting aggravating circumstance (e)(9), that the capital felony was especially heinous, atrocious, or cruel, because the circumstance is impermissibly vague on its face and as applied; (iii) the court erred in instructing the jurors in the penalty phase that if they found the aggravating and mitigating circumstances were in equipoise, then they were also to consider whether to recommend death; and (iv) the trial court erred in refusing to arrest judgment on defendant's conviction of first-degree burglary.

We have considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

PROPORTIONALITY

[36] Having found defendant's trial and capital sentencing proceeding free of prejudicial error, we are required by statute to review the record and determine whether (i) the record supports the jury's finding the aggravating circumstances on which the court based its sentence of death, (ii) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (iii) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993); *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).

We have held that the record supports the jury's finding of the aggravating circumstances that (i) the capital felony was committed during the commission of a felony (burglary), N.C.G.S. § 15A-2000(e)(5); (ii) the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) the murder was part of a course of conduct which included other crimes of violence committed by the defendant against additional victims, N.C.G.S. § 15A-2000(e)(11). We also conclude nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We turn to our final statutory duty, proportionality review, and first

> 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.
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> *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).

State v. Syriani, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, No. 93-5077, 1993 WL 248196 (U.S., Nov. 1, 1993). Only cases found

to be free of error in both the guilt-innocence and sentencing phases are considered. *Id.* Our consideration is limited "to those cases 'which are roughly similar with regard to the crime *and* the defendant . . . .' *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985) (emphasis added)." *Id.* at 400-401, 428 S.E.2d at 426. If juries have consistently returned death sentences in those similar cases, a strong basis exists for concluding that the death sentence under consideration is not excessive or disproportionate. However, if juries have consistently returned life sentences in the similar cases, a strong basis exists for concluding that the sentence under consideration is excessive or disproportionate. *Id.* at 401, 428 S.E.2d at 146.

Salient characteristics of defendant's case include (i) murders of three members of a family, a mother and her children who were also defendant's mother-in-law, sister-, and brother-in-law, preceded by defendant's threats, made to his wife, to harm the family; (ii) a calculated plan of attack by defendant, including efforts to disguise his identity; (iii) fear on the part of the victims, who recognized defendant and were bound and gagged; and (iv) as to the first victim, a conscienceless and pitiless shooting found to be especially heinous, atrocious, or cruel by the jury, which also found the subsequent shootings especially heinous, atrocious, or cruel.

Defendant was convicted of all three first-degree murders based upon theories both of premeditation and deliberation and felony murder and also was convicted of first-degree burglary and two counts of conspiracy. As to every murder, the jury found all three aggravating circumstances submitted: that the capital felony was committed during a felony (burglary), that the capital felony was especially heinous, atrocious, or cruel, and that the murder was part of a course of conduct in which defendant committed other crimes of violence against other victims. Also as to each murder the jury found three statutory mitigating circumstances and three nonstatutory mitigating circumstances. The jurors considered but declined to find fourteen additional mitigating circumstances.

"Of the cases in which this Court has found the death penalty disproportionate, only two involved the 'especially heinous, atrocious, or cruel' aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d

170 (1983)." *Syriani*, 333 N.C. at 401, 428 S.E.2d at 146-47. We find *Stokes* and *Bondurant* are not similar to the instant case.

Significant dissimilarities between *Stokes* and the instant case include that (i) in *Stokes* there was only one victim; defendant Gibbs shot three people; (ii) defendant Stokes was seventeen years old; defendant Gibbs was twenty-six; (iii) in *Stokes* defendant was convicted on a felony murder theory; defendant Gibbs was convicted on theories both of premeditation and deliberation and felony murder and there was ample evidence of premeditation; and (iv) in *Stokes* there was no evidence showing who was the ringleader; in this case defendant Gibbs clearly was the leader in the murders of the Farris family.

Significant dissimilarities between *Bondurant* and the instant case include (i) in *Bondurant* there was only one victim and (ii) defendant Bondurant immediately exhibited concern for the victim's life and remorse by helping him get medical treatment, whereas defendant Gibbs went home and went to sleep.

In *State v. McCollum*, 334 N.C. at 240-42, 433 S.E.2d at 162-63, this Court reviewed all seven cases, including *Stokes* and *Bondurant*, in which we have found the death penalty disproportionate.[1] We have already distinguished *Stokes* and *Bondurant*, and of the other five cases, none involved a multiple homicide. In only one case, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), were multiple aggravating circumstances found to exist. However, in *Young* only two such circumstances were found; and this Court "focused on the failure of the jury in *Young* to find either" that the murder was especially heinous, atrocious, or cruel, or that it "was committed as part of a course of conduct which included the commission of violence against another person or persons." *State v. McCollum*, 334 N.C. at 241, 433 S.E.2d at 162. These aggravating circumstances are two of the three found by the jury in the instant case. Based on the three aggravating circumstances found in the instant case, we conclude it is also unlike the five cases in addition to *Stokes* and *Bondurant* discussed in *McCollum*.

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1. The five cases in addition to *Stokes* and *Bondurant* are as follows: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *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); *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); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We have reviewed the record in *State v. Rainey*, 331 N.C. 259, 415 S.E.2d 337 (1992), a triple homicide case, and determined that the jurors found only one aggravating circumstance as to each of the three victims, that the murder was part of a course of conduct involving violence towards others. Also finding the existence of four mitigating circumstances as to each of the three murders, the jury recommended life sentences. *Id.* at 260, 415 S.E.2d at 337.

In *Syriani* and *Young* we found the existence of the (e)(9) circumstance—that the capital felony was especially heinous, atrocious, or cruel—significant; and we conclude its existence distinguishes the instant case from *Rainey*. We note also that none of the four cases[2] discussed in *Syriani* in which juries recommended life after finding the existence of the (e)(9) circumstance was a multiple homicide case, and thus those cases are dissimilar to the instant case.

Focusing first on evidence of his deficient mentality and mitigating circumstances based thereon, defendant relies on cases in which there was substantial evidence of impaired capacity or emotional disturbance and the juries returned life sentences: *State v. Anderson*, 303 N.C. 185, 278 S.E.2d 238 (1981); *State v. Clark*, 300 N.C. 116, 265 S.E.2d 204 (1980); and *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980). We note first that none of these cases involved a multiple homicide, thus the crimes are dissimilar. In *Anderson*, evidence showed defendant "had some mental disorders resulting from an automobile accident," was "very upset and depressed," and "went to a mental health facility for help in dealing with his anger and jealousy." 303 N.C. at 188, 278 S.E.2d at 240. When questioned by his mother about the shooting, defendant appeared to know nothing about it. *Id.* Based on these facts, we find that in the instant case, defendant's mentality is dissimilar to that of defendant Anderson.

In *Clark*, defendant gave notice of his intent to rely on the defense of insanity. 300 N.C. at 117, 265 S.E.2d at 205. Defense counsel filed a motion questioning defendant's capacity to proceed

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2. *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); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110; *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. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240 (1981).

to trial, and the court held defendant was competent. *Id.* Upon conflicting evidence, the trial court concluded defendant had a "paranoid personality, precipitated by drugs and alcohol and m[ight] have psychotic episodes." *Id.* at 122, 265 S.E.2d at 208. Based on these facts, defendant Gibbs' mentality is dissimilar.

In *Franks*, defendant was an alcoholic who testified he did not know why he killed the victim—"[S]omething just told me to do it and I got up and choked her." 300 N.C. at 5, 265 S.E.2d at 179. A psychiatrist testified that defendant had been in and out of mental hospitals since the age of fifteen, at Dorothea Dix Hospital twelve times, and at about six other mental hospitals. *Id.* at 6, 265 S.E.2d at 179. Again, we find defendant Gibbs' mentality dissimilar.

In addition, we note defendant concedes that in *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989), the United States Supreme Court determined that the Eighth Amendment does not categorically prohibit infliction of the death penalty on a person who is mentally retarded. Defendant has presented no argument based on the North Carolina Constitution.

Defendant Gibbs was convicted on theories both of premeditation and deliberation and felony murder, and there were three homicides. In light of all the cases discussed hereinabove, we cannot say that the three death sentences were excessive or disproportionate, considering both the crimes and defendant.

NONCAPITAL SENTENCING

[37] Defendant contends the trial court erred by finding duplicative aggravating factors as to his noncapital sentence. Again we disagree.

For purposes of sentencing the court consolidated defendant's convictions of first-degree burglary, conspiracy to commit burglary, and conspiracy to commit murder. The court imposed a fifty-year term of imprisonment, which exceeds the aggregate presumptive sentence for all three offenses. *See* N.C.G.S. § 15A-1340.4(f) (Supp. 1992). Pursuant to N.C.G.S. § 15A-1340.4(a), the court first found as factors in aggravation that defendant induced others to participate in the commission of the offense, N.C.G.S. § 15A-1340.4(a)(1), and occupied a position of leadership or dominance of other participants, *id.*

"This Court has held that both the fact that a defendant induced others to commit a crime *and* his position of leadership may be found as separate, independent factors in aggravation of his sentence 'so long as there is separate evidence to support each.' " *State v. Tucker*, 329 N.C. 709, 726, 407 S.E.2d 805, 815 (1991) (quoting *State v. Erlewine*, 328 N.C. 626, 638, 403 S.E.2d 280, 287 (1991)); *accord State v. Miller*, 315 N.C. 773, 340 S.E.2d 290 (1986); *State v. SanMiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

In the instant case, evidence that defendant induced others to participate included that he engaged Doris' help in preparing the note, induced her to buy bullets, and instructed her to wake him up. In addition, upon being awakened he instructed Doris to get his hat and gun, a flashlight, and the bullets and told Yvette to find the note. Evidence that he led or dominated others included that he ordered Yvette to accompany him "or else" and loaded the .22 rifle she carried only after they had walked up to the house. In addition, it was defendant who broke the glass in the door and, according to his statement, forced Yvette to act as lookout for him while he shot the victims. Since there was separate evidence to support each factor, we hold there was no duplication error.

We hold defendant received a fair trial and capital sentencing proceeding free of prejudicial error. In comparing his case to similar cases in which the death penalty was imposed, and in considering both the crimes and defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. Similarly, we find no error in the trial court's sentencing of defendant for the noncapital felonies.

NO ERROR.

RICHMOND COUNTY v. THE NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY, A BODY CORPORATE, AND CHEM-NUCLEAR SYSTEMS, INC.

CHATHAM COUNTY AND WAKE COUNTY v. THE NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

RICHMOND COUNTY v. NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

CHATHAM COUNTY AND WAKE COUNTY v. NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

No. 105A93

(Filed 5 November 1993)

Environmental Protection, Regulation, and Conservation § 117 (NCI4th)— siting of low-level radioactive waste facility— preliminary injunction--necessity for completion of permitting process

The Low-Level Radioactive Waste Management Authority may not be preliminarily enjoined in its process of site selection for a low-level radioactive waste disposal facility until the permitting process has been completed and the final site selection has been made.

Am Jur 2d, Pollution Control § 276.

Justice FRYE dissenting in part.

Appeal by plaintiffs Richmond, Chatham, and Wake Counties from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 700, 425 S.E.2d 468 (1993), affirming in part orders of Long (James M.), J., filed in Superior Court, Chatham County, on 30 October 1991 allowing defendants' motions to dismiss made pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure as to certain counts of plaintiffs' complaints and dismissing as moot defendants' appeals from those portions of the same orders denying defendants' motions to dismiss certain other counts. Heard in the Supreme Court 14 September 1993.

James, McElroy & Diehl, P.A. by Gary S. Hemric, Mark T. Calloway, and John S. Arrowood, for plaintiff-appellant Richmond County.

Tharrington, Smith & Hargrove, by Michael Crowell, and Gunn & Messick, by Robert L. Gunn, for plaintiff-appellant Chatham County; and Wake County Attorney's Office, by Michael Ferrell, for plaintiff-appellant Wake County.

Michael F. Easley, Attorney General, by Gayl M. Manthei, Special Deputy Attorney General, and Smith Helms Mulliss & Moore, by Richard W. Ellis, Gary R. Govert, and Matthew W. Sawchak, for defendant-appellee North Carolina Low-Level Radioactive Waste Management Authority; and Moore & Van Allen, by David E. Fox, for defendant-appellee Chem-Nuclear Systems, Inc.

MEYER, Justice.

In 1980, Congress enacted the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021j (1980). The Act declared as federal policy that states should be responsible for low-level radioactive waste generated within their borders and that such waste could be most safely and efficiently managed on a regional basis. 42 U.S.C. § 2021d(a)(1). The law authorized states to enter interstate compacts and encouraged their use by providing that, beginning 1 January 1986, any state that had an approved facility and belonged to an approved compact could refuse to accept waste from noncompact states without violating the Commerce Clause. In 1985, Congress amended the Act to move forward to 1 January 1993 the date on which states with waste facilities could ban shipments from noncompact states.

In 1983, North Carolina joined the Southeast Interstate Low-Level Radioactive Waste Management Compact (the Southeast Compact) with Alabama, Florida, Georgia, Mississippi, South Carolina, Tennessee, and Virginia. The compact is codified as Chapter 104F of the North Carolina General Statutes. The Compact Commission denominated South Carolina, which already had a low-level waste facility in Barnwell, as the first host state. In 1986, the Compact Commission chose North Carolina to be the second host to operate a facility for the eight states. The obligation of a host state is to operate a facility for twenty years or to dispose of 32 million

cubic feet of waste, whichever comes first. N.C.G.S. § 104F-1, art. V(e) (1990).

In response to the Compact Commission's decision, the General Assembly in 1987 enacted Chapter 104G of the North Carolina General Statutes. In N.C.G.S. § 104G-3, our General Assembly determined that "the generation of low-level radioactive waste is an unavoidable result of the needs and demands of a modern society." N.C.G.S. § 104G-3, para. 1 (1989). The General Assembly found that the safe and efficient management of this waste "presents urgent problems for North Carolina[ ] and that solutions to these problems are essential to the State's continued economic growth and to protection of the public health and safety and the environment." *Id.* To respond to these urgent problems and to fulfill North Carolina's obligations under the Southeast Compact, the General Assembly in 1987 created the Low-Level Radioactive Waste Management Authority (the Authority) and gave it the task of establishing a low-level radioactive waste disposal facility. N.C.G.S. § 104G-4 (1989); N.C.G.S. § 104G-6(a)(1) (Supp. 1992); *see* N.C.G.S. § 104F-1 (codifying the Southeast Compact).

The Authority, in turn, hired Chem-Nuclear Systems, Inc. (Chem-Nuclear), to assist it in siting, licensing, building, operating, and eventually closing the facility. *See* N.C.G.S. § 104G-6(a)(3) (Supp. 1992).

Chapter 104G of the North Carolina General Statutes contains a detailed procedural outline for the siting and licensing of North Carolina's disposal facility. *See, e.g.*, N.C.G.S. §§ 104G-9, -11 (1989). The Authority has been conducting site selection within this statutory framework for the last five years. Beginning in 1988, the Authority and its contractors examined the entire land mass of North Carolina and identified the areas most likely to meet the site suitability criteria previously adopted by the Authority and the state Division of Radiation Protection (DRP).[1] *See* 1 NCAC 37 .0201-.0207 (July 1988), *amendments proposed*, 7 N.C. Reg. 2393 (Feb. 1993), *proposed amendments revised*, 8 N.C. Reg. 232 (May 1993); 15A NCAC 11 .1228 (May 1992).

In early November 1989, the Authority designated four areas for "precharacterization," a heightened level of scrutiny that in-

1. DRP, an agency within the state Department of Environment, Health, and Natural Resources, is responsible for overseeing characterization testing and for licensing the North Carolina low-level radioactive waste disposal facility.

cludes limited on-site investigations. On 30 April 1990, the Authority selected a site in Chatham and Wake Counties (the Chatham/Wake site) and a site in Richmond County (the Richmond site) for "characterization" testing. Characterization is an environmental study intended to determine, among other things, whether a particular site is suitable for a low-level radioactive waste disposal facility. *See* 15A NCAC 11 .1204-.1208 (May 1992). Characterization testing on the Richmond and Chatham/Wake sites could not begin until DRP approved a characterization plan for each site. 15A NCAC 11 .1206(b). Chem-Nuclear prepared the comprehensive plans for submittal to DRP, and DRP circulated copies to numerous state agencies, including most of those responsible for environmental protection. On 16 August 1991, after about fourteen months of review, DRP approved revised versions of the characterization plans. Testing on the two sites is now in progress and is expected to be completed in late 1993.

By the lawsuits that are the subject of this appeal, the Counties sought an injunction to stop characterization of their respective sites, thereby preventing the Authority and Chem-Nuclear from determining whether those sites are suitable for a low-level radioactive waste disposal facility.

THE CHATHAM AND WAKE COUNTIES ACTION

On 31 October 1990, Chatham County filed this action against the Authority, raising several claims concerning its activities in connection with a planned eight-state radioactive waste repository in North Carolina. The case was designated as an exceptional case pursuant to Rule 2.1 of the General Rules of Practice and was assigned to Judge James M. Long. Chem-Nuclear, the major contractor for the project, intervened as a defendant on 4 February 1991.

Chatham County filed a three-count amended complaint on 23 January 1991, which, in Count I, alleges that the Authority committed multiple violations of its governing statute and regulations both through actions and failures to act. Count II alleges a violation of due process in that the vote by the Authority to hire Chem-Nuclear was tainted by a conflict of interest. Count III alleges that the defendants' failure to prepare an environmental impact statement prior to characterization violates the North Carolina Environmental Policy Act.

The trial court denied a motion by the defendants to dismiss based on lack of standing, and thereafter, extensive discovery occurred involving numerous depositions and the production of many documents. The trial court permitted Wake County to intervene as a plaintiff on 4 September 1991. Pursuant to the order allowing it to intervene, Wake County filed a complaint that contained the same three counts as Chatham County's amended complaint.

On 16 August 1991, the defendants moved to dismiss all counts of the amended complaint for lack of ripeness. The motion was based solely on the 14 August 1991 decision of this Court in *Granville Co. Bd. of Comrs. v. N.C. Haz. Waste Mgmt. Comm.*, 329 N.C. 615, 407 S.E.2d 785, *reh'g denied*, 409 S.E.2d 593 (1991) [hereinafter *Granville County*].

A hearing was held on the motion to dismiss on 4 September 1991. The trial court ruled in open court on 5 September 1991 that defendants' motion to dismiss would be allowed for Counts I and II but not Count III.

Beginning on 16 September 1991, the trial court held a preliminary injunction hearing on the claim that an environmental impact statement or environmental assessment must be prepared prior to characterization. Following the hearing, the court entered an order denying Chatham and Wake Counties' motion for a preliminary injunction.

On 26 September 1991, Chatham and Wake Counties filed a second amended complaint that contained two allegations: (1) that no environmental assessment had been prepared by the Authority as required by 1 NCAC 25 .0401, and (2) that no environmental impact statement had been prepared by the Authority as required by N.C.G.S. § 113A-4(2).

On 30 October 1991, the trial court entered its written order granting the defendants' motion to dismiss for lack of ripeness as to Counts I and II of the amended complaint but denying the motion as to Count III. This order was certified for immediate appeal pursuant to Rule 54(b). The Court of Appeals consolidated the appeal with that of Richmond County and, on 2 February 1993, affirmed the trial court's dismissal of Counts I and II of the plaintiffs' complaint. Judge Cozort dissented. Pursuant to N.C.G.S. § 7A-30(2), plaintiffs filed their notice of appeal in this Court on 9 March 1993.

THE RICHMOND COUNTY ACTION

On 27 February 1990, Richmond County filed a complaint against the Authority alleging that the Authority, working in concert with Chem-Nuclear, had been involved in the evaluation of potential suitable sites for a low-level radioactive waste facility and that a recommendation by Chem-Nuclear was going to be made to the Authority that the Authority select a site in Richmond County for characterization. The complaint further alleged that the Authority had not complied with the provisions of Chapter 113A of the North Carolina General Statutes and the pertinent provisions of the North Carolina Administrative Code, in that the Authority and Chem-Nuclear had failed to prepare an environmental impact statement concerning the effect of characterization on the Richmond site. The County requested a preliminary injunction prohibiting the Authority from designating Richmond County as a site for characterization and asked that this injunctive relief be made permanent upon a trial on the merits.

On 28 March 1990, a hearing was conducted before Judge Preston Cornelius, and the court entered an order that effectively continued the hearing on the preliminary injunction request and maintained the status quo at the Richmond site, while allowing access to the property by the Authority to perform visual inspections necessary for the preparation of a detailed site characterization plan.

On 6 June 1990, Richmond County filed an amended complaint, adding Chem-Nuclear as a defendant. The amended complaint carried forward as its third count the environmental impact statement claim alleged in the initial lawsuit and added two additional counts.

The first count of the amended complaint alleged that a failure by the Authority to comply with the provisions of Chapter 104G of the North Carolina General Statutes, particularly as those statutes related to the site selection process, constituted a violation of North Carolina law and procedural due process. The County sought preliminary and permanent injunctive relief and a declaratory judgment that the statutory provisions and procedural safeguards set forth in Chapter 104G were being disregarded.

In the second count of its amended complaint, Richmond County alleged that the process of site selection as it had been undertaken by defendants was flawed in many critical respects, primarily

because of defendants' reliance upon incorrect, incomplete, or outdated information. The second count also alleged that Chem-Nuclear's recommendation to characterize a site in the County was unreliable and incorrect because of numerous substantive errors in the precharacterization report. On 8 February 1991, Richmond County filed an amendment to the amended complaint, adding a fourth count to its lawsuit.

On 9 July 1990, defendants answered and filed various motions to dismiss. On 14 February 1991, the trial court signed an order denying defendants' motions to dismiss plaintiff's complaint for lack of standing. Following this entry, the parties engaged in a very substantial discovery process.

On 16 August 1991, defendants filed a joint motion to dismiss pursuant to Rule 12(b)(6) on the bases that the claims were not ripe for adjudication, were nonjusticiable, and that the trial court lacked subject matter jurisdiction. Defendants' motion was based solely upon the 14 August 1991 decision of this Court in *Granville County*, 329 N.C. 615, 407 S.E.2d 785.

On 5 September 1991, the trial court entered an order in open court allowing defendants' motion to dismiss with respect to Counts I, II, and IV of Richmond County's amended complaint and denied the motion with respect to Count III (the environmental impact statement count). The court also allowed plaintiff's motion to certify this ruling as a final judgment for purposes of immediate appeal pursuant to Rule 54(b). This ruling was later memorialized in a written order dated 30 October 1991. From the order of dismissal, plaintiff appealed to the North Carolina Court of Appeals. The Court of Appeals consolidated the appeal with that of Chatham and Wake Counties and, on 2 February 1993, filed an opinion affirming the trial court's order. Judge Cozort dissented, and plaintiff Richmond County gave notice of appeal on 4 March 1993.

We note at the outset that the panel below unanimously concluded, and we agree, that the defendants' appeals from the denial of their motions to dismiss the environmental impact statement claims are moot and dismissed the same.

The consolidated cases are before this Court solely by virtue of the dissent below, and our consideration is limited to the single issue addressed in the dissent: whether our recent decision in *Granville County*, 329 N.C. 615, 407 S.E.2d 785, compels the affirmance

of the trial court's dismissal of plaintiffs' claims in Counts I and II of Chatham and Wake Counties' complaint and Counts I, II, and IV of Richmond County's complaint. For essentially the same reasons expressed in the majority opinion of the panel below, we conclude that it does, and we therefore affirm the decision of the Court of Appeals.

Though in *Granville County*, this Court interpreted and applied Chapter 130B of our General Statutes relating to the North Carolina Hazardous Waste Commission (the Commission), whereas, here, we are involved with Chapter 104G relating to the Low-Level Radioactive Waste Management Authority, the facts are remarkably similar, as are the two Acts. In determining that our *Granville County* case governs the outcome of the appeals in the present case, the panel below noted the following similarity in the "essential" points:

> Like in *Granville County*, plaintiffs in the instant case seek declaratory and injunctive relief regarding the selection and testing of potential sites for a disposal facility for dangerous waste. Like in *Granville County*, the legislature has characterized the timely establishment of the disposal facility at issue as an "urgent problem" for North Carolina, the solution to which is essential to the protection of the public health and safety. Like in *Granville County*, the actions in the instant case were commenced when the selection process had been narrowed to two sites; no final decision has been made, and additional steps may or may not result in the selection of the Richmond County site over the Chatham/Wake County site, and vice versa. Like in *Granville County*, plaintiffs in the instant case have alleged violations of state law in the selection process. In addition, plaintiffs in the instant case have raised due process claims. *See Granville County*, 329 N.C. at 625, 407 S.E.2d at 791 (the rule prohibiting premature intervention of the courts "applies with special force to prevent the premature litigation of constitutional issues").

Richmond Co. v. N.C. Low-Level Radioactive Waste Mgmt. Auth., 108 N.C. App. at 707, 425 S.E.2d at 472.

Even a cursory reading of the two Acts in question reveals that the statutory missions of the two agencies (the Commission and the Authority) as well as the statutorily mandated site selection processes are remarkably similar. Each of the two agencies has

exclusive authority to establish a class of waste facilities, and each is charged with doing urgent work to protect public safety and the environment. Indeed, in the selection of waste sites, the two agencies are following nearly identical multi-step processes, and both have been challenged in the courts at the same early point in the site selection process.

While the Authority deals with a different type of waste, it is quite clear that our legislature considers disposal of both types of waste to be urgent problems and has charged the two agencies with similar missions. In all important respects, the Authority's site selection process mirrors that of the Commission which we addressed in *Granville County*. Here, as was the case in *Granville County*, the agency had adopted procedures and criteria for site selection; had incorporated in its procedures and criteria rules adopted by the Department of Environment, Health and Natural Resources; had, after studying the land mass of the entire state, identified a large number of potentially suitable sites; and had designated two sites for more detailed, on-site studies before the present lawsuits were filed. The final on-site testing had not been completed, and thus, a preferred site had not been selected, the required environmental impact statement had not been drawn, and the required approval of other agencies had not been secured. As was the case in the Court of Appeals, at oral argument before this Court, the parties informed this Court that characterization of both the Richmond site and the Chatham/Wake site is now virtually complete.

The urgency of the problem with regard to hazardous waste about which we spoke in *Granville County* is equally compelling with regard to low-level radioactive waste. In *Granville County*, we emphasized that "[o]ur legislature has determined that the management of hazardous waste is *essential* to protect the public health, safety, and environment and that the *timely* establishment of a hazardous waste facility is one of the *most urgent* problems facing North Carolina." *Granville County*, 329 N.C. at 624, 407 S.E.2d at 790 (citing N.C.G.S. § 130B-3 (1989)); *see also id.* at 618, 407 S.E.2d at 787 (quoting same statute). In N.C.G.S. § 104G-3, the legislature has made virtually identical findings about low-level radioactive waste disposal. Elsewhere, the General Assembly has directly confirmed that in its judgment, hazardous waste disposal and low-level radioactive waste disposal are equally pressing problems:

> The General Assembly of North Carolina hereby finds and declares that the safe management of *hazardous wastes and low-level radioactive wastes*, and particularly the timely establishment of adequate facilities for the disposal and management of hazardous wastes and low-level radioactive wastes is *one of the most urgent problems* facing North Carolina. The safe management and disposal of these wastes are essential to continued economic growth and to protection of the public health and safety. When improperly handled, these wastes pose a threat to the water, land, and air resources of the State, as well as to the health and safety of its citizens.

N.C.G.S. § 143B-285.10(a) (1990) (emphasis added).

The harmful effects of premature litigation that we addressed in *Granville County* with regard to the siting of a hazardous waste facility apply with equal force to the siting of the low-level radioactive waste facility here.

Documents before this Court indicate that the Authority has already defended three preliminary injunction proceedings, including one that occurred prior to our decision in *Granville County*, which resulted in an injunction that remained effective for sixteen months. In addition, the Authority itself had to seek injunctive relief to obtain routine well permits that were withheld by Richmond County under the guise of an environmental protection ordinance that the trial court found to have no application to the Authority. Absent some action by this Court, there appears nothing to prevent future injunctive proceedings to delay a final site selection.

Other documents before us reveal that delay in establishing the facility in question exposes the state to severe sanctions from its compact partners, including financial penalties and the possible early closing of the South Carolina regional facility. Under South Carolina law, the current regional facility for low-level radioactive waste will stop accepting waste from North Carolina no later than 1 January 1996, which is shortly before the Authority expects North Carolina's facility to begin operation even if currently established deadlines are met. *See* S.C. Code Ann. § 48-48-80(A)-(H) (Supp. 1992). If North Carolina must dispose of its waste before it has a facility capable of accepting it, the public interest demands that it do so for as short a time as possible.

Plaintiff-Counties contend that this Court's reasoning in *Granville County* should not apply to the cases at bar. We disagree. Plaintiffs contend that our *Granville County* decision applies only to the unique facts and claims presented in that case; that, here, they are attacking generic and illegal defects in the Authority's selection process, whereas *Granville County* related to an attack on the selection of a particular site; that, here, the Authority's selection of sites for characterization is not the same as the Commission's selection of sites for on-site testing in Granville County; and that, unlike *Granville County*, these actions do not challenge a state agency's exercise of discretion.

After carefully considering these assertions, we find them to be illusory. Each of them assumes that our decision in *Granville County* was limited to the specific facts and claims presented in the precise context of that case. Correctly viewed, however, in *Granville County*, this Court was concerned with the potential of interlocutory injunctions to disrupt an urgent site-selection process, whatever claim or legal theory gave rise to them. Our decision in *Granville County* bars all site-selection-related litigation until site selection has been completed. Our reasoning was that "[u]nless and until the Commission makes a final site selection decision, there is no justiciable issue and no genuine controversy between the parties." *Granville County*, 329 N.C. at 625, 407 S.E.2d at 791. That reasoning applies with equal strength to the Authority and the claims at issue here.

The distinction between site-specific and nonsite-specific claims, between the selection of sites for on-site testing and characterization, or between attacks on the agencies' exercise of discretion and defects in a site-selection process played no part in our decision in *Granville County*. Nor did our reliance on *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960), and other cases cited in *Granville County* imply, as plaintiffs argue, that there should be exceptions to the ripeness requirement based upon the particular allegations of the complaint.

We were concerned in *Granville County*, as we are here, with the potential for disruption and delay "[i]n matters of this nature which seek solutions to extremely urgent problems, where the solutions are essential to protect the public health and safety." *Granville County*, 329 N.C. at 624, 407 S.E.2d at 790; *see* N.C.G.S. § 143B-285.10(a) ("these wastes pose a threat to the water, land,

and air resources of the State, as well as to the health and safety of its citizens").

As we held in *Granville County* with regard to the Hazardous Waste Commission, we now hold that the Low-Level Radioactive Waste Management Authority may not be preliminarily enjoined in its process of site selection until the permitting process has been completed and the final site selection has been made. The Court of Appeals correctly concluded that this case is controlled by our recent decision in *Granville County* and correctly affirmed the trial court's dismissal of Counts I and II of Chatham and Wake Counties' complaint and Counts I, II, and IV of Richmond County's complaint on the grounds that such claims do not present justiciable issues and that no genuine controversy exists between the parties. The decision of the Court of Appeals is therefore affirmed.

AFFIRMED.

Justice FRYE dissenting in part.

I respectfully dissent from that part of the Court's opinion which concludes that the Court of Appeals correctly affirmed the trial court's dismissal of Counts I and II of Chatham and Wake Counties' complaint and Counts I, II, and IV of Richmond County's complaint based solely on our decision in *Granville Co. Bd. of Comrs. v. N.C. Haz. Waste Mgmt. Comm.*, 329 N.C. 615, 407 S.E.2d 785, *reh'g denied*, 409 S.E.2d 593 (1991) [hereinafter *Granville County*]. For essentially the same reasons stated by Judge Cozort in his dissenting opinion in the Court of Appeals, I do not believe that our decision in *Granville County* requires the dismissal of the complaints at this stage of the proceedings.

It should be emphasized that the issue before this Court is not whether the declaratory and injunctive relief sought by plaintiffs should be granted, but whether the actions should be maintained at all, that is, whether a justiciable issue exists.

> "A justiciable issue has been defined as an issue that is 'real and present as opposed to imagined or fanciful.' *In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988) (*citing* [*Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 344 S.E.2d 55, *disc. rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986)], . . .). In order to find complete absence of a justiciable issue it must conclusively appear that such issues are absent even

> giving the pleadings the indulgent treatment they receive on motions for summary judgment or to dismiss. [*Sprouse*, 81 N.C. App.] at 682-3, 373 S.E.2d at 325. (Citation omitted.)"

Sunamerica Financial Corp. v. Bonham, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) (quoting *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989)). Giving the pleadings in this case the indulgent treatment they are entitled to receive on a motion to dismiss, I conclude that the issues are real and present and not imagined or fanciful. Thus, dismissal on the basis of nonjusticiability is improper.

Unlike the majority which reads *Granville County* as "bar[ring] all site-selection-related litigation until site selection has been completed," I read *Granville County* as providing "guidance to the lower courts as to their proper and timely role" in cases such as these, within the context of the facts, as they occurred in that particular case. *Granville County*, 329 N.C. at 623, 407 S.E.2d at 790. Proceeding from this construction of *Granville County*, I find the claims in question to be justiciable, that is, ripe for decision.

In *Granville County*, the Granville County Board of Commissioners initiated an action against the North Carolina Hazardous Waste Management Commission [hereinafter the Commission], seeking a temporary restraining order, a preliminary order and a permanent injunction to enjoin the Commission from siting a hazardous waste treatment facility on a specific parcel of land in Granville County, alleging that the Commission had violated statutory and administrative rules prohibiting the siting of a hazardous waste facility within twenty-five miles of a polychlorinated biphenyl (PCB) landfill facility. The Commission's process included selection of "suitable" sites for further study, designation of a "preferred" site for the permit application, and issuance of a permit. At the time the action was brought, the parcel of land in Granville County had been selected as a "suitable" site but had not been designated a "preferred" site.

The agency decision at issue in *Granville County* was the Commission's choice of a particular site which would not have been final until several additional steps occurred. In the present case, plaintiffs' claims attack defects in the Low-Level Radioactive Waste Management Authority's [hereinafter the Authority] selection process which will remain defects no matter what site is ultimately

chosen. Plaintiffs alleged the following: that the Authority had failed to comply with applicable law in its evaluation of potential suitable sites for placement of a low-level radioactive waste disposal facility; that the process of site selection as it had been undertaken by defendants was flawed, primarily due to defendants' reliance upon incorrect, incomplete, or outdated information, and because of substantive errors in the precharacterization report; and that the Authority's vice-chairman had failed to disclose that her husband owned stock in the grandparent company of Chem-Nuclear and in various low-level radioactive waste generators which would use the proposed facility.

The factual differences between *Granville County* and the present case are more than "illusory" as the majority asserts in its opinion but instead are critical to a determination of whether the case at hand is premature. Contrary to the majority's opinion, this Court in *Granville County* did not set a broad rule of ripeness but used the specific facts as they occurred in that case in analyzing whether the suit was justiciable.

The majority sets forth numerous public policy considerations which undoubtedly deserve great attention from this Court; however, they do not justify shutting down the courts to any and all site-related litigation "until the permitting process has been completed and the final site selection has been made." As Judge Cozort stated in his dissent:

> To hold otherwise runs perilously close to violating Article I, Section 18 of the Constitution of North Carolina, which mandates that "(a)ll courts shall be open; every person for an injury done to him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Richmond Co. v. N.C. Low-Level Radioactive Waste Mgmt. Auth., 108 N.C. App. 700, 710, 425 S.E.2d 468, 474 (1993) (Cozort, J., dissenting in part) [hereinafter *Richmond County*]. The majority's decision could delay the correction of obvious and apparent defects in the proceedings for years. Equally as important as the public policy considerations discussed at length by the majority are concerns involving the ramifications of a lengthy, elaborate and complicated process of evaluation, study and final selection of a site which could be reversed by litigation that, absent the majority's decision, could have addressed the problem early on.

Our decision in *Granville County* should not serve as a complete bar to the courts, irrespective of the facts and circumstances, in cases where genuine controversies exist between parties such as the ones at hand. As Judge Cozort observed:

> [A]llowing plaintiffs' claims regarding adherence to statutes and rules would not create a risk that the administrative process would be improperly delayed by frivolous claims for injunctive relief. No plaintiff would be entitled to preliminary injunctive relief unless evidence was presented which demonstrated probable cause plaintiff will be able to establish the rights asserted and a reasonable apprehension of irreparable loss unless immediate relief is granted.

Richmond County, 108 N.C. App. at 710-11, 425 S.E.2d at 474-75 (quoting *Williams v. Greene*, 36 N.C. App. 80, 85, 243 S.E.2d 156, 159, *rev. denied*, 295 N.C. 471, 246 S.E.2d 12 (1978)).

Thus, I respectfully dissent from that part of the majority opinion which holds that *Granville County* compels dismissal of plaintiffs' claims on the grounds that such claims do not present justiciable issues and that no genuine controversy exists between the parties.

COLLINS & AIKMAN CORPORATION v. THE HARTFORD ACCIDENT & INDEMNITY COMPANY, AND AETNA CASUALTY AND SURETY COMPANY

No. 252PA92

(Filed 5 November 1993)

1. Insurance § 99 (NCI4th)— excess liability insurance—delivery of policy in another state—N.C. connections to interests insured—interpretation governed by N.C. law

Even though an application for excess liability insurance came from California and the last act to make a binding insurance contract (the delivery of the policy) occurred in California, the contract is deemed to have been made in North Carolina under N.C.G.S. § 58-3-1 and the law of North Carolina thus governs in interpreting the policy where North Carolina has close connections with the interests insured by the policy

because most of the insured's vehicles were titled in this state and the insured's transportation division is located in this state.

Am Jur 2d, Insurance § 320 et seq.

2. **Insurance § 895 (NCI4th)— excess liability insurance—coverage of punitive damages**

An umbrella excess liability insurance policy provided coverage for punitive damages awarded in a wrongful death action where the policy insured for loss "because of bodily injury" since punitive damages were recovered because of the recovery for bodily injuries to the decedents.

Am Jur 2d, Insurance § 703 et seq.

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.

3. **Insurance § 895 (NCI4th)— excess liability insurance—punitive damages not fines or penalties**

Punitive damages do not constitute "fines or penalties" which are excluded from coverage under an excess liability insurance policy.

Am Jur 2d, Insurance § 703 et seq.

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.

Justice MEYER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31, from a decision of the Court of Appeals, 106 N.C. App. 357, 416 S.E.2d 591 (1992), reversing and remanding a judgment entered by Saunders, J., in the Superior Court, Mecklenburg County, on 15 March 1991. Heard in the Supreme Court 12 April 1993.

This appeal brings to the Court a question as to the liability insurance coverage under an insurance policy issued by the defendant, the Hartford Accident and Indemnity Company, to plaintiff. The plaintiff is a wholly owned subsidiary of Wickes Companies, Inc., a Delaware corporation with its principal place of business in California. Wickes hired an independent insurance broker in

California to procure an insurance policy for the plaintiff. The broker negotiated with Hartford and procured an umbrella/excess liability policy.

The policy provided for $5,000,000 of insurance coverage in excess of a $2,000,000 primary policy issued by defendant Aetna Casualty and Surety Company. The policy period was from 1 March 1987 through 29 February 1988. The policy was sent to the insurance broker's office in California and remained there until 8 March 1988, at which time it was sent to the plaintiff's office in Charlotte, North Carolina. The plaintiff owned one hundred and two trucks of which ninety-seven were titled in North Carolina. The plaintiff's transportation division is located in Albemarle, North Carolina.

On 29 February 1988, one of the trucks which was titled in this state was involved in an accident in Yadkin County, North Carolina, in which two people were killed. In a wrongful death action growing from the accident, the jury awarded $2,500,000 in compensatory damages and $4,000,000 in punitive damages against the plaintiff in this case. The parties settled the case for $4,200,000.

The defendant Hartford denied that it was liable for any punitive damages and this action was commenced for a determination of the rights and liabilities of the parties. The superior court denied a motion for partial summary judgment by the plaintiff and allowed a motion for partial summary judgment by Hartford, holding that Hartford was not responsible for any recovery for punitive damages. The Court of Appeals reversed, holding that Hartford was liable for such a recovery. We allowed Hartford's petition for discretionary review.

Parker, Poe, Adams & Bernstein, by Irvin W. Hankins, III and Josephine H. Hicks, for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, by Ronald C. Dilthey, and Cranfill, Sumner & Hartzog, by Susan K. Burkhart, for defendant-appellant The Hartford Accident and Indemnity Company.

WEBB, Justice.

[1] The first issue raised by this appeal involves the choice of law to be applied. Hartford contends that California law should be used in interpreting the insurance policy and that punitive

damages are not covered by the policy under the law of California. We agree with the Court of Appeals that this case is governed by N.C.G.S. § 58-3-1 which provides:

> All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

The policy in this case protects the interest of plaintiff against having to pay damages for the wrongful acts of its agents. The insurance contract is deemed to have been made in North Carolina.

The appellant, relying on *Land Co. v. Byrd*, 299 N.C. 260, 261 S.E.2d 655 (1980), *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967) and *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931), contends that the law of the state in which the last act in the making of a contract governs and that would be California in this case. None of these cases involved insurance policies and the implication of N.C.G.S. § 58-3-1 was not considered.

The North Carolina cases involving insurance contracts, *Connor v. Insurance Co.*, 265 N.C. 188, 143 S.E.2d 98 (1965), *Roomy v. Insurance Co.*, 256 N.C. 318, 123 S.E.2d 817 (1962) and *Keesler v. Insurance Co.*, 177 N.C. 394, 99 S.E. 97 (1919), upon which Hartford relies are distinguishable. *Keesler* involved a life insurance policy issued in Georgia to a resident of Georgia. No interest in North Carolina was involved. *Connor* and *Roomy* involved automobile liability policies on vehicles owned by residents of other states. The vehicle in each case was titled in another state and the insurance policy was purchased in another state. This Court held in each case, without any reference to N.C.G.S. § 58-3-1 or its predecessor, that the law of the states in which the policies were issued was the law that governed. It is the very few contacts with this state that distinguishes *Connor* and *Roomy* from this case.

Hartford also relies on *Hartford A. and I. Co. v. Delta and Pine Land Co.*, 292 U.S. 143, 78 L. Ed. 1178 (1934), in which the Supreme Court of the United States held that a Mississippi statute similar to N.C.G.S. § 58-3-1 violated the due process clause as the statute was applied in that case. In that case, the plaintiff had purchased an indemnity bond from the defendant in Tennessee where both parties had offices. A defalcation occurred in Missis-

sippi. The United States Supreme Court reversed a decision by the Supreme Court of Mississippi which had held that Mississippi law governed. The Supreme Court said a state "may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi." *Id.* at 150, 78 L. Ed. at 1181. We believe that is the distinction from this case. In this case, the State has much more than a casual connection with the substance of the insurance policy. Most of the vehicles insured were titled in this state and plaintiff's transportation division is located in this state.

The last two cases upon which Hartford relies are *Lowe's No. Wilkesboro Hardware v. Fidelity Mut. L. Ins. Co.*, 206 F. Supp. 427 (M.D.N.C. 1962) and *Turner v. Liberty Mut. Ins. Co.*, 105 F. Supp. 723 (E.D.N.C. 1952). *Lowe's* involved a choice of law question in an action in tort, the plaintiff having alleged that the defendant negligently failed to act on an application for a life insurance policy. A tort claim does not implicate N.C.G.S. § 58-3-1. *Lowe's* is not authority for this case.

In *Turner*, the United States District Court for the Eastern District of North Carolina held that a predecessor statute to N.C.G.S. § 58-3-1 did not require that the law of North Carolina govern in interpreting a motor vehicle liability policy when the policy was issued in New Jersey by a New Jersey corporation to a citizen of New Jersey. The motor vehicle was involved in an accident in North Carolina. The court cited *Delta and Pine Land Co.* and said it would violate the Fourteenth Amendment to allow the statute to require the law of a state to govern "regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract." *Id.* at 726.

We believe that the distinction between this case and those cases upon which Hartford relies and which hold that N.C.G.S. § 58-3-1 or similar statutes do not apply or are unconstitutional, lies in the connection of this state with the interests insured. North Carolina has a close connection with the interests insured in this case. N.C.G.S. § 58-3-1 clearly means that the law of North Carolina applies and we do not believe the United States Constitution prohibits it.

[2] Hartford contends that if North Carolina law applies it is not liable under the terms of the policy. The policy says:

> The company will pay on behalf of the **insured ultimate net loss** in excess of the total applicable limit . . . of **underlying insurance** . . . because of **bodily injury, personal injury, property damage** or **advertising injury** . . . .
>
> . . . .
>
> When used in reference to this insurance . . .:
>
> "**bodily injury**" means bodily injury, sickness or disease sustained by any person which occurs during the policy period;
>
> . . . .
>
> "**damages**" do not include fines or penalties . . .;
>
> . . . .
>
> "**ultimate net loss**" means all sums which the **insured** and his or her insurers shall become legally obligated to pay as **damages**
>
> . . . .

Hartford contends that the policy does not cover losses by the plaintiff for punitive damages. It says this is so because the policy insures for loss for "bodily injury, personal injury, property damage or advertising injury" and punitive damages in this case were not awarded for any of the injuries. Hartford argues that compensatory damages were awarded for the damages for bodily injury but punitive damages were not. It says the punitive damages were awarded for the bad conduct of the plaintiff's agent and not for damages for bodily injury. Hartford distinguishes *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E.2d 217 (1984), a medical malpractice case in which we held the insurance carrier was liable for punitive damages awarded against the defendant on the ground that in *Mazza* the policy provided coverage for all damages, which would include punitive damages. There is no such coverage in this case, says Hartford.

We hold that the policy in this case covers liability for punitive damages. If compensatory or nominal damages for bodily injury had not been recoverable by the personal representatives of the two estates in this case, the plaintiff could not have recovered punitive damages. *Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992). Punitive damages were recovered because of the recovery

for bodily injuries to the deceased persons. This recovery is covered by the policy.

[3] Hartford next contends that punitive damages are penalties and thus not covered by the policy which defines damages as not to include "fines or penalties." Hartford relies on *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964), to argue that punitive damages are penal in nature and should be construed as a penalty.

We do not believe *Allred* is authority for this case. In *Allred*, the plaintiff sued the defendants for assault and battery and prayed for punitive damages. The question before this Court was whether the privilege against self incrimination prevented the plaintiff from examining the defendants before trial. We said that "penalty is an elastic term with many different shades of meaning." *Id.* at 38, 134 S.E.2d at 192. We held that for purposes of exercising the privilege against self incrimination in that case, in which the defendants would be subject to arrest and bail if punitive damages were awarded, the defendants could not be examined before trial. The references to the definition of a penalty in a case involving the privilege against self incrimination are not authority for this case.

We agree with the Court of Appeals that "penalty" as used in the policy is at best ambiguous. This being so, we must interpret it against the insurer who wrote the policy. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). It takes some construing of the word "penalty" to hold that it includes punitive damages. This we cannot do.

For the reasons stated in this opinion, we affirm the Court of Appeals.

AFFIRMED.

Justice MEYER dissenting.

Contrary to the majority, I conclude that N.C.G.S. § 58-3-1 does not control the choice of law question here. Rather, I believe that the traditional rule of *lex loci contractus* applies, and thus, California law is the correct law to be applied in this case. Assuming *arguendo*, however, that North Carolina law is the correct choice, I conclude that the language of the policy does not cover awards of punitive damages, as the policy was limited to damages "because

of bodily injury" and excludes "fines and penalties" from recovery. I therefore dissent.

As the majority notes, Wickes Companies, Inc. ("Wickes"), a Delaware Corporation with its primary place of business and headquarters in Santa Monica, California, is the parent company of Collins and Aikman Corporation ("C&A"). C&A is a Delaware Corporation, which at all times pertinent to the case before us was headquartered in New York City, with sixteen subsidiaries doing business in twenty-eight states, the Virgin Islands, and several foreign countries. It has administrative offices, sales offices, and warehouses throughout the United States. It operates thirty-four manufacturing plants that are located in New York, Indiana, North Carolina, Georgia, Oklahoma, Rhode Island, Texas, Quebec, and Ontario.

Wickes recommended that its subsidiary, C&A, use Marsh & McLennan, an independent insurance broker in Los Angeles, California, to negotiate an excess liability insurance policy. C&A had attempted to get a policy through Marsh & McLennan's office in North Carolina but had been unsuccessful. Marsh & McLennan began negotiations with Hartford Accident and Indemnity Company ("Hartford") to create an excess liability insurance policy for C&A. Hartford dealt almost exclusively with Marsh & McLennan's California office in creating the excess liability policy for C&A. In preparing the quotation, Hartford used information that indicated C&A was headquartered in New York City. The policy identified the named insured as Collins and Aikman, located at 210 Madison Avenue, New York, NY 10016. Hartford received the premium payment from Marsh & McLennan.

During the policy period, Hartford was potentially liable for the excess on actual claims filed against C&A for motor vehicle accidents in Louisiana, Georgia, Pennsylvania, Ohio, North Carolina, New Jersey, and New York.

The majority says that N.C.G.S. § 58-3-1 controls this case. The statute covers "all contracts of insurance on property, lives, or interests in this State . . . and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State." N.C.G.S. § 58-3-1 (1991). N.C.G.S. § 58-3-1 has been construed to apply when a policy of insurance covers lives, property, or tangible assets physically located in the state. However, I believe that N.C.G.S. § 58-3-1 does not

apply here, where a contract is formed in either Connecticut or California and the application for the insurance came from California, C&A being unsuccessful in its attempt to get insurance through Marsh & McLennan's North Carolina office. The United States Supreme Court has noted that

> [a] legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 150, 78 L. Ed. 1178, 1181-82, *reh'g denied*, 292 U.S. 607, 78 L. Ed. 1468 (1934).

Based on the fact that Hartford's policy is a nationwide policy that was created in Connecticut for a business headquartered in New York City, which covers claims in many states all over the nation and even in Canada and the Virgin Islands, I believe that the correct rule to apply in determining what law is applicable is the longstanding rule in North Carolina: *lex loci contractus*, that the substantive law of the state where the last act to make a binding contract takes place controls all aspects of the interpretation of contracts. *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980); *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931).

On many occasions, this Court has applied this rule in determining what law should be applied in disputes over insurance contracts. In *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 123 S.E.2d 817 (1962), this Court adopted the rule that the interpretation of an insurance contract depends upon the law of the place where the policy is delivered. *See also Connor v. State Farm Mut. Auto. Ins. Co.*, 265 N.C. 188, 143 S.E.2d 98 (1965); *Keesler v. Mutual Benefit Life Ins. Co. of New York*, 177 N.C. 394, 99 S.E. 97 (1919).

The majority attempts to distinguish *Roomy*, *Keesler*, and *Connor* by arguing that the policy at issue here has a much greater causal connection to North Carolina than the cases in which this Court and the United States Supreme Court applied *lex loci contractus*. While I agree that in this case there are more connections

with North Carolina because a majority of the trucks are registered in North Carolina and C&A has manufacturing plants in North Carolina, I disagree that these connections, when looking at the policy as a whole, are enough to justify applying North Carolina law to this contract. As noted above, this policy covered not only trucks, but every other type of imaginable risk involving the business operations and products of C&A that could result in the injuries noted in the policy. C&A had thirty-four plants in seven states and two Canadian provinces. In addition, C&A had listed its headquarters as New York City at the time the policy was issued. During the policy term, there were nineteen accidents that potentially could have involved the Hartford excess policy; nine of these accidents were not in North Carolina. Finally, in neither *Roomy*, *Keesler*, nor *Connor* did we rely upon or even discuss that the number of contacts with North Carolina was determinative of the choice of law.

When reviewing the circumstances of the issuance of this policy and the contents of the policy itself, I fail to find enough connections with North Carolina to justify the application of N.C.G.S. § 58-3-1. I believe that *lex loci contractus* should apply and that the applicable law should be determined based upon the substantive law of the state where the last act creating a binding contract took place. In regard to insurance contracts, it is usually held that the delivery of the contract is the last act to make a binding contract. *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335, 339, 79 L. Ed. 398, 401 (1934). Here, the policy was mailed from Hartford, Connecticut, to Marsh & McLennan in Los Angeles, California, sometime in March of 1987. Marsh & McLennan had possession of the policy until 8 March 1988, by which time the accident in question had already occurred and the policy had expired. Because the contract was negotiated by, paid by, and delivered to Marsh & McLennan in Los Angeles and because the policy covers so many different interests around the United States and the world, I believe that the proper choice of law is California, which is the state where the last act to make a binding contract (the delivery of the policy) took place. In California, punitive damages are uninsurable as a matter of public policy; thus, the plaintiff here would not be able to recover punitive damages from Hartford under its policy of insurance. *State Farm Fire & Cas. Co. v. Superior Court*, 191 Cal. App. 3d 74, 77-78, 236 Cal. Rptr. 216, 219 (1987). In addition, here the policy itself states that "damages" do not include damages

for which insurance is prohibited by the law applicable to the construction of the policy.

Assuming *arguendo*, however, that North Carolina law applies, Hartford's policy still affords no coverage for punitive damages. Punitive damages, quite simply, are not awarded "because of bodily injury." Punitive damages are awarded solely to punish the wrongdoer for his outrageous conduct. *Oestreicher v. Stores*, 290 N.C. 118, 134, 225 S.E.2d 797, 807 (1976). In *Cavin's Inc. v. Atlantic Mut. Ins. Co.*, 27 N.C. App. 698, 220 S.E.2d 403 (1975), the Court of Appeals held that the liability insurance policy in question did not afford coverage for punitive damages. In *Cavin's*, the policy defined "damages" to mean only those payable "because of a personal injury." The Court of Appeals explained that punitive damages were not payable because of personal injury, stating:

> Punitive damages are never awarded merely because of a personal injury inflicted nor are they measured by the extent of the injury; they are awarded because of the outrageous nature of the wrongdoer's conduct. Being awarded solely as punishment to be inflicted on the wrongdoer and as a deterrent to prevent others from engaging in similar wrongful conduct, punitive damages can in no proper sense be considered as being awarded "only with respect to personal injury" or as damages "which are payable because of personal injury." Compensatory damages, which are awarded to compensate and make whole the injured party and which are therefore to be measured by the extent of the injury, are the only damages which are payable "because of personal injury."

Id. at 702, 220 S.E.2d at 406.

In addition, this Court has interpreted the phrase "damages sustained" to not include punitive damages. In *Transportation Co. v. Brotherhood*, 257 N.C. 18, 125 S.E.2d 277, *cert. denied*, 371 U.S. 862, 9 L. Ed. 2d 100, *reh'g denied*, 371 U.S. 899, 9 L. Ed. 2d 131 (1962), we held that

> [d]amages sustained are limited to actual damages suffered as a result of the wrong inflicted. Punitive damages are never awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong. They are given to the plaintiff in a proper case, not because they are due, but because of the opportunity the case

affords the Court to inflict punishment for conduct intentionally wrongful.

Id. at 30, 125 S.E.2d at 286 (citation omitted).

The Court of Appeals, relying on *Transportation Co. v. Brotherhood*, determined that the phrase "damages *because of bodily injuries*" did not include punitive damages. *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 100-01, 237 S.E.2d 341, 345, *disc. rev. denied*, 293 N.C. 589, 239 S.E.2d 263 (1977) (emphasis added). In addition, numerous courts in other jurisdictions support the view that punitive damages are not damages "because of bodily injury." *See Union Ins. Co. v. Kjeldgaard*, 775 P.2d 55, 56 (Colo. Ct. App. 1988); *Brown v. Western Cas. & Surety Co.*, 484 P.2d 1252, 1253 (Colo. Ct. App. 1971); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361 (Me. 1982); *Caspersen v. Webber*, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973); *Schnuck Markets, Inc. v. Transamerica Ins. Co.*, 652 S.W.2d 206, 209-10 (Mo. Ct. App. 1983); *Crull v. Gleb*, 382 S.W.2d 17, 23 (Mo. Ct. App. 1964); *Creed v. Allstate Ins. Co.*, 365 Pa. Super. 136, 141, 529 A.2d 10, 12 (1987), *appeal denied*, 517 Pa. 616, 538 A.2d 499 (1988); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 397, 134 S.E.2d 206, 210 (1964). The policy here was for damages "because of bodily injury"; thus, the policy does not cover punitive damages.

It is true that this Court has concluded that when a policy is written to cover "all damages, including damages for death, which are payable because of injury to which this insurance applies," punitive damages may be included in the recovery. *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 629, 631, 319 S.E.2d 217, 222, 223 (1984). In *Mazza*, the policy provided medical malpractice coverage for "[a]ny claim . . . arising out of the performance of professional services rendered." *Id.* at 623, 319 S.E.2d at 219. Thus, in *Mazza*, the insurer chose to define damage coverage by the cause of the damage (professional services) not by the effect on the injured party (bodily injury). Thus, *Mazza* can be distinguished from the case at hand because here, the damages that may be recovered have been limited to damages incurred "because of bodily injury."

In determining that the policy in *Mazza* provided for punitive damages awarded on account of medical malpractice, this Court carefully and expressly distinguished the Court of Appeals cases

that held that policies do not cover punitive damages. This Court noted:

> A careful examination of the insurance contracts, factual situations, and holdings in *Cavin's* and *Knight* convinces us that these two cases are clearly distinguishable from the case *sub judice*, and are not any legal precedent upon which to base a decision favorable to the defendant Medical Mutual. In other words, neither *Cavin's* nor *Knight* control in this situation.

Mazza, 311 N.C. at 631, 319 S.E.2d at 223.

The policy at issue here contains language identical to that found in *Knight* and similar to that in *Cavin's*; thus, it seems that *Mazza*, which held *Cavin's* and *Knight* distinguishable, should not apply to this case. The policy at issue here is simply not as broad as that found in *Mazza* because Hartford included the limiting phrase "because of bodily injury" in its definition of damages covered. Thus, Hartford should not be required to pay the punitive damages awarded in this case.

The majority relies on *Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992), for the proposition that if the plaintiff is entitled to recover compensatory damages for bodily injury, the plaintiff can also recover punitive damages. I do not find *Hawkins* apposite here. In *Hawkins*, we did not condition the recovery of punitive damages on the recovery of compensatory damages; in fact, we allowed punitive damages when no compensatory damages were awarded. *Hawkins*, which incidentally was an assault and battery case and had nothing whatsoever to do with an insurance contract, merely establishes that the recovery of punitive damages is not dependent on the recovery of compensatory damages, whether for bodily injury or any other injury or damage.

Furthermore, Hartford should not be liable for punitive damages here because Hartford's policy defines "damages" not to include fines or penalties. This Court has held that "ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Where a nontechnical term such as "penalty" is not defined in the policy, the court should give the term its ordinary meaning. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978). "Penalty" is defined as "[a] punishment

established by law or authority for a crime or an offense," *The American Heritage Dictionary of the English Language* 1337 (3d ed. 1992); "punitive damages" are "[d]amages awarded by a court against a defendant as a deterrent or punishment to redress an egregious wrong perpetrated by the defendant," *id.* at 1469. Thus, punitive damages come within this definition of the term "penalty."

In *America Home Assurance Co. v. Fish*, 122 N.H. 711, 715, 451 A.2d 358, 360 (1982), the court found that where losses that include "fines and penalties imposed by law" are excluded from coverage, punitive damages are not covered within the policy. *See also Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 436 (5th Cir. 1962) (Florida characterization of punitive damages as a "penalty" conforms with the most widely accepted basis for punitive damages in other American jurisdictions).

The interpretation of punitive damages as a fine or penalty is supported by the United States Supreme Court, which has found that a jury may inflict what are called exemplary, punitive, or vindictive damages " 'by means of a civil action, and the damages, inflicted by way of *penalty* or punishment, [are] given to the party injured.' " *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16, 113 L. Ed. 2d 1, 18 (1991) (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371, 14 L. Ed. 181, 185 (1851)). The United States Supreme Court has also held that punitive damages are not compensation for injury but, rather, are " 'private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' " *International Broth. of Elec. Workers v. Foust*, 442 U.S. 42, 48, 60 L. Ed. 2d 698, 704 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 41 L. Ed. 2d 789, 811 (1974)).

I conclude that giving the terms "penalty" and "fine" their ordinary meanings, they include punitive damages. As such, it is clear that the exclusion of fines and penalties would exclude punitive damages.

The majority errs in determining that the policy should be interpreted under North Carolina law, and even assuming *arguendo* that the majority was correct in its choice of law, the language of the policy does not cover awards of punitive damages. I vote to reverse the decision of the Court of Appeals.

Chief Justice Exum and Justice Parker join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHNNIE L. HARRINGTON

No. 441PA92

(Filed 5 November 1993)

1. **Criminal Law §§ 481, 540 (NCI4th)— juror's statement to other jurors—failure to hold hearing—replacement of juror because he overheard something about case**

The trial court did not err in failing to conduct a hearing to question a juror whom the courtroom clerk overheard tell two other jurors he did not believe a defense witness and then in replacing the juror prior to deliberations without prior consultation with defendant because the juror had informed the court that he had "overheard something about the case" where the court asked the other jurors if any had overheard anything about the case and none responded; the trial court thus acted within its discretion in not excusing any other jurors; the trial court's excusal of the juror was favorable to defendant since whatever he had overheard about the case could conceivably have affected his impartiality; the defense witness about whom the juror spoke was a minor corroborative witness, and the juror's questioning of this evidence could not have prejudiced defendant; and the trial court acted within its discretion under N.C.G.S. § 15A-1215(a) by replacing the juror to avoid any suspicion about his ability to be fair and impartial.

Am Jur 2d, Trial §§ 1544, 1610, 1637.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case. 21 ALR4th 444.

2. **Constitutional Law § 342 (NCI4th)— ex parte conversation between court and juror—absence of prejudice**

While the trial court's reference to "something you told me earlier" in its remarks to a juror in this noncapital trial indicates that an *ex parte* conversation between the court and the juror did occur, this conversation out of defendant's presence could not have influenced the verdict and was not prejudicial to defendant where the record establishes that the substance of the conversation related to the juror's having "overheard something about the case"; the court removed the

juror prior to deliberations to avoid suspicion about his ability to be fair and impartial; and no juror responded when the trial court asked if any juror had overheard anything about the case.

Am Jur 2d, Trial §§ 1579, 1637.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors. 41 ALR2d 288.

3. Criminal Law § 738 (NCI4th)— statement by court—unusual amount of evidence on one side—no expression of opinion

The trial court did not express an opinion on the weight of the evidence by its statement that "it is unusual for us to hear so much evidence on one side" when the statement is considered in context where the court was admonishing the jurors pursuant to N.C.G.S. § 15A-1236(a)(3) to maintain an open mind until they conducted their deliberations, and the statement occurred during instructions that the jurors should resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side and that it was the duty of jurors to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion.

Am Jur 2d, Trial § 1573.

4. Criminal Law § 865 (NCI4th)— instructions on unanimous verdict and reasoning together—no invasion of province of jury or violation of free speech

The trial court did not invade the province of the jury or violate the jurors' free speech rights by instructing the jury that "it is important that you not go to the jury room and immediately take a vote or immediately stake yourself out on a strong position" where the court was instructing the jury, in accordance with N.C.G.S. § 15A-1235, that the jurors must be unanimous in order to return a verdict, that they have a duty to consult and deliberate, that they should try to reach agreement but only if this can be accomplished without violating any member's convictions, and that they should keep an open mind in the process.

Am Jur 2d, Trial §§ 1188, 1451.

On certiorari to review judgments of imprisonment entered by Long, J., at the 10 February 1986 Criminal Session of Superior Court, Lee County, upon jury verdicts finding defendant guilty of first-degree sexual offense and first-degree kidnapping. Heard in the Supreme Court 16 September 1993.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Cunningham, Dedmond, Petersen & Smith, by Bruce T. Cunningham, Jr. and F. Marsh Smith, for defendant-appellant.

WHICHARD, Justice.

Defendant, Johnnie Harrington, was indicted on one count each of sexual offense, rape, and kidnapping. He was found guilty of first-degree kidnapping and first-degree sexual offense and not guilty of rape. The trial court sentenced him to life imprisonment for the sexual offense and a concurrent twelve years imprisonment for the kidnapping. On 15 February 1993 this Court, recognizing that defendant had not had a direct appeal from the judgments entered upon his convictions, allowed defendant's petition for certiorari. We now conclude that defendant received a fair trial, free of prejudicial error.

The evidence presented at trial tended to show the following:

The victim is defendant's first cousin. She moved from New York City to Cameron, North Carolina in July 1984 to live with her aunt, Lucy Johnson. On 17 August 1985 defendant's wife, Jennie Harrington, invited the victim to visit their home in Sanford. Defendant was thirty-five years old at the time; the victim was sixteen. On 18 August around 2:00 p.m., Jennie met the victim at her Aunt Lucy's home, left Jennie's daughter Tomika in Lucy's care for the day, and drove the victim to Sanford. They arrived at defendant's home around 3:00 p.m.

Soon thereafter, defendant arrived. Jennie was in the kitchen preparing a meal, and the victim was sitting in the den. After a period of conversation, defendant and Jennie went to their bedroom in the rear of the house. Defendant soon returned to the den. He told the victim that Jennie had something to tell her in the bedroom and to "be good and be nice." In the bedroom, the victim found Jennie looking upset. Jennie said it was not the victim's fault. The victim could tell something was wrong. Jennie asked

the victim, "Did he tell you yet?" Defendant then came into the room briefly and suggested that the victim put on some fingernail polish. He left the room. Jennie asked the victim to put on a negligee. After initially declining, the victim obliged. She testified that she did so only to show Jennie briefly how it looked. While the victim was in the adjacent bathroom putting on nail polish and wearing the negligee, defendant again entered the bedroom. He had changed into a robe and bikini underwear.

The victim tried to cover herself with her shirt. Defendant struggled with her to remove the shirt. She then went to sit on the bed because she felt sick. Defendant tried to get on top of her, but she pushed him off. Defendant then slapped her several times and tried to force her into the spare bedroom. He threatened to kill her. Back in the bedroom again, she noticed defendant had a gun. Defendant asked, "Oh, you scared of this?" He fired the gun twice toward the floor, once near the bathroom door and once as he walked out of the bedroom. Jennie told the victim just to do everything she did.

Defendant returned to the bedroom holding the gun and a smoking pipe containing marijuana. After the three of them smoked from the pipe, defendant told the victim and Jennie to get on their knees. He removed his underwear and told the victim to perform oral sex on him. When she refused, he directed Jennie to demonstrate the act. Defendant then placed the gun at the victim's head and forced her to perform oral sex on him. After defendant had consensual sexual intercourse with Jennie, he had sexual intercourse with the victim. Defendant continued to hold the gun in his hand. He again had sexual intercourse with each woman. The victim testified she did not consent to any of these sexual acts.

During the course of these events, the victim twice left the bedroom, saying she needed a cigarette. She testified she did not try to escape because (1) she was scared, (2) she had no money, (3) she was wearing only a negligee and underclothes, (4) she did not know how to get back to Cameron, and (5) defendant had threatened to kill her.

The victim, Jennie, and defendant returned to the den where defendant showed a pornographic movie on the television. The victim only "glanced" at it, and she began to offer excuses as to why she needed to return home.

Jennie drove the victim home around 11:00 p.m., stopping at McDonald's to get her dinner. They did not discuss what had happened. After arriving at home, the victim did not speak to anyone and went outside to eat her meal. Lucy Johnson testified that the victim was not in her usual "jolly and happy" mood. She looked sad, and her face was "puffy." She looked like something was wrong, and her eyes "looked like she had been crying." When Lucy asked the victim if everything was all right, Jennie answered for her, assuring Lucy the victim was "fine." The victim walked with Jennie and her daughter Tomika to Jennie's car. Jennie told the victim, "I'm sorry. This will never happen again. Please don't tell, or we could go to jail."

The victim did not tell anyone about the incident until very late the evening of 19 August when she told her cousin, Michele Johnson, "Johnnie raped me." She then recounted the events of the evening in question to Michele. Michele's testimony corroborated the victim's, with minor additions. She stated that defendant had told the victim soon after he arrived home that afternoon that the spare bedroom could be hers if she would "just do what [he said] and listen to [him]." Michele also testified that after defendant fired the second gun shot, Jennie told the victim, "I'm sorry. This will never happen again. Just do what I do; that's all." Michele also stated that when defendant was forcing the victim to perform oral sex on him, he held the gun over her head and told her she had "better do it right or else." Michele and the victim then woke up their aunt, Lucy Johnson, and told her what had happened. Lucy called the police.

Detective Kevin Gray testified that he took the victim's statement the next morning, 20 August. He re-read the statement to her several times for her verification. She swore to its accuracy before a magistrate. Her statement was consistent with her court testimony with slight variation. She stated defendant had pointed the gun at her twice. She also stated that defendant told her before she left the house that if she "got pregnant to call Jennie to arrange an abortion."

Gray also testified that he and a colleague went to defendant's home on 20 August. He identified three bullet holes in defendant's bedroom floor. Two of the holes were very similar. Gray suggested they were made by a gun about the size of a .38 caliber. One

of the holes was near the bathroom door, and the other was near the bedroom entrance.

Detective Ray Garner testified that he accompanied Gray to defendant's home. He identified State's Exhibit 1 as the .38 caliber pistol he found in the home.

Defendant's testimony varied greatly from the evidence presented by the State. He first testified that one night in 1984 he drove the victim back to Cameron from Pinehurst, where they had checked their grandmother into the Moore County Hospital. He stopped at a convenience store to buy beer which he and the victim drank. The victim then approached defendant and performed unsolicited oral sex on him while he drove. On her cross-examination earlier in the trial, the victim had denied that this happened, saying defendant was lying if he said it did.

Defendant testified that when he returned to his home on 18 August 1985, having been out drinking, he was surprised to see the victim there. Because he and Jennie had argued about his drinking problem that morning, he went to see Jennie in the bedroom to try to make amends. She would not talk to him. He and the victim drank in the den and smoked marijuana on the patio. He asked the victim for a "repeat performance" of that night in 1984, but the victim said she was worried about what Jennie would do if she did that. Defendant and the victim then agreed to watch a pornographic movie. Jennie testified she was watching television in the bedroom during this time.

Defendant then went to the bedroom and told Jennie he wanted her and the victim to "get pretty" and just do what he said. He returned to the den and told the victim to go to the bedroom because Jennie had "something she want[ed] to tell [her]." When he later entered the bedroom in his robe and underwear, he saw the victim sitting on a footstool at the foot of the bed dressed in a "nightie" and Jennie sitting in the bathroom in her "nightie."

When Jennie refused to come out of the bathroom, defendant testified he took Jennie's .38 special out of her dresser drawer. He identified State's Exhibit 1 as that gun. He fired the gun at the floor while standing outside the bathroom. At this point the victim still sat on the stool behind him. He testified that he did not look at her, point the gun at her, or direct any conversation at her. He yelled at Jennie and left the room, firing another shot at the floor.

After he returned with the gun and the three of them had smoked marijuana, defendant told Jennie, "[the victim] and I have got something to show you." He asked the victim to come over and show Jennie a "repeat performance." He had the gun in his hand. The victim came over to him, removed his underwear, and performed oral sex on him. Defendant then laid back on the bed and had Jennie call his supervisor to say he was too sick to work.

Jennie and the victim left. Defendant denied ever threatening the victim, hitting her, or forcing her to do anything the entire evening, with or without a weapon.

On cross-examination, defendant testified that he had several beers and numerous gin drinks during the hours leading up to the alleged acts. He admitted he had a drinking problem and that drinking and smoking marijuana sometimes affected his memory. Defendant also testified that between midnight Friday and the time the victim left his house Sunday evening he had only about two hours of sleep. Much of this time was spent drinking alcohol with friends. He had to leave his Saturday night work shift early because he was sick from drinking. He admitted there was a lot said on 18 August that he did not remember.

Defendant denied having sexual intercourse with his wife or the victim. He acknowledged that he was convicted in 1976 of the felonies of breaking and entering the residence of a woman and of assaulting her when inside.

Jennie Harrington testified that she invited the victim over "just to spend some time with her, have her company." She called the victim after her argument with defendant on Saturday and did not tell defendant she had done so.

Jennie generally corroborated defendant's account of the events of 18 August. She also testified to additional material facts. She had not known defendant wanted her to "get pretty" prior to his asking her to do so, but because defendant had asked her to do this in the past, she knew what he meant. The victim did not object when asked to put on the negligee; she simply went to the bathroom to put it on. When the victim performed oral sex on defendant, Jennie was "shocked and ashamed" because she had never seen defendant act like that before. Afterward, she was mad and "hated both of them."

On the way to the victim's home, she and the victim did not have a conversation because she was so mad. They stopped at McDonald's, where she had a brief conversation with Reginald Williams, a friend of defendant.

At Lucy's home, she did not answer for the victim when Lucy inquired about her. The victim answered for herself. When the victim walked Jennie to the car, Jennie told her she would "get [her] for what happened." The victim tried to hug Jennie, but Jennie did not hug back.

On cross-examination, Jennie testified that she "didn't completely ignore" the victim after inviting her over to spend time with her. Although she left the victim in the den with defendant for a long period of time, she did once invite her to the bedroom to watch television.

She testified that even though defendant's actions were "so unusual" and though he had never before walked around with a gun following an argument, she was "not really" afraid. She was just nervous. She knew him well enough to know he would not use the gun on her or the victim. She said he had it "just to let us know he meant business." She told the prosecutor she did not worry about what was going on because she did not know what was going on. She said it all happened so fast she did not have time to think about it. At the prosecutor's suggestion, she then acknowledged that thirty minutes passed between the time defendant asked her to "get pretty" and the time defendant entered the bedroom in his robe and underwear. She then "guess[ed]" she did have time to think about it but just did not.

Only when the victim performed oral sex on defendant did Jennie know what was going on. She did not say anything when the victim performed this act. She did not try to stop it even though she had not seen anything like it before. She testified she has not asked defendant about it since.

Reginald Williams testified that he saw Jennie at McDonald's that evening. She and the victim were alone in the car.

Detective Gray testified that he made every reasonable effort on 20 August to insure the accuracy of the victim's statement before reducing it to its final form. The statement said that Jennie and defendant both drove the victim home.

Lucy Johnson again testified for the State in rebuttal. She stated that on the evening in 1984 that defendant testified to, she received a telephone call at home at 11:00 p.m. She was told defendant and the victim had left Pinehurst. They arrived in Cameron at 11:20 p.m. even though it takes twenty-five to thirty minutes to complete that drive by either available route. She also testified that the convenience stores between Pinehurst and Cameron are closed after 11:00 p.m. She smelled no alcohol on the victim's breath when the victim returned home that evening.

On cross-examination, Lucy testified she had not driven from the Moore County Hospital to Cameron since 1978, but she still rode that route often. She had driven on it since 1978. When she did so, she often looked for an open store late at night where she could buy gas.

[1] First, defendant contends the trial court erred in not conducting a hearing to question a juror whom the courtroom clerk overheard tell two other jurors he did not believe a defense witness and then in excusing the juror without prior consultation with defendant. We disagree.

After the close of all the evidence, an exchange occurred in chambers. Those present were Mr. O'Hale, an Assistant District Attorney; Mr. Kinnaman, defense counsel; the court reporter; and Cynthia Myers, an assistant clerk. The exchange was as follows:

> MR. O'HALE: The Clerk just told me as the jurors were leaving, she was downstairs, she heard one of the jurors make a comment, I believe, about Reginald Williams' testimony.
>
> THE CLERK: He didn't say the name.
>
> MR. O'HALE: And I would just rather she say exactly—this is Cynthia Myers, the clerk in the courtroom, and has been in the courtroom during the trial.
>
> THE COURT: This is as the jurors were leaving the courthouse?
>
> THE CLERK: As they were going down the stairs. He was saying something to two other men. The lady behind him said "You'd better be quiet. You're not supposed to be talking." Got down the steps and stopped and he was saying, "I believe when you take that Bible in your hand you are supposed to be telling the truth and I don't think that young boy was

telling the truth. When I take the Bible in my hand—" he laughed. He said, "I think I'll tell the judge tomorrow."

THE COURT: He said what?

THE CLERK: He said, "I think I'll tell the judge tomorrow."

THE COURT: Do you remember what he looked like? Do you remember which juror it was?

THE CLERK: Joseph Brown, third gentleman on the back row with the blue shirt on. And when you and all the attorneys were at the bench the last few minutes, he was whispering at one of the other juro[r]s and looking at Mr. Harrington.

MR. O'HALE: But you don't know what he said?

THE CLERK: I don't know what he said.

MR. KINNAMAN: When he made that comment, who was present in his earshot?

[THE] CLERK: All the jurors were going down the stairs. There were two men he was talking to. Whether they were jurors or not, I don't—I think they were. It shocked me. I didn't pay any attention to them.

THE COURT: All right. Is that all you heard?

THE CLERK: Yes.

THE COURT: Okay.

THE CLERK: And I'm not sure he was talking about Williams, but that is who I think—

THE COURT: But he said young man?

THE CLERK: Young man.

. . . .

THE COURT: Let's go ahead and hold the charge conference, and if any motions [come] as a result of this in any way, we will take those when they come.

Neither counsel made a motion for a hearing or requested any further inquiry. The only other time juror Brown was discussed was just before the trial court dismissed the jury to deliberate. The court stated:

> It is natural that some person may have said something to you which could possibly influence your decision. It is possible that you may have read something about the matter in the paper or overheard someone who has read something about it in the paper, and I would ask at this time if there are any jurors who have any matters of that nature to report to the Court.

When none responded, the court continued:

> Now, I understand, Mr. Brown, from something you told me earlier, that you overheard something about the case. You feel like you could render a fair decision and that wouldn't influence you, but you wanted the Court to know about that. Are there any others? All right.
>
> Despite the fact that I believe you, in confidence, could render a fair and impartial verdict, since no others have any such matters to report and in keeping with your desire to be open and honest about it and in keeping with our desire that no one should be suspicious of your ability to do what you think you can do, we will allow you to step down rather than the 13th juror and place him in your seat.

The court dismissed Juror Brown. It asked counsel to offer any objections, but none were made.

Defendant argues that *State v. Drake*, 31 N.C. App. 187, 229 S.E.2d 51 (1976), requires the conclusion that the trial court abused its discretion. *Drake*, he contends, gives the court an affirmative duty to hold a hearing to investigate juror misconduct and to allow a defendant to participate in that hearing.

Drake does not prescribe this as an absolute rule, however. The Court of Appeals there stated that "where instructions fail to prevent alleged [juror] misconduct, an investigation *may* be required." *Drake*, 31 N.C. App. at 191, 229 S.E.2d at 54 (emphasis added). An examination is "generally" required only "where some prejudicial content is reported." *Id.* at 192, 229 S.E.2d at 54.

Nothing in the record compels the conclusion that juror Brown's statements were prejudicial to defendant. The court asked the jurors if any had overheard anything about the case. None responded. Under these circumstances, the trial court clearly acted within its discretion in not excusing any jurors other than Brown. "The

determination and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991).

As to juror Brown, the court dismissed him. Given that he had overheard something about the case that conceivably could have affected his impartiality, this action was favorable to defendant. Defendant has not argued, and the record does not reflect, any possible prejudice to defendant from the alternate juror's sitting in the place of juror Brown.

Finally, the defense witness about whom juror Brown spoke, Reginald Williams, was a minor witness. His testimony served only to corroborate that Jennie Harrington was the only person who drove the victim home. Through this testimony, defendant tried to impeach the victim's credibility, in that her sworn statement indicated that both Jennie Harrington and defendant had driven her home. Considering the State's evidence as a whole, juror Brown's calling this evidence into question could not have prejudiced defendant.

Had prejudicial conduct occurred, "*any* appropriate action by the trial court" would have been warranted. *Drake*, 31 N.C. App. at 191, 229 S.E.2d at 54 (emphasis added). The trial court may remove a sitting juror and seat an alternative juror "before final submission of the case to the jury" if a juror "becomes incapacitated or disqualified, or is discharged for any other reason." N.C.G.S. § 15A-1215(a) (1988). The trial court removed juror Brown "in keeping with [its] desire that no one should be suspicious" of his capacity to render a fair verdict. It acted well within its discretion under N.C.G.S. § 15A-1215(a) in doing so.

[2] Defendant next contends the trial court erred in talking to juror Brown about the case out of defendant's presence. The trial court's reference to "something you told me earlier" in its remarks to juror Brown indicates that an *ex parte* conversation between the court and juror Brown did occur. He argues that the conversation deprived him of his right to be present at every critical stage of his trial, citing Article I, sections 18, 23 and 24 of the North Carolina Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. In a capital case, the defendant's "right to be present at every stage of his trial is unwaivable." *State v. Pittman*, 332 N.C. 244, 253, 420 S.E.2d 437, 442 (1992). In a non-capital case, such as this one, the right is "a personal

right which [can] be waived, either expressly, or by [the defendant's] failure to assert it." *Id.*

While we have disapproved the practice of a trial court conducting private conversations with jurors, *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978), the conversation in question could not have prejudiced defendant. The record establishes that the substance of the conversation related to juror Brown's having "overheard something about the case." The court excused juror Brown to insure that "no one should be suspicious" about his ability to be fair and impartial. Because this juror was removed from the case prior to deliberations, and no juror indicated that he or she had overheard anything about the case, the conversation between the court and juror Brown could not have influenced the verdict.

[3] Defendant next contends that the trial court erred in giving the following instruction to the jury prior to the presentation of evidence:

> Do not make up your mind as to what your verdict will be in the case.
>
> Now, you will be hearing all of the State's evidence, or at least all of the direct evidence, before you hear any evidence of the defendant, if the defendant chooses to offer evidence, and it is unusual for us to hear so much evidence on one side and the inclination is to come to some tentative conclusions, but I charge it is your duty to keep an open mind until you have heard all of the evidence, that is, from both sides, and then you should keep an open mind until you have discussed the case in the jury room.
>
> So please do not make up your mind as to how you will vote in the case, and try as best you can to refrain from drawing any conclusions about guilt or innocence in the case.

He argues that by using the word "unusual" the court intimated that the amount of evidence to be presented by the State was out of the ordinary, and that by saying there was "so much evidence on one side" the court commented on the weight of the evidence. He asserts that the comments constituted an expression of opinion by the trial court in violation of N.C.G.S. §§ 15A-1222 and 15A-1232.

N.C.G.S. § 15A-1236(a)(3) provides:

> The judge at appropriate times must admonish the jurors that it is their duty:
>
> . . . .
>
> (3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations[.]

The court here was simply admonishing the jurors, pursuant to this provision, to maintain an open mind until they conducted their deliberations. To this end, it instructed them to resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side. It informed the jurors that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. The instruction, in context, contains no expression of opinion about any question to be decided by the jury or about the weight of the evidence. The instruction was proper and indeed was favorable to defendant, as it attempted to neutralize the jury until defendant could present his side of the case.

[4] Defendant finally contends that the trial court erred in giving the following instruction to the jury immediately prior to its deliberations:

> Now, your verdict must be unanimous. You may not take a vote by a majority, but all 12 of the retiring jurors must agree as to what your verdict will be in each of these cases. That being the requirement of the law it is important that you not go to the jury room and immediately take a vote or immediately stake yourself out on a strong position. Your duty is to discuss the evidence at some length until you feel there is some general consensus about the facts in the case. And then you should discuss the law relating to the charge you may have under consideration until you feel there is some general consensus about the law. And when you feel you are near a unanimous decision, you may take a vote, but even then, if your vote is not unanimous it is your duty to continue to reason together in an effort to reach a unanimous verdict, if that can be done without violating anyone's conscientious convictions. No one is required to compromise his or her convictions about the case for the purpose of reaching a unanimous verdict. As a matter of fact, that would be a violation of your oath.

> But since it is required that the vote be unanimous, I suggest to you that if you immediately take a vote or immediately state a strong position, the[n] it becomes more difficult for you to keep an open mind and to listen to some general discussion or persuasive discussion about the case.

He argues that the instruction violates both N.C.G.S. § 15A-1235 and the jurors' free speech rights under the First Amendment to the United States Constitution.

N.C.G.S. § 15A-1235 provides, in pertinent part:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

The instruction in question falls squarely within the provisions of this statute. It did not, as defendant in effect contends, invade the province of the jury by prescribing the procedure for its deliberations. It simply instructed the jurors, in accordance with the statute, that they must be unanimous in order to return a verdict, that they have a duty to consult and deliberate, that they should try to reach agreement but only if this can be accomplished without violating any member's convictions, and that they should keep an open mind in the process. The instruction fully accorded with the

law; it neither invaded the province of the jury nor violated the jurors' First Amendment rights. Each juror had complete freedom under the instruction, within the confines of the jury room, to express fully and openly his or her views on the case. There is no merit to this argument.

We conclude that defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. APRIL LEIGH BARBER

No. 24A93

(Filed 5 November 1993)

Evidence and Witnesses § 1252 (NCI4th)— in-custody interrogation —ambiguous invocation of right to counsel—clarification by questions—admissibility of incriminating statements

Defendant did not invoke her right to counsel when, in response to warnings as to her *Miranda* and juvenile rights, she asked the interrogating officer whether she needed a lawyer where the officer responded that he could not tell her whether she needed a lawyer but was merely advising her of her rights to a lawyer; the officer asked whether defendant understood each of the rights explained to her and defendant answered affirmatively; defendant answered "Yes" when asked if she wished to answer questions; defendant responded affirmatively when asked whether she wished to answer questions without a lawyer and without her parents, guardian or custodians being present; and defendant then made incriminating statements about the setting of a fire which killed her grandparents. Defendant's inquiry constituted an ambiguous or equivocal invocation of her right to counsel which was clarified by her responses to the narrow questions posed by the officer, and those responses made it clear that defendant was not asking for the assistance of counsel. Therefore, defendant's incriminating statements were admissible in her trial for first-degree murder where the trial court found that the statements

were made freely, voluntarily and understandingly after defendant waived her *Miranda* and juvenile rights.

Am Jur 2d, Criminal Law §§ 732 et seq., 967 et seq.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of life imprisonment entered by Beaty, J., at the 3 August 1992 Criminal Session of Superior Court, Wilkes County, pursuant to a conditional plea of guilty to two counts of first-degree murder. Heard in the Supreme Court 14 September 1993.

Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for the State.

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

FRYE, Justice.

Following Judge Julius A. Rousseau, Jr.'s denial of her motion to suppress all statements made by her, defendant entered a conditional plea of guilty to two counts of murder in the first degree, preserving her right to appeal the denial of her suppression motion pursuant to N.C.G.S. § 15A-979. Judge James A. Beaty, Jr., accepted the plea and sentenced defendant to two consecutive terms of life imprisonment. The remaining charges against her, one count each of first-degree arson and conspiracy to commit murder, were dismissed by the State.

Defendant appealed to this Court, contending that Judge Rousseau (the hearing judge) erred by denying her motion to suppress a statement made by her to a special agent of the State Bureau of Investigation. She contends that she invoked her right to counsel after being advised of her *Miranda* rights by asking the officer whether she needed a lawyer. We conclude that defendant did not invoke her right to counsel and the hearing judge did not err in denying her motion to suppress.

A fire on the night of 4 September 1991 in a home located on Fireplanes Road in Wilkes County resulted in the deaths of Lillie and Aaron Barber. The house was a one-story wood frame

brick veneer residence with a full basement. Defendant, who was fifteen years old at the time, was the adopted daughter of the Barbers although she referred to them as her grandparents. Lillie Barber was seventy-seven years old and Aaron was eighty-three. Aaron Barber died of smoke inhalation on the night of the fire and Lillie Barber died one week after the fire as a result of fire-related injuries.

Special Agent T.A. Rasmussen, an arson investigator with the S.B.I., conducted an investigation of the home shortly after the fire. He found burn patterns throughout the house, indicating that a flammable or combustible liquid had been poured on various places within the house. Special Agent Rasmussen testified that certain burned areas revealed the odor of gasoline. Samples were also taken from various points in the house which were examined and showed the presence of gasoline.

Officer Robert Benfield, from the Wilkes County Sheriff's Department, testified that at 11:50 p.m. on 4 September 1991 he was called to investigate the fire. Benfield located defendant at the home of Emily Taylor, Aaron Barber's sister, where defendant had gone after being released from Wilkes Regional Medical Center following the fire. Defendant's natural mother, Sheila Barber, was also present. Defendant gave investigators two statements, the first to Officer Benfield while at the home of Emily Taylor.

In the statement to Officer Benfield, defendant said that on the evening of the fire she was at home watching television and her grandparents were in the bathroom where her grandmother was assisting her grandfather in taking a bath. Defendant saw a spark or flicker near the television and ran out the door to the carport, carrying the cordless telephone with her. Defendant explained that she always carried the telephone with her. Defendant stated that she did not tell her grandparents that the house was on fire. In the carport defendant tried to use the telephone to call 911, but the fire had damaged the phone lines and she was unable to get through. A short time later a truck pulled into a neighbor's driveway. The occupants of the truck, a man and a woman, approached defendant and asked if there was anyone else in the house. Defendant told them that her grandparents were inside. The man directed defendant to go to a neighbor's home and call for help, which she did. When defendant returned to her home, she saw a crowd of people gathered around her grandmother,

Lillie, who had escaped from the house. Defendant approached her grandmother and informed Lillie that she (defendant) was all right. Lillie responded that she did not think that defendant's grandfather Aaron had made it. Defendant returned to the neighbor's house, called her boyfriend and told him about the fire. He told her that he would come over immediately. Defendant could not recall anything else that happened. Benfield testified that defendant's boyfriend was named Clinton Johnson and that he was thirty years old.

Defendant's second statement was given to Special Agent Steve Cabe of the S.B.I. at the Wilkes County Sheriff's Department. In this statement, defendant confessed that she had kicked over a jug of gasoline in the house and the snap-on lid had come off spilling some of the gasoline. Her boyfriend had brought the gasoline to the house on or about 1 September, which was about four days before the fire. After the gasoline had spilled, defendant carried the jug to the hallway and poured gasoline out onto the floor. She lit the gasoline on the carpet by first lighting a newspaper with a cigarette lighter which she then dropped on the carpet. Defendant's grandparents were in the bathroom where Lillie was assisting Aaron in taking a bath at the time. Defendant did not know why she lit the gasoline. She stated that she and her grandparents had argued on the night of the fire but the argument had not been serious. She stated that she wanted her grandparents to be less strict and to give her more space. Defendant stated repeatedly that she did not expect the fire to kill her grandparents, she did not intend for either of them to die, nor did she want them dead; in fact she thought that dealing with the fire might bring her family closer together. Defendant stated that she was sorry that her grandfather had died, but that he was "better off" dead and she thought that her grandmother would be better off if she died also, because she would be lonely without Aaron. Defendant and her boyfriend had talked about the fact that her grandparents would be better off dead, and on several occasions talked about how to get rid of them. They had never decided how to do it, although they had talked about burning the house down. They also talked about shooting them or poisoning them.

Juvenile petitions charging defendant with one count of arson, two counts of first-degree murder, two counts of felonious assault, and two counts of conspiracy were filed in Wilkes County District Court, Juvenile Division, on 5, 9, and 12 September 1991. On 1

October 1991, District Court Judge Edgar B. Gregory allowed the State's motion to transfer the cases to Superior Court. On 11 November 1991, defendant was indicted in Superior Court on two counts of first-degree murder, one count of first-degree arson, and one count of conspiracy to commit murder. A motion by defendant to suppress any and all statements made by her was heard at the 1 June 1992 Criminal Session of Superior Court, Wilkes County, before Judge Julius A. Rousseau, Jr. Defendant's motion was denied by oral order on 5 June 1992 and a written order denying the motion was entered on 12 June 1992.

At the 3 August 1992 Criminal Session of Superior Court, Wilkes County, Judge James A. Beaty, Jr., presiding, defendant pled guilty to two counts of first-degree murder, reserving her right to appeal the denial of her suppression motion. N.C.G.S. § 15A-979(b) (1988). Defendant was sentenced to two consecutive terms of life imprisonment, N.C.G.S. § 14-17 (1992), and the remaining charges against her were dismissed.

On appeal to this Court, defendant makes one argument: Judge Rousseau erred by denying her motion to suppress her statement made to S.B.I. Agent Cabe at the Wilkes County Sheriff's Department. More specifically, defendant contends that law enforcement officers continued to interrogate her after she had invoked her right to counsel, in violation of her constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. Therefore, the confession made by her in response to the interrogation must be deemed involuntary and inadmissible. She further contends that her confession was involuntary in that it was induced by threats and promises in violation of her state and federal due process rights.

Defendant's plea of guilty was conditioned on the admissibility of her confession. Thus, if defendant is correct in her contentions, her plea of guilty must be stricken and the case remanded to superior court for further proceedings. If, on the other hand, her contentions are without merit, her guilty plea, and the sentences entered thereon, must stand. We proceed therefore to a consideration of defendant's contentions supporting her argument that the hearing judge erred by denying her motion to suppress her statement made to Special Agent Cabe.

Prior to ruling on the motion to suppress, Judge Rousseau held an extensive voir dire hearing. Following the hearing, Judge Rousseau found facts as follows:

> That on September the 4th, 1991, at about 11:50 p.m., Detective Benfield of the Wilkes County Sheriff's Department was assigned to investigate a fire in which two people were killed as a result of the fire. Officer Benfield was informed that the defendant was the granddaughter of the two deceased persons, lived in the home with her grandparents and was probably in the house when the fire started; that he first went to Wilkes Regional Hospital and was told that the defendant had already left. Officer Benfield then located the defendant at a residence about two and a half miles from the county courthouse at about 3:30 a.m. on Thursday, September 5, 1991; At that time, Officer Benfield was in street clothes and driving an unmarked car and was accompanied by Deputy Terry Wright, who was in uniform and driving a marked car;
>
> That at the residence, the defendant was on the couch and a lady and the defendant's natural mother were present. Officer Benfield advised the defendant that he wanted to talk to her about the fire to find out what she knew about it. At that time, the defendant was not a suspect, but merely a potential witness. The defendant met with the two officers in the presence of her natural mother, at which time the defendant made a statement about being in the house when the fire started and running out to get help. The officers talked to the defendant for approximately thirty minutes, during which time the defendant did not incriminate herself;
>
> That after taking this statement from the defendant, Officer Benfield went outside the residence and called his supervisor, Lieutenant Walsh, at about 4:45 a.m. Lieutenant Walsh arrived about 5:30 or a quarter of 6:00; that after conferring with Officer Benfield, Lieutenant Walsh told the defendant that he needed to talk to her further concerning the fire and wanted her to go to the Sheriff's Office. He advised her that she was the only one in the house at the time of the fire who was still alive and they needed to find out about the fire; that the defendant stated that she would go to the Sheriff's Office; that Lieutenant Walsh asked the defendant's mother if she wanted to go, but the mother declined the invitation;

that Officer Benfield and the defendant then left while Lieutenant Walsh stayed for a few minutes to talk with the defendant's mother;

That the defendant was not told that she had to go to the Sheriff's Office; that she was not placed in handcuffs, but rode on the right front seat for the approximately two and a half miles to the Sheriff's Office; that Officer Benfield and the defendant arrived at the Sheriff's Office shortly after 6:00 a.m.;

That the Sheriff's Office is located approximately one-third block from the jail, is a one-story frame building used at one time as a barber shop and now converted into a Sheriff's Office and Detective Office; that the defendant was never told that she was under arrest, but only that she was needed as a witness; that upon entering the office, there is a reception area with a couch and various offices located throughout the building. Upon entering the Sheriff's Office, Officer Benfield offered the defendant a drink and showed her the restroom also; that the defendant sat on the couch and waited for Lieutenant Walsh to come; that during this time, Officer Benfield asked the defendant if she wanted breakfast and said he could get it from the jail since it was about breakfast time; that the defendant said she was not hungry and did not want it. Officer Benfield did not again talk to the defendant until about 11:30 a.m., and at that time offered her lunch; that Office Benfield's wife then came in carrying a pizza and offered a pizza to the defendant, which the defendant refused. Officer Benfield did not again talk to the defendant until 3:30 that afternoon.

Lieutenant Walsh arrived in civilian clothes at the Sheriff's Office at about 6:30 or 6:45 and saw the defendant shortly after 7:00 a.m. sitting on the couch in the Detectives' Office. At or about that time, Special Agent Steve Cabe, with the SBI, also arrived; that he, too, was in civilian clothes, but dressed in coat and tie; that Lieutenant Walsh and Agent Cabe talked for a few minutes outside the Sheriff's Office discussing the situation and, particularly, as to how to talk to the defendant inasmuch as she was fifteen years of age and some months; that they talked about how to be careful with her due to her age;

That about 7:20 a.m., Agent Cabe and Lieutenant Walsh then talked with the defendant; they told her she was not under arrest; that she was only a witness; that all they wanted to do was to talk with her and not to be afraid.

Lieutenant Walsh read the defendant the Miranda rights at about 7:20 a.m. on September the 5th, 1991, in the Detectives' Office in the Wilkes County Sheriff [sic] Department; that he advised the defendant that she had a right to remain silent; that anything she said could be used against her; that she had a right to have a parent, guardian or custodian present during questioning; that she has [sic] a right to talk to a lawyer for advice before question [sic] and to have a lawyer with her during questioning; that if she could not afford a lawyer, that a lawyer would be appointed for her; that if she consented to answer questions now without a lawyer, parent, guardian being present, she still had a right to stop at any time.

That the defendant then asked the officer if she needed a lawyer, and the officer said he could not advise her of whether she needed a lawyer or not, but that he was merely advising her of her rights to a lawyer; that the officer then asked her, "Do you understand each of these rights I've explained to you?" That the defendant answered, "Yes." "Having these rights in mind, do you wish to answer questions?" The defendant answered, "Yes." "Do you wish to answer questions without a lawyer present?" "Yes." "Do you now wish to answer questions without your parents, guardian or custodians present?" And, the defendant answered, "Yes."

That the defendant admits answering each of the questions "Yes" but does not remember the officer asking [sic] her, "You have a right to have a parent, custodian or guardian present."

That it took approximately eight minutes to advise the defendant of her rights; that Agent Cabe and Lieutenant Walsh then proceeded to talk to the defendant, and did talk to her from about 7:30 to 12:20; that during this period of time the officers were in the defendant's presence, at the most three hours; that on one occasion, SBI Agent Rasmussen came in and inquired about some aspect of the fire, he being an arson expert, and that he advised her that if she didn't tell the truth, he could find it out; that on one of the occasions while

the officers were out of the room, the defendant drew a picture of Snoopy; that while she was there in the officers' presence, the defendant was very poised and mature acting; that she was not excited; that there were no tears; she showed no emotion; that she was courteous and polite and soft spoken, but did appear sleepy.

That the defendant advised the officers that she was in the tenth grade, and that the school personnel had suggested that she might skip the eleventh grade and go to the twelfth grade; that she wanted to be an artist.

At no time did Lieutenant Walsh or Agent Cabe tell her that if she didn't tell the truth that they would call in someone who could tell whether she was telling the truth or what the truth was;

That during the entire interview, the defendant did not appear confused; that she never requested any food or water, even though food and drink were offered to her four or five different times, and each time the defendant refused it; that at no time did the defendant complain; she appeared to understand the questions; that her answers were responsive to the questions; that she never asked for any attorney; that no promises were made, and that she was never threatened; that the defendant appeared to show no emotion and did not appear to be nervous;

That the Court, having observed the defendant testify from the witness stand, is of the belief that the defendant is mature for her age; that she was articulate, and appeared to be well educated and above average intelligence.

Defendant does not challenge the hearing judge's findings of fact. Thus we accept these findings of fact as the basis for decision in this case and move to the question of whether the findings of fact support the conclusions of law and whether the conclusions support the order entered by the hearing judge. Judge Rousseau stated his conclusions as follows:

Based on the foregoing, the Court concludes when the officers went to the residence at about 3:30 a.m. on September the 5th, 1991, that the defendant had been listed as a witness, and the officers had every right to talk to her as a witness to find out what, if anything, she knew about the facts, and

that any statement she gave to the officer at the time was freely, voluntarily and understandingly made in the presence of her mother.

The Court further concludes that the defendant freely, voluntarily and willingly consented to go to the Sheriff's Office in Wilkesboro, and at that time she was not under arrest; she was not a suspect, but only that the officers were trying to obtain more information as to the cause of the fire, and what the only eyewitness might have known about it.

The Court further concludes that once the defendant arrived at the Sheriff's Office, she was still not in custody; was not under arrest, and freely, voluntarily and understandingly made a statement to the officers.

The Court further concludes that even if the defendant was in custody after arriving at the Sheriff's Office and staying there for some period of time, if that's deemed to be custody, then the defendant was advised of her juvenile rights; that she voluntarily acknowledged having received each of those rights; and voluntarily waived each of those rights, and that the statement she gave thereafter to the officers was freely, voluntarily and understandingly given.

While the trial court's findings of fact are binding on this Court if supported by the evidence, the conclusions are questions of law which are fully reviewable by this Court on appeal. *See State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). Thus, we are not bound by the trial court's conclusion that defendant was not in custody at the time she made the statement in question. Rather, for purposes of this appeal, we assume, as defendant contends in her brief, that she was in custody and therefore entitled to the 5th and 14th Amendment protections of *Miranda* and *Edwards*.

In the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court "established a number of prophylactic rights designed to counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v. Wisconsin*, --- U.S. ---, 115 L. Ed. 2d 158, 167 (1991). The Court in *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981), added a second layer of protection by holding that once an individual invokes his right to counsel all custodial

interrogation must cease until an attorney is present or the individual himself initiates further communication with the police. *See State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992).

Therefore, the crucial question in this case is whether defendant invoked her right to counsel in response to the *Miranda* and juvenile warnings. If she invoked her right to counsel after being given the *Miranda* warnings, then any statement made by her in response to custodial interrogation initiated by the officers in the absence of counsel would be inadmissible. *See Smith v. Illinois*, 469 U.S. 91, 83 L. Ed. 2d 488 (1984).

In discussing what constitutes an invocation of one's right to counsel, we stated in *State v. Torres*:

> There are no "magic words" which must be uttered in order to invoke one's right to counsel. The crucial determination is whether the person has indicated "in any manner" a desire to have the help of an attorney during custodial interrogation. To require precise and exact language to invoke one's right to counsel would undermine *Miranda* by working to the disadvantage of those who arguably need its protection the most: the uneducated and those unfamiliar with the criminal justice system. *See Randall*, 1 Cal. 3d at 955, 464 P.2d at 118, 83 Cal. Rptr. at 662 [1970]. In deciding whether a person has invoked her right to counsel, therefore, a court must look not only at the words spoken, but the context in which they are spoken as well.
>
> . . . .
>
> We recognize that some courts have found, on the facts of a particular case, a question such as "Do you think I need an attorney" to be equivocal or ambiguous. *E.g.*, *Ruffin*, 524 A.2d at 700; *Russell v. Texas*, 727 S.W.2d 573, 575-76 (Tex. Crim. App.), *cert. denied*, 484 U.S. 856, 98 L. Ed. 2d 119 (1987). The Supreme Court has expressly left unresolved the question of what is the appropriate response to an ambiguous invocation of counsel. *Barrett*, 479 U.S. at 529 n.3, 93 L. Ed. 2d at 928 n.3; *Smith v. Illinois*, 469 U.S. 91, 96-97 & n.3, 83 L. Ed. 2d 488, 494 & n.3 (1984). The majority rule, however, appears to be that, *when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent. E.g., Crawford*

> *v. State*, 580 A.2d 571, 576-77 (Del. 1990); *Towne v. Dugger*, 899 F.2d 1104, 1107, *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 546 (1990).

State v. Torres, 330 N.C. at 528-29, 412 S.E.2d at 26-27 (emphasis added).

In *Torres* we examined the facts and concluded that defendant invoked her right to counsel when she inquired of the sheriff's officials whether she needed an attorney. In examining the facts in the instant case, however, we reach the opposite conclusion.

In *Torres*, defendant, while in police custody, was told that she would be interrogated by a deputy sheriff and an S.B.I. agent.

> The trial judge found that at some point in the evening, defendant "made inquiry about an attorney . . . [and] was advised that she did not need one at that time." It is not clear from this finding of fact exactly when this inquiry was made; however, witnesses testified that defendant actually made two such inquiries: one to Deputy Sykes, another to Sheriff Sheppard. Based on these facts, we believe defendant indicated a desire, on at least one occasion, to have the help of an attorney during police interrogation.

Torres, 330 N.C. at 528-29, 412 S.E.2d at 27. In *Torres*, we went on to cite several cases where similar inquiries were treated as an invocation of the right to counsel. After noting the majority rule that when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent, we applied the rule to the facts of that case as follows:

> Under this rule, therefore, even if defendant's invocation in this case is termed ambiguous, the result remains the same. The officers clearly did not seek to clarify defendant's intent; instead, they dissuaded defendant from exercising her right to have an attorney present during interrogation. Under these circumstances, we must resolve any ambiguity in favor of the individual. *See Towne*, 899 F.2d at 1110 ("because [defendant] made an equivocal request for an attorney that was never clarified, and [defendant] did not initiate further interrogation, the confession was obtained in violation of his Fifth Amendment rights.").

> We therefore hold that defendant invoked her right to counsel when she inquired of sheriff's officials whether she needed an attorney.

Id. at 529-30, 412 S.E.2d at 27.

The facts found by the trial court in the instant case contrast sharply with the facts in *Torres*. Here, Judge Rousseau found that after Lieutenant Walsh advised defendant of her rights, including the "right to have a parent, guardian or custodian present during questioning; a right to talk to a lawyer for advice before question[ing] and to have a lawyer with her during questioning; that if she could not afford a lawyer a lawyer would be appointed for her and that if she consented to answer questions now without a lawyer, parent, [or] guardian being present, she still had a right to stop at any time[,]" defendant then asked the officer if she needed a lawyer. The officer's response was that "he could not advise her of whether she needed a lawyer or not, but that he was merely advising her of her rights to a lawyer." The officer then asked defendant, "Do you understand each of these rights I have explained to you?" Defendant answered, "Yes." "Having these rights in mind, do you wish to answer questions?" Defendant answered, "Yes." The officer then asked whether she wished to answer questions without a lawyer present and whether she wished to answer questions without her parents, guardian or custodians present and the answer in both cases was "Yes."

Looking not only at the words spoken, but the context in which they were spoken, we conclude that defendant's inquiry in response to the *Miranda* warnings constituted an ambiguous or equivocal invocation of the right to counsel which was clarified by her responses to the narrow questions posed by the interrogating officer. The responses to those narrow questions made it clear that defendant was not asking for the assistance of an attorney during questioning. Thus we hold that under the facts of this case defendant did not invoke her right to counsel when she asked the officer if she needed a lawyer.

We also hold that the hearing judge's findings of fact support the conclusions of law that "the defendant . . . voluntarily waived [her juvenile and *Miranda*] rights, and that the statement she gave thereafter to the officers was freely, voluntarily and understandingly given." These conclusions support the hearing judge's order that the statement given by defendant to Agent Cabe was admis-

sible in this case. Thus we affirm Judge Rousseau's order denying defendant's motion to suppress her statement and we find no error in the judgments entered by Judge Beaty sentencing defendant pursuant to her guilty plea.

NO ERROR.

CHARLES E. NELSON AND NANCY W. NELSON v. BATTLE FOREST FRIENDS MEETING, AN UNINCORPORATED ASSOCIATION, AND STEVE WOOD

No. 87A93

(Filed 5 November 1993)

Railroads § 13 (NCI4th)— abandoned railroad easement—road right-of-way within easement—easement does not adjoin right-of-way—title to property between railroad and right-of-way

Where the right-of-way for a public road was entirely within an abandoned railroad easement, the abandoned railroad easement did not "adjoin" the public road right-of-way within the meaning of the second sentence of N.C.G.S. § 1-44.2(a) so that the statute does not apply to vest title to a 30-foot strip of land between the center of the railroad tracks and the edge of the public road right-of-way in defendant church as adjacent property owner.

Am Jur 2d, Railroads §§ 82-86.

What constitutes abandonment of a railroad right of way. 95 ALR2d 468.

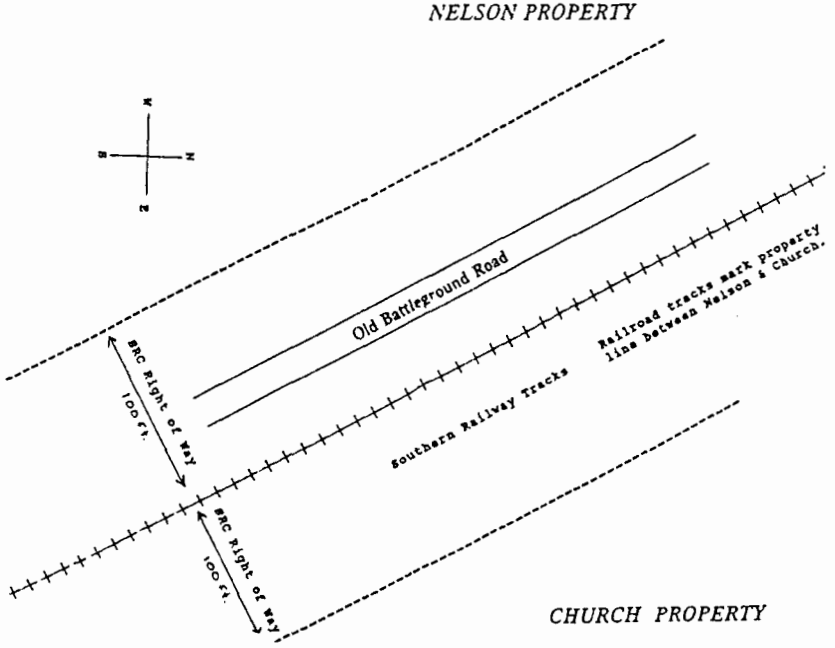
Justice MEYER dissenting.

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

On appeal by the defendants pursuant to N.C.G.S. § 7A-30(2) and on discretionary review pursuant to N.C.G.S. § 7A-31(c) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 641, 425 S.E.2d 4 (1993), reversing a judgment entered by Allen (W. Steven), J., on 24 January 1991 in Superior Court, Guilford County. Heard in the Supreme Court 15 September 1993.

The dispute in this case involves a tract of land in Greensboro. The plaintiffs own a tract which they say extends to the center of what was an easement owned by the Southern Railway. The defendants contend the plaintiffs' tract extends only through the right-of-way of a public road.

The plaintiffs brought this action for trespass and to quiet title to the tract. Each side made a motion for summary judgment. The papers filed in support and in opposition to the motions showed that the following matters are not in dispute. The plaintiffs and defendant Battle Forest Friends Meeting own adjoining tracts of land. The record titles show that the property line of each party runs along the centerline of a track of the Southern Railway. The Southern Railway had an easement for the track that extended one hundred feet on each side from the center of the track onto the property of the parties. Old Battleground Road ran parallel and approximately thirty feet from the track. The right-of-way for the road was entirely within the railway easement. The following diagram depicts the interests of the parties.



Southern Railway removed the tracks in 1981 and abandoned the easement shortly thereafter.

The superior court denied the defendants' motion for summary judgment and allowed the plaintiffs' motion for summary judgment. The Court of Appeals reversed and remanded the case for the determination by the superior court of a constitutional question. The plaintiffs appealed based on a dissent in the Court of Appeals. We allowed discretionary review as to issues other than those raised in the dissent.

Fuller, Becton, Billings & Slifkin, P.A., by Steven B. Epstein and Charles L. Becton, for plaintiff-appellants.

Elrod & Lawing, P.A., by Frederick K. Sharpless and Stephanie T. Farabow, for defendant-appellees.

Michael F. Easley, Attorney General, by James C. Gulick, Special Deputy Attorney General, Amicus Curiae.

WEBB, Justice.

All parties agree that, except for the constitutional question, this case is to be resolved by the interpretation of N.C.G.S. § 1-44.2 which provides in part as follows:

> (a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement *adjoins* a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way. . . .
>
> (b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption

established by this section is rebuttable by showing that a party has good and valid title to the land.

N.C.G.S. § 1-44.2 (Supp. 1992) (emphasis added).

The part of the section crucial to the resolution of this case is the second sentence of subsection (a) which provides that a property owner's line will be along the edge of a public road right-of-way if the public road right-of-way "adjoins" the abandoned railroad easement. The resolution of this case turns on the meaning of the word "adjoin."

The defendants contend the abandoned railroad easement adjoined the public road right-of-way although the right-of-way was entirely within the easement. They say first that the legislative purpose was to avoid ownership of small strips of land that are of no benefit to the owners and to maximize the access of landowners to public roads. The defendants say this legislative purpose will be accomplished if we hold that the abandoned railroad easement adjoined the public road right-of-way. The defendants say that if we hold the easement did not adjoin the right-of-way, it will render the second sentence of the section virtually meaningless because there will be very few cases in which an easement and a right-of-way will be perfectly contiguous.

We hold that the public road right-of-way did not adjoin the abandoned railroad easement and the second sentence of N.C.G.S. § 1-44.2(a) does not apply in this case. In interpreting a statute, it is presumed the General Assembly intended the words it used to have the meaning they have in ordinary speech. *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). When the plain meaning of a statute is unambiguous, a court should go no further in interpreting the statute. *State v. Camp*, 286 N.C. 148, 151-152, 209 S.E.2d 754, 756 (1974).

We believe the definition of "adjoin," as found in several dictionaries, shows that the public road right-of-way did not adjoin the railroad easement. The following are illustrations:

adjoin . . . 1. to be close to or in contact with;

The Random House Dictionary of the English Language 25 (2d ed. 1987).

adjoin . . . to join on; to lie next to . . . .

Chambers English Dictionary 16 (1988).

> **adjoin** . . . 4. To join; to come into union or contact.

The Oxford English Dictionary 156 (2d ed. 1989).

> **Adjoining.** The word in its etymological sense means touching or contiguous, as distinguished from lying near to or adjacent. To be in contact with; to abut upon[.]

Deluxe Black's Law Dictionary 41 (6th ed. 1990).

Black's Law Dictionary defines contiguous as:

> In close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by[.]

Deluxe Black's Law Dictionary 320 (6th ed. 1990).

We believe that the definition of "adjoin" does not include a tract which, as in this case, is included within the bounds of another tract. To adjoin, a tract must be "close to or in contact," "next to" or "touching." None of the definitions include a tract that is encompassed within another tract. We hold that the plain meaning of the statute in this case excludes the plaintiffs' land from coverage by the statute.

If we were to hold that the public road right-of-way adjoined the railroad easement we would face the question of whether N.C.G.S. § 1-44.2, which divests persons of their property, is unconstitutional. *See McDonald's Corp. v. Dwyer*, 111 N.C. App. 127, 432 S.E.2d 165 (1993). In interpreting a statute if "one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977). The defendants say that this maxim does not apply in this case because the constitutional question will not be avoided but merely postponed until a case arises in which a public road right-of-way adjoins an abandoned railroad easement. We shall avoid the constitutional question in this case and decide it when it is properly before us.

For the reasons stated in this opinion, we reverse the Court of Appeals.

REVERSED.

Justice MEYER dissenting.

I dissent.

The presumption set forth in the pertinent statute is that

> [w]henever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. *In cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.*

N.C.G.S. § 1-44.2(a), para. 1 (Supp. 1992) (emphasis added).

The application of the presumption in the case at bar is dependent upon the meaning to be given the word "adjoin." I conclude that Judge Greene, who wrote for the majority on the panel below, correctly interpreted N.C.G.S. § 1-44.2(a) as follows:

> In applying statutes we must presume that the legislature intended that the words used in statutes be given the meaning they have in ordinary speech. *LaFayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). Courts use the dictionary to determine the ordinary meaning of words. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Objects "adjoin" when they are "close to or in contact with one another." *Webster's New Collegiate Dictionary* 56 (9th ed. 1984). Therefore, the word "adjoin," as used in the second sentence of N.C.G.S. § 1-44.2(a), applies whenever the abandoned easement touches a public road right-of-way, whether within the abandoned easement or at its boundary.
>
> Because the OB Road right-of-way is located within the abandoned easement, they adjoin, and the exception in the second sentence of N.C.G.S. § 1-44.2(a) applies. Title to the disputed strip therefore is vested in the Church as adjacent property owner. Accordingly, summary judgment in favor of Nelson was error.

Nelson v. Battle Forest Friends Meeting, 108 N.C. App. 641, 646, 425 S.E.2d 4, 7 (1993).

The dictionary definitions cited by the majority demonstrate the various shades of meaning that the word embraces, and reasonable minds could read them to support a different result. I believe that the Court of Appeals' interpretation of the word "adjoin" carries out the intention of the legislature.

As this Court has stated many times, the cardinal principle of statutory construction is that the intent of the legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). "Where possible, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the Legislature intended to prevent." *In re Hardy*, 294 N.C. 90, 96, 240 S.E.2d 367, 372 (1978). It is my view that the "evil" that the sentence of the statute emphasized above is designed to prevent is the loss of access to a public road enjoyed by owners of land lying adjacent to the railroad easement prior to its abandonment. The legislature was no doubt aware that, over the course of the many miles of railways in this state, many landowners can gain access to a public roadway only by crossing over a railroad easement. This circumstance is true whether the roadway traces the edge of the railway easement, is partially contained within it, or is completely contained within it. Under the Court of Appeals' interpretation of the statute, a landowner in such a position will, upon abandonment of the easement, be presumed to own the land over which it is necessary for him to cross to gain access to the roadway.

It is my view that the majority's interpretation of the word "adjoin" severely and unnecessarily limits the purpose of the presumption and is contrary to the intent of the legislature. "A construction which will defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *In re Hardy*, 240 N.C. at 96, 240 S.E.2d at 372. I do not believe that the construction adopted by the Court of Appeals does violence to the language of the statute, and I would hold that the second sentence of the statute applies in this case.

The Court of Appeals' majority remanded this case to the trial court for consideration of the question of the constitutionality of the statute in question. The majority of this Court, however,

declines to interpret the statute as did the Court of Appeals so as to avoid the constitutional question that such interpretation presents. It is true that "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (quoted by the majority). It is nonetheless also true that "[i]n matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Electric Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In addition, the Court is " 'not at liberty to give a statute a construction at variance with [the legislature's] intent, even though such construction appears to us to make the statute more desirable and free it from constitutional difficulties.' " *Delconte v. North Carolina*, 313 N.C. 384, 402, 329 S.E.2d 636, 648 (1985) (alteration in original) (quoting *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978)).

I believe that this Court's interpretation of the statute circumvents the intent of the legislature and that such interpretation should not be chosen for the purpose of avoiding a constitutional question. I vote to affirm the Court of Appeals.

Chief Justice Exum and Justice Whichard join in this dissenting opinion.

PEGGY L. HILL v. HENRY S. HILL

No. 100A92

(Filed 5 November 1993)

Divorce and Separation § 288 (NCI4th)— modification of alimony— effectiveness as of date motion filed

A trial court has the discretion to modify an alimony award for changed circumstances as of the date the motion to modify was filed. Therefore, the trial court's order increasing plaintiff's alimony award effective from the date the motion to modify was first noticed for hearing was not a retroactive modification of alimony.

Am Jur 2d, Divorce and Separation § 699 et seq.

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

Appeal as of right pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 105 N.C. App. 334, 413 S.E.2d 570 (1992), which affirmed in part and reversed in part an order entered by Harris, J., on 24 July 1990 in District Court, Mecklenburg County. Heard in the Supreme Court on 7 October 1992.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Katherine Line Thompson, for plaintiff-appellant.

Lamb Law Offices, P.A., by William E. Lamb, Jr. and Colin P. McWhirter, for defendant-appellee.

EXUM, Chief Justice.

This appeal involves modification of an award of alimony. The trial court found, and the Court of Appeals agreed, that plaintiff had shown "substantial and material changes of condition[s] and circumstance[s]" warranting an increase in alimony payments. The issue is whether the trial court was authorized to increase plaintiff's alimony award effective February 1988 by an order entered 24 July 1990. The Court of Appeals held the trial court's order was an unauthorized retroactive modification of alimony. We disagree and direct the trial court's order be reinstated.

Plaintiff and defendant were married 14 September 1951 and separated 1 May 1983. On 4 August 1983 the parties entered into a court approved order in South Carolina settling the issues of alimony, child custody and equitable distribution. Pursuant to this order, defendant was obligated to pay plaintiff alimony payments of $900 per month. On 20 May 1985, defendant was granted an absolute divorce in North Carolina.

Plaintiff registered the South Carolina support order in Mecklenburg County on 18 December 1985 pursuant to Chapter 52A of the North Carolina General Statutes, the Uniform Reciprocal Enforcement of Support Act ("URESA"). Once registered under URESA, an alimony order of a foreign court loses its foreign nature and becomes an order of the North Carolina court for all purposes. *Allsup v. Allsup*, 323 N.C. 603, 374 S.E.2d 237 (1988). As such

"[it] may be enforced [in this state] in the same manner as a support order issued by a court of this state." *Id.* at 606, 374 S.E.2d at 239; N.C.G.S. § 52A-30(a) (1992). Modification of the South Carolina order awarding alimony is therefore governed by our statute on this subject, which provides:

> An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

N.C.G.S. § 50-16.9(a) (1987).

Pursuant to this statute, plaintiff filed on 21 December 1987 a motion in the cause seeking a judgment for alimony arrearages, an increase in the amount of alimony and further modification in the original support order. The motion was set for hearing on 9 February 1988; but, due to no fault of either party, the motion was not heard until 28 September 1988. By order entered 24 July 1990, in which extensive findings and conclusions were made, the trial court, among other things, increased plaintiff's alimony award from $900 to $1,500 per month. The trial court found that "[p]ursuant to local rules of practice (Rule 11) of the 26th Judicial District, an order of support entered after a continuance from an original hearing date may be made retroactive to the date when the case was to have been heard."[1] After ordering an increase in alimony from $900 to $1,500 per month effective February 1988 and thereafter monthly, the trial further ordered as follows:

> The Court is informed as of June 29, 1990 that Defendant has continued to make alimony payments at the rate of $900.00 per month from February 1988 through the month of June 1990. An arrearage has thus accumulated for a period of 29 months at a rate of $600.00 per month, creating a principal sum due of $17,400.00 in alimony arrearages. Judgment is rendered in favor of Plaintiff against Defendant in that amount plus interest due on each payment ($600.00 per month) from the due date (the first day of each month commencing with

1. Defendant argues that local rule 11 does not authorize the trial court's ruling because it expressly applies only to "alimony *pendente lite*." Our decision, however, is not based on local rule 11. It is based on the common law which applies generally to modifications of alimony awards. Whether local rule 11 provides authorization or not is immaterial to our decision.

> the month of February 1988). The Court further directs that this arrearage of $17,400.00 plus accrued interest on each payment shall be liquidated in full by Defendant on or before December 1, 1990.

The Court of Appeals unanimously affirmed the trial court's order insofar as it increased the alimony award. A majority of the Court of Appeals concluded, however, that the trial court was without authority to make the increase effective February 1988 and reversed only this aspect of the trial court's order. Judge Cozort, dissenting, disagreed with this conclusion. He wrote, "I dissent from that portion of the majority opinion which holds that the trial court erred in making the alimony increase retroactive with interest from the date when the case was first scheduled to be heard. I concur with the remainder of the majority opinion."

Defendant appeals on the basis of Judge Cozort's dissent. The question before us, then, is whether the Court of Appeals majority erred in reversing that aspect of the trial court's order making the increase in alimony effective February 1988 with interest.[2] We hold that it did.

Defendant challenges the trial court's authority to order the alimony increase effective February 1988 on the ground that the order constituted an unauthorized retroactive modification of alimony. He urges us to affirm the Court of Appeals.

We do not agree. We need not consider whether this state's law authorizes retroactive modifications of alimony because we conclude the trial court's order modifying alimony from the date the matter was first noticed for hearing is not a retroactive modification. While this issue has not been addressed previously by this Court, we are persuaded by the rule which prevails in other jurisdictions which states:

> Orders which modify alimony or support payments effective as of the date of the petition or subsequent thereto but prior to the date of the order of modification are not subject to

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2. Defendant makes no separate argument and refers us to no authority directed specifically to the power of the trial court to order that interest be paid on the monthly increases in alimony from the date these increases became due. Defendant's argument is simply that because the trial court had no authority to make the increases effective before the date of its order, it likewise had no authority to assess interest which accrued on the increases.

> the criticism that they have retroactive effect which destroys vested rights. This is true because the modification and the whole proceeding in which it is made are referable to the date of the filing of the petition and any change effective as of that date cannot be said to be retroactive.

McArthur v. McArthur, 106 So. 2d 73, 76 (Fla. 1958). *Accord Holt v. Holt*, 633 S.W.2d 171 (Mo. App. 1982); *McLeod v. Sandy Island Corp.*, 260 S.C. 209, 195 S.E.2d 178 (1973); *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962); *Harris v. Harris*, 259 N.Y. 334, 182 N.E. 7 (1932).

In *Harris v. Harris*, the Court of Appeals of New York explained the rationale behind this precept:

> [The purpose for the hearing on plaintiff's motion is] to establish the facts upon which the court could act with caution and with justice. So far as the power of the court is concerned, those facts are deemed to have been established as of the date when the motion was made returnable . . . and the order could properly take effect as of that date. Were this not so, a defendant, by repeated adjournments for one excuse or another, might delay [the plaintiff] in procuring . . . the relief and help which [the plaintiff] should have, owing to changed conditions and circumstances.

Harris, 259 N.Y. at 336-37, 182 N.E. at 8. For this reason, "[a] majority of the courts of other states which have considered the question have held a trial court may make modifications effective as of the date the petition is filed." *Kruse v. Kruse*, 464 N.E.2d 934, 938 (Ind. App. 1984) ("To grant modification of support only from the date of the court's order detracts from the purposes of the changed circumstances and serves to encourage and benefit dilatory tactics"). *Accord Trezevant v. Trezevant*, 403 A.2d 1134 (D.C. App. 1979); *Movius v. Movius*, 163 Mont. 463, 517 P.2d 884 (1974); *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202; 52 A.L.R. 3d 156 (1973). Further support for this position is found in the Uniform Marriage and Divorce Act, which provides:

> [T]he provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. . . .

Marriage and Divorce Act § 316, 9A U.L.A. 183 (1979).

Because a trial court has the discretion to modify an alimony award as of the date the petition to modify is filed, "[i]t follows, then, a trial court has discretion to make the modification effective as of any ensuing date after a petition to modify is filed." *Kruse*, 464 N.E.2d at 939. Here the trial court ordered the alimony increase effective February 1988, the month during which the initial hearing was scheduled. Because this date was subsequent to the 21 December 1987 filing of plaintiff's motion, the trial court's order was not a retroactive modification.

Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963), relied on by defendant, does not control the issue presented. *Fuchs* involved the modification of a child support order. The motion for modification was filed 11 June 1963. The trial court ordered an increase in the amount of child support effective February 1963, five months before the motion was filed. This Court held that "the order making the increased allowance retroactive to and including February 1963, without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity." 260 N.C. at 641, 133 S.E.2d at 492. *Fuchs* thus dealt with a true retroactive modification, i.e., a modification ordered to take place before the motion for modification was filed. Here, as we have shown, the modification was not retroactive because it was made to take effect on a date subsequent to the date the motion for modification was made.

For the foregoing reasons, the decision of the Court of Appeals reversing in part the trial court's order is reversed and the trial court's order is in all respects reinstated.

REVERSED.

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

STATE OF NORTH CAROLINA v. TERRY DALE ROBINSON

No. 211PA93

(Filed 5 November 1993)

Constitutional Law § 166 (NCI4th); Homicide § 5 (NCI4th)— year and a day rule—abrogation between crime and death—depriving defendant of rule—ex post facto violation

Depriving defendant of the defense of the "year and a day rule" based on the prospective abrogation of that rule by judicial action in *State v. Vance*, 328 N.C. 613 (1991), violates the prohibition against *ex post facto* laws where the murderous acts occurred prior to the abrogation and the victim's death occurred after the abrogation but more than a year and a day after the murderous acts. If defendant is prosecuted for murder based on abrogation of the "year and a day" rule subsequent to defendant's assault on the victim but prior to the time the victim died, he is deprived of a defense that was allowed by the law in effect at the time of his murderous acts, and consequently his conviction could be obtained on less evidence than was required of the State at the time of those acts. U.S. Const. art. I, § 10; N.C. Const. art. I, § 16.

Am Jur 2d, Constitutional Law § 634 et seq.; Homicide § 14.

Homicide as affected by lapse of time between injury and death. 60 ALR3d 1323.

Supreme Court's views as to what constitutes an ex post facto law prohibited by Federal Constitution. 53 L. Ed. 2d 1146.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision by a unanimous panel of the Court of Appeals, 110 N.C. App. 284, 492 S.E.2d 357 (1993), vacating an order entered 31 October 1991 by McHugh, J., in Superior Court, Guilford County, which dismissed the bill of indictment. Heard in the Supreme Court 11 October 1993.

Michael F. Easley, Attorney General, by Linda M. Fox, Assistant Attorney General, for the State.

John Bryson for defendant-appellant.

WHICHARD, Justice.

On 18 October 1988 defendant assaulted his estranged wife, Gina Robinson. On 5 April 1989 defendant was convicted of assault with a deadly weapon inflicting serious injury with intent to kill as a result of this incident. He was sentenced to sixteen years imprisonment. Mrs. Robinson became comatose on the date of the assault and remained so for over two and a half years until her death on 30 May 1991. Prior to her death, but subsequent to the assault, we abolished the common law "year and a day" rule by our decision in *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991). The opinion was filed on 2 May 1991; the final mandate issued on 22 May 1991.

Defendant was indicted for first-degree murder on 9 September 1991 based on the death of his wife from this assault. On 29 October 1991 defendant moved to dismiss the indictment based on the indictment's allegations showing that the victim died more than a year and a day after the assault. The trial court allowed the motion. The Court of Appeals reversed. *State v. Robinson*, 110 N.C. App. 284, 492 S.E.2d 357 (1993). On 1 July 1993 this Court granted defendant's petition for discretionary review.

The sole issue is whether depriving defendant of the defense of the "year and a day" rule based on our prospective abrogation of that rule in *Vance* violates the prohibition against *ex post facto* laws where the murderous acts occurred prior to the abrogation and the victim's death occurred after the abrogation but more than a year and a day after the murderous acts. We hold that it does and accordingly reverse the decision of the Court of Appeals.

The United States and the North Carolina Constitutions prohibit the enactment of *ex post facto* laws. U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). The United States Supreme Court first interpreted the *ex post facto* clause in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). Justice Chase there stated that the following laws were *ex post facto*:

> Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. . . . Every law that aggravates a crime, or makes it greater than it was, when committed. . . . Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. . . . Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390, 1 L.Ed. at 650. The focus of the *ex post facto* clauses is legislative action; however, the Supreme Court of the United States held in *Bouie v. City of Columbia*, 378 U.S. 347, 354-55, 12 L. Ed. 2d 894, 900-01 (1964), that the retroactive application of an unforeseeable judicial modification of a criminal statute that deprives a defendant of due process is prohibited by the Fifth and Fourteenth amendments to the United States Constitution. *See also Marks v. United States*, 430 U.S. 188, 191-92, 51 L. Ed. 2d 260, 264-65 (1977) (holding violation of *ex post facto* clause prohibitions based on retroactive application of standards created judicially for interpretation of the statute which was basis of charge); *Vance*, 328 N.C. at 620-21, 403 S.E.2d at 501 (holding that prospective application of abrogation of the "year and a day" rule is compelled by the Fifth and Fourteenth amendments to the United States Constitution). Though the United States Supreme Court concluded that the United States Constitution prohibits the disadvantageous retroactive application of judicial modification of a criminal statute to a defendant, we implicitly recognized in *Vance* that the United States Constitution also would prohibit disadvantageous retroactive application of judicial modification of criminal common law to a defendant.

By judicial action, we abrogated the common law "year and a day" rule in *Vance* and limited that abrogation to prospective application. Prior to *Vance* the "year and a day" rule created a presumption that if the death of the victim occurred more than a year and a day after the assault, defendant's actions were not the cause of death. *State v. Orrell*, 12 N.C. (1 Dev.) 139 (1826). In *Beazell v. Ohio*, 269 U.S. 167, 169-70, 70 L. Ed. 216, 217 (1925), the United States Supreme Court stated that "any statute . . . which deprives one charged with crime of any defense available according to the law at the time when the act was committed,

is prohibited as *ex post facto*." By the same reasoning, a judicial action applied retroactively that would have the same effect also would be banned by the Fifth and Fourteenth amendments of the United States Constitution. If we consider the criminal act to have been committed at the time of the assault, the "year and a day" rule, which was the law in effect on that date, would be a defense available to defendant which would prohibit the State from prosecuting defendant for murder. If we consider the act to have been committed at the time of the victim's death, based on the abrogation of the "year and a day" rule in effect on that date, defendant would not have this defense against the murder charge.

In *Vance* we held that the abrogation of the "year and a day" rule could not be applied to defendant Vance because retroactive application would have allowed his conviction "upon less evidence than would have been required to convict him of that crime at the time the victim died and would [have], for that reason, violate[d] the principles preventing the application of *ex post facto* laws." *Vance*, 328 N.C. at 622, 403 S.E.2d at 501 (citing *Calder*, 3 U.S. (3 Dall.) at 390, 1 L. Ed. at 650). There, both the defendant's murderous acts and his victim's death occurred prior to our abrogation of the "year and a day" rule. We would have reached the same result whether we considered the date of the defendant's murderous acts or the date of the victim's death as critical for purposes of *ex post facto* analysis. Both events occurred prior to our abrogation of the "year and a day" rule, and thus the effective law was the same on both dates.

We faced a similar situation to the case at bar in *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979). Detter poisoned her husband in January, February, and March of 1977. At that time the punishment for murder was life imprisonment. Subsequent to Detter's murderous acts, the death penalty became effective on 1 June 1977. Detter's husband died on 9 June 1977. The death penalty statute was to have prospective effect: "The provisions of this act shall apply to murders committed on or after the effective date of this act." 1977 N.C. Sess. Laws, Ch. 406, s. 8. We held that the death penalty could not be imposed on Detter without violating the prohibition against *ex post facto* laws and stated that "for purposes of the prohibition against *ex post facto* legislation, . . . the date(s) of the murderous acts rather than the date of death is the date the murder was committed." *Detter*, 298 N.C. at 638, 260 S.E.2d at 590. We also noted that choosing either the

date of the murderous act or the date of death as the date the act was committed "should be dictated by the nature of the inquiry." *Id.*

Here the nature of our inquiry must be different from that in *Vance* and similar to that in *Detter* because the law applying to defendant's crime was different on the critical dates of the assault and of the victim's death. It is not dispositive that on the date of the assault defendant could not yet assert the defense because the victim had not yet died beyond the period of the rule; rather, the question is, what was the law on the date of the assault, *i.e.*, what defenses were potentially available to defendant at that time. If defendant is prosecuted for murder based on our abrogation of the "year and a day" rule subsequent to the assault but prior to the time the victim died, he is deprived of a defense that was allowed by the law in effect at the time of his murderous acts, and consequently his conviction could be obtained on less evidence than required of the State at the time of those acts. Such retroactive application of judicial action deprives defendant of due process of law under the United States Constitution and our decision in *Vance*. We thus hold that to apply the abrogation of the "year and a day" rule to defendant in this case would violate *ex post facto* prohibitions.

Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Guilford County, for reinstatement of the order dismissing the bill of indictment.

REVERSED AND REMANDED.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 154, JOHN S. HAIR, JR., RESPONDENT

No. 231A93

(Filed 5 November 1993)

Judges, Justices, and Magistrates § 36 (NCI4th)— censure of district court judge

A district court judge is censured for conduct prejudicial to the administration of justice that brings the judicial office

into disrepute for comments which could reasonably be interpreted as threats of professional reprisal against members of the district attorney's office and an attorney practicing in the district court for what the judge perceived to be disloyalty to and a betrayal of him in his divorce case.

Am Jur 2d, Judges § 19.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, filed with the Court on 8 June 1993, that Judge John S. Hair, Jr., a Judge of the General Court of Justice, District Court Division, Twelfth Judicial District of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Calendared in the Supreme Court 14 October 1993.

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

PER CURIAM.

The Judicial Standards Commission (Commission) notified Judge John S. Hair, Jr., on 7 August 1991 that it had ordered a preliminary investigation to make inquiry concerning alleged misconduct of the respondent. The subject matter of the investigation included allegations that during the course of his divorce proceedings, the respondent had *ex parte* contact with a judge in which he questioned the fairness of the judge's decision and attempted to exert pressure on him, resulting in his withdrawal from respondent's case; threatened members of the staff of the district attorney's office, his ex-wife's attorneys, and other attorneys with professional reprisal for their involvement in his case; and presided over cases in which his attorney or members of his attorney's law firm represented parties while respondent's divorce case was pending.

Special Counsel for the Commission filed a complaint on 18 March 1992. Respondent answered, admitting some of the allegations and denying others. He stated that the personal distress related to his divorce led to his conduct which, in retrospect, he understands could have created the appearance of impropriety. Respondent stated that he did not feel he had willfully engaged in misconduct or conduct prejudicial to the administration of justice and asked that the Commission accept his present understanding as to these matters and issue a decision consistent therewith.

On 27 January 1993, respondent was served with an Amended Notice of Formal Hearing concerning the charges alleged against him. On 21 April 1993, respondent was accorded a plenary hearing before seven members of the Commission on the charges contained in the complaint. The Commission's evidence was presented by William N. Farrell, Jr., Senior Deputy Attorney General, and respondent was represented by his counsel, Joseph B. Cheshire, V, and Alan Schneider. After hearing the evidence, the Commission concluded on the basis of clear and convincing evidence that respondent's conduct constituted, *inter alia*, violations of Canons 1, 2A, and 3A(3) of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The findings upon which the Commission based these conclusions are contained in paragraphs 9 and 10 of its Recommendation. Paragraph 9 is as follows:

> 9. The respondent is the defendant in *Hair v. Hair*, Cumberland County file number 88 CVD 4591, which has been an emotional, volatile, and contentious divorce proceeding since its inception. On the following two occasions the respondent made hostile and unprovoked comments unbecoming to his judicial office which a reasonable person or objective observer could interpret to constitute threats of professional reprisal against the individuals to whom the comments were directed for what the respondent perceived to be these individuals' disloyalty to and betrayal of him in connection with his divorce case.
>
> a. After a hearing in the *Hair* case concluded on May 10, 1990, with a consent judgment, the respondent was walking down the hallway leading to the offices of Twelfth Prosecutorial District Attorney Edward W. Grannis, Jr., when Mr. Grannis called out to the respondent from his office where he was seated along with his administrative assistant Anne Hatch, assistant district attorney John Dickson, and SBI agent Marshall Evans. In response to Mr. Grannis' inquiry about the status of the respondent's hearing, the respondent entered Mr. Grannis' office. Before anyone else present had said a word, the respondent addressed Ms. Hatch and Mr. Dickson, who had been on standby status to testify as witnesses for the respondent, and stated to them in an angry, trembling voice while pointing his finger in their direction that he did not appreciate their not testifying which he considered disloyal. Further, when Ms.

Hatch tried without success to explain that she and Mr. Dickson were on standby status but were not called to testify, the respondent reminded Mr. Grannis that: 1) the respondent wore a black robe, 2) members of Mr. Grannis' staff had to appear before him, and 3) the respondent would remember that staff members Hatch and Dickson had not testified for him. Ms. Hatch, upset by the respondent's attack on her and his failure to give her an opportunity to explain, replied to the respondent's verbal tirade by telling him he could take his subpoena and "shove it."

b. In the winter of 1989 the respondent was presiding over a session of court at which attorney Robert Stiehl had cases calendared. As soon as Mr. Stiehl entered the courtroom, the respondent stopped court, stated to Mr. Stiehl that he wanted to see him, and instructed Mr. Stiehl to accompany the respondent to the judge's chambers adjacent to the courtroom. Upon the two entering the judge's chambers, the respondent slammed the door and in a very angry tone of voice and with an obviously flushed face demanded to know if a Wanda Kane worked for Mr. Stiehl's law firm. Ms. Kane had in fact notarized a document for Barbara Hair, the respondent's ex-wife, so it could be filed in the *Hair* case after Mr. Stiehl had offered Ms. Kane's services to Ms. Hair for that purpose only. When Mr. Stiehl confirmed that Ms. Kane did work for Stiehl's law firm, the respondent told Mr. Stiehl, "I appreciate the hell out of your law firm helping my wife with her domestic matter." The respondent went on to explain that he had received a document with Ms. Kane's name on it and reiterated his displeasure and lack of regard for Mr. Stiehl or the people in Mr. Stiehl's law firm for providing assistance to his wife in their domestic matter. In light of the respondent's language, tone of voice, and excitable state, Mr. Stiehl decided it would not be prudent for him to appear before the respondent and that his clients would be penalized by the respondent if Mr. Stiehl did so. Consequently, Mr. Stiehl did not return to the respondent's courtroom that day or for a number of weeks thereafter.

Based upon these and other findings of fact and conclusions of law, the Commission recommended that the Supreme Court of North Carolina censure the respondent. On 9 June 1993, pursuant to Rule 2(a) of the Rules Governing Supreme Court Review of

Recommendations of the Judicial Standards Commission, the Clerk of this Court forwarded to the respondent and his counsel a certified true copy of the Findings of Fact, Conclusions of Law, and Recommendations of the Judicial Standards Commission, together with a copy of the Rules Governing Supreme Court Review of Recommendations of the Judicial Standards Commission. Respondent was also advised, as provided in Rule 2(b), that he had ten (10) days from the date shown on the return receipt in which to petition the Supreme Court for a hearing. The return receipt, properly filed with this Court, shows a delivery date of 11 June 1993. No petition having been filed with this Court for a hearing, and no briefs having been filed in this case by any party, an order was entered by this Court on 27 August 1993 that this case be disposed of on the record.

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

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

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

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

STATE OF NORTH CAROLINA v. PHILLIP LEE ABSHER

No. 13PA93

(Filed 5 November 1993)

Criminal Law §§ 1053, 1457 (NCI4th)— prayer for judgment continued for thirty days—jurisdiction to sentence after thirty days

Where the trial court announced at the time defendant entered a plea of guilty to DWI that prayer for judgment would be continued for thirty days without conditions, the trial court did not lose jurisdiction to impose a sentence because the State failed to move for the imposition of a sentence within thirty days after prayer for judgment was continued. The prayer for judgment was in effect continued from term to term when a sentence was not imposed, and the court had jurisdiction to impose a sentence as long as prayer for judgment was not continued for an unreasonable time and defendant was not prejudiced.

Am Jur 2d, Criminal Law §§ 526 et seq., 560.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 108 N.C. App. 356, 424 S.E.2d 464 (1992), vacating a judgment entered by Martin (Lester P., Jr.), J., on 27 October 1989 at the Criminal Session of Superior Court, Wilkes County. Heard in the Supreme Court 13 September 1993.

This case brings to the Court a question as to the jurisdiction of the superior court to enter a judgment more than thirty days after the entry of a guilty plea, when the court at the time of the plea announced that prayer for judgment would be continued for thirty days. The defendant pled guilty to driving while impaired in Superior Court, Wilkes County on 18 May 1989. At a sentencing hearing, the arresting officer testified without objection that the defendant had a prior conviction of driving while impaired in April of 1985. The presiding judge continued prayer for judgment for thirty days. A sentence was not imposed within thirty days.

On 27 October 1989, the defendant appeared in Superior Court, Wilkes County and made a motion to dismiss the case on the ground that a sentence was not imposed within the time specified. The court overruled the motion and sentenced the defendant to

one year in prison. The prison sentence was suspended and the defendant was placed on unsupervised probation for one year. As a condition of probation, the defendant was ordered to serve seven days in the county jail. The time in jail was to be served on weekends.

The defendant appealed to the Court of Appeals which vacated the sentence, 100 N.C. App. 453, 396 S.E.2d 825 (1990). This Court reversed, holding that the Court of Appeals should have granted the State's motion to dismiss the appeal because the defendant did not have a right to appeal from a guilty plea, 329 N.C. 264, 404 S.E.2d 848 (1991). The Court of Appeals granted the defendant's petition for certiorari and again vacated the sentence of the superior court, 108 N.C. App. 356, 424 S.E.2d 464. We allowed the State's petition for discretionary review.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State, appellant.

Larry S. Moore, John E. Hall, Max F. Ferree, and William C. Gray, Jr., for defendant-appellee.

WEBB, Justice.

The defendant argues that it was the duty of the State to move for the imposition of a sentence within thirty days from the time the prayer for judgment was continued and when it failed to do so, the court lost its jurisdiction to impose a sentence. We hold there is no such requirement.

When the defendant entered the guilty plea, the court had the power to continue the prayer for judgment to a later term. *State v. Graham*, 225 N.C. 217, 34 S.E.2d 146 (1945); N.C.G.S. § 15A-1334(a) (1988). The prayer for judgment was in effect continued from term to term when a sentence was not imposed. As long as a prayer for judgment is not continued for an unreasonable period, as it was not in this case, and the defendant was not prejudiced, as he was not in this case, the court does not lose the jurisdiction to impose a sentence. *In re: Greene*, 297 N.C. 305, 225 S.E.2d 142 (1979); *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 149 (1957).

The defendant relies on *State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927). In *Gooding*, the superior court imposed a sentence requiring the defendant to pay a fine of $150.00, and the cost, with which the defendant complied. The court also continued the

prayer for judgment for one year upon condition that the defendant be of good behavior. Eighteen months later, the court imposed a sentence of one year for violation of the condition upon which the prayer for judgment was continued. We reversed, saying a sentence could not be imposed more than one year after the prayer for judgment was imposed.

Gooding does not control this case. In this state, we have made a distinction between cases in which prayer for judgment is continued with conditions imposed and cases in which prayer for judgment is continued without any conditions. *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). In *Gooding*, a condition was imposed on the prayer for judgment, and the defendant was required to pay a fine of $150.00 and to pay the costs. In this case, no conditions were imposed. In *Gooding*, the court could not impose a sentence on defendant at one term and continue prayer for judgment and impose another sentence at a subsequent term. In this case, only one sentence was imposed. That is the distinction between this case and *Gooding*. To the extent the language of *Gooding* is inconsistent with the language of this case, *Gooding* is overruled.

Our decision in this case is consistent with *State v. Degree*, 110 N.C. App. 638, 430 S.E.2d 491 (1993).

For the reasons stated in this opinion, we reverse the Court of Appeals and remand to the Court of Appeals for remand to superior court for reinstatement of the sentence.

REVERSED AND REMANDED.

DOROTHY M. FAULKENBURY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEM DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); AND STATE OF NORTH CAROLINA

No. 94A93

(Filed 5 November 1993)

Appeal by plaintiff, 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. 357, 424 S.E.2d 420 (1993), reversing in part orders entered by Cashwell, J., on 28 June 1991 in Superior Court, Wake County. Heard in the Supreme Court on 15 October 1993.

Marvin Schiller, and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce and Susan S. McFarlane, for plaintiff-appellant.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, and Norma S. Harrell and Tiare B. Smiley, Special Deputy Attorneys General, for defendant-appellees.

PER CURIAM.

This is an action filed 5 November 1990 for declaratory judgment and injunctive relief in which plaintiff alleges various claims which she contends entitle her and all similarly situated to her to the relief sought. Plaintiff alleges that she is a disability retired school teacher who retired in 1983 and whose rights to certain disability retirement benefits of the Teachers and State Employees' Retirement System became vested in 1968. She contends that certain statutory changes, which took effect in 1982, to the method by which disability retirement benefits are calculated have caused defendants to underpay her benefits and the benefits of all who are similarly situated. In plaintiff's prayer for relief she seeks (1) to have her action certified as a class action; (2) a declaration that the 1982 amendments may not be constitutionally applied to her and the class of which she is a member; (3) a declaration that

she and the class have a vested contractual right to have benefits calculated under the statute as it existed before the amendment; (4) an injunction requiring defendants to pay to the class "all funds" to which plaintiff and the class are entitled and to comply with their fiduciary duties "to inform all class members of their vested right to receive disability pension benefits" in accordance with the statute as it existed before the amendment; and (5) recovery of costs and attorneys fees.

The complaint asserts claims sounding in (1) violation of various provisions of the United States Constitution and 42 U.S.C. § 1983; (2) violation of various provisions of the North Carolina Constitution and Chapter 128 of the General Statutes; (3) breach of fiduciary duty; and (4) constructive or resulting trust.

Defendants answered, setting up various immunity defenses, and the defenses of the statute of limitations, laches, failure to exhaust administrative remedies, and lack of personal and subject matter jurisdiction. Defendants' answer sought to have the action dismissed for failure to state a claim upon which relief could be granted and on the basis of the defenses asserted.

The trial court denied defendants' motions to dismiss and allowed plaintiff's motion for class certification as to certain sub-classes but denied it as to a sub-class relating to future disability retirees. Plaintiff took voluntary dismissals without prejudice as to defendants Ducker and Boyles individually.

Defendants appealed, assigning error to the trial court's denial of its motions to dismiss and to its allowance of class certification.

The Court of Appeals unanimously affirmed the trial court's rulings on class certification and its denial of defendants' motion to dismiss plaintiff's claims based on the constitutional prohibition against impairment of contracts. The Court of Appeals unanimously reversed, on the ground the statute of limitations had run, the trial court's denial of defendants' motion to dismiss plaintiff's 42 U.S.C. § 1983 claim. A majority of the Court of Appeals reversed, on the ground plaintiff had failed to state a claim upon which relief could be granted, the trial court's denial of the motion to dismiss plaintiff's breach of fiduciary duty claim. Judge Walker dissented only from this part of the decision.

Plaintiff appealed to us on the basis of Judge Walker's dissent and on the basis of her contention that other issues determined

by the Court of Appeals raised substantial constitutional questions. Plaintiff also petitioned for discretionary review of additional issues determined by the Court of Appeals. We denied plaintiff's petition for discretionary review and allowed defendants' motion to dismiss plaintiff's appeal insofar as the appeal was based on what plaintiff contended were substantial constitutional questions.

The only question before us, therefore, is whether the Court of Appeals properly reversed the trial court's denial of defendants' motion to dismiss plaintiff's breach of fiduciary duty claim for failure to state a claim upon which relief could be granted. We conclude that this decision should be affirmed.

AFFIRMED.

WOODARD v. LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM

[335 N.C. 161 (1993)]

WILLIAM H. WOODARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF v. NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); STATE OF NORTH CAROLINA, DEFENDANTS

No. 95A93

(Filed 5 November 1993)

Appeal by the plaintiff, 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. 378, 424 S.E.2d 431 (1993), reversing the judgment of Cashwell, J., at the 3 May 1991 Civil Session of Superior Court, Wake County. Heard in the Supreme Court on 15 October 1993.

Marvin Schiller, and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce and Susan S. McFarlane, for the plaintiff-appellant.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, and Norma S. Harrell and Tiare B. Smiley, Special Deputy Attorneys General, for the defendants-appellees.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES WAYNE SMITH

No. 213A93

(Filed 5 November 1993)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 119, 429 S.E.2d 425 (1993), finding error in defendant's conviction for robbery with a firearm at the 27 August 1991 Criminal Session, Superior Court, Brunswick County, Ellis, J., presiding, and remanding this charge for a new trial. Heard in the Supreme Court 13 October 1993.

Michael F. Easley, Attorney General, by Daniel C. Oakley, Special Deputy Attorney General, for the State-appellant.

Michael Ramos for defendant-appellee.

PER CURIAM.

At trial defendant was convicted of first-degree kidnapping (91 CRS 2720), larceny of a firearm (91 CRS 2722), first-degree sex offense (91 CRS 3100) and robbery with a firearm (91 CRS 3332). A majority of the Court of Appeals, Judge Cozort dissenting, found error in the trial court's failure to instruct on the lesser included offense of assault with a deadly weapon in the robbery case and remanded this case for a new trial. The Court of Appeals unanimously found no error in the other convictions.

The State appeals to us on the basis of Judge Cozort's dissent, contending that the Court of Appeals' decision in the robbery case was erroneous. We conclude the decision should be affirmed.

AFFIRMED.

SHOLAR v. HAMBY

[335 N.C. 163 (1993)]

JEFFREY T. SHOLAR AND ALICE F. SHOLAR v. ROGER W. HAMBY, INDIVIDUALLY, RHONDA R. HAMBY, INDIVIDUALLY, JAMES SMITH, INDIVIDUALLY, TROY WALLACE, INDIVIDUALLY, ROBERT MORTON, INDIVIDUALLY, SWH ENTERPRISES, D/B/A NATIONAL PACKAGING & SHIPPING OF TAYLORS, SOUTH CAROLINA, SWH ENTERPRISES, D/B/A NATIONAL PACKAGING & SHIPPING OF GREENVILLE, SOUTH CAROLINA, A LIMITED PARTNERSHIP, SWH ENTERPRISES, INC., D/B/A NATIONAL PACKAGING & SHIPPING, A SOUTH CAROLINA DOMESTIC CORPORATION

No. 88PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of an unpublished decision of the Court of Appeals, 108 N.C. App. 787, 426 S.E.2d 301 (1993), dismissing plaintiffs' appeal from an order entered 8 August 1991 by Seay, J., in Superior Court, Forsyth County, which dismissed plaintiffs' action as to defendants Roger W. Hamby, Rhonda R. Hamby, James Smith, Troy Wallace, Robert Morton, and SWH Enterprises of Greenville, South Carolina. Heard in the Supreme Court 11 October 1993.

David F. Tamer for plaintiff appellants.

E. Clarke Dummit for defendant appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

CECIL KING D/B/A TWIN REAL ESTATE COMPANY v. GEORGE KOUCOULIOTES

No. 100PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an opinion of the Court of Appeals, 108 N.C. App. 751, 425 S.E.2d 462 (1993), finding no error in the judgment of Beal, J., entered 25 September 1991 in Superior Court, Mecklenburg County. Heard in the Supreme Court 14 October 1993.

Newitt & Bruny, by John G. Newitt, Jr. and Todd A. Stewart, for plaintiff-appellant.

Eugene C. Hicks, III for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

UNION GROVE MILLING AND MANUFACTURING COMPANY, INC. v. MARY EDNA FAW

No. 117PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 109 N.C. App. 248, 426 S.E.2d 476 (1993), reversing summary judgment for plaintiff entered 3 October 1991 in Superior Court, Wilkes County, by Judge William H. Freeman, and remanding to the trial court for the entry of an order dismissing plaintiff's actions. Heard in the Supreme Court 14 October 1993.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellant.

John E. Hall for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

AFFIRMED.

CARL P. WORLEY, JR. v. IRMGARD ELIZABETH WORLEY

No. 128PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 108 N.C. App. 789, 426 S.E.2d 302 (1993), affirming the judgment entered by Christian, J., on 3 June 1991 in District Court, Johnston County. Heard in the Supreme Court 14 October 1993.

Mast, Morris, Schulz & Mast, P.A., by George B. Mast, Bradley N. Schulz, and David F. Mills, for plaintiff-appellee.

Emanuel and Emanuel, by Stephen A. Dunn and Robert L. Emanuel, for defendant-appellant.

PER CURIAM.

Justice Parker recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Kempson v. N.C. Dept. of Human Resources*, 328 N.C. 722, 403 S.E.2d 279 (1991).

AFFIRMED.

HERITAGE HOSPITAL OF NORTH CAROLINA DBA HERITAGE HOSPITAL
v. SHARON K. PEEK

No. 130PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 109 N.C. App. 134, 427 S.E.2d 896 (1993), affirming in part and reversing in part the judgment entered by Butterfield, J., on 15 April 1991 in Superior Court, Edgecombe County. Heard in the Supreme Court 11 October 1993.

Bridgers, Horton & Rountree, by Charles S. Rountree, for plaintiff-appellee.

Schiller Law Offices, by Marvin Schiller, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ELIJAH TOM TURNAGE, GUARDIAN AD LITEM FOR THOMAS PAUL TURNAGE, AND ELIJAH TOM TURNAGE, INDIVIDUALLY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 153PA93

(Filed 5 November 1993)

On discretionary review, pursuant to N.C.G.S. § 7A-31, of an opinion of the Court of Appeals, 109 N.C. App. 300, 426 S.E.2d 433 (1993), affirming summary judgment for the plaintiffs entered on 8 July 1991 by Butterfield, J., in Superior Court, Craven County. Heard in the Supreme Court on 13 October 1993.

Hiram J. Mayo, Jr., for the plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for the defendant-appellant.

PER CURIAM.

Affirmed.

LANDON W. SLOAN, JR. AND WIFE, PHYLLIS FAY SLOAN v. MILLER BUILDING CORPORATION, AND CARLOS PEREZ, INDIVIDUALLY AND D/B/A PEREZ PAINTING COMPANY

No. 166PA93

(Filed 5 November 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 109 N.C. App. 489, 428 S.E.2d 292 (1993), affirming entry of summary judgment by Wright, J., in favor of defendant Perez at the 9 September 1991 Civil Session of Superior Court, New Hanover County. Heard in the Supreme Court 13 October 1993.

Armstrong & Armstrong, P.A., by Emery D. Ashley, for plaintiff-appellants.

Crossley McIntosh Prior & Collier, by Sharon J. Stovall, for defendant-appellee Perez, Individually and d/b/a Perez Painting Company.

PER CURIAM.

After reviewing the record proper and the briefs of the parties and considering the oral arguments of counsel, we conclude that plaintiff-appellants' petition for discretionary review was improvidently allowed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MYRA JOYCE P. REBER, ADMINISTRATRIX OF THE ESTATE OF APRIL LOVE REBER, DECEASED v. EDNA WINDOM BOOTH AND JACK C. BOOTH, JR.

No. 80A93

(Filed 5 November 1993)

Appeal by plaintiff 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. 731, 425 S.E.2d 450 (1993), affirming judgment in favor of defendants entered by Grant, J., at the 6 May 1991 Civil Session of Superior Court, Dare County. Plaintiff's petition for discretionary review as to additional issues was denied by this Court 6 May 1993. Heard in the Supreme Court 15 October 1993.

Twiford, Morrison, O'Neal & Vincent, by Branch W. Vincent, III, for plaintiff-appellant.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Roger A. Askew, for defendant-appellees.

PER CURIAM.

For the reasons stated by Judge Wells in his dissenting opinion, the decision of the Court of Appeals is reversed, and this case is remanded to that court for remand to the Superior Court, Dare County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

APAC-CAROLINA, INC. v. GREENSBORO-HIGH POINT AIRPORT AUTHORITY

No. 325P93

Case below: 110 N.C.App. 664

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

BROWN v. TOWN OF RICHLANDS

No. 321P93

Case below: 110 N.C.App. 314

Petition by John I. Brown and Lewis Shaw for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1993.

CHERRY v. HARRIS

No. 274P93

Case below: 110 N.C.App. 478

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

CONSIDINE v. WEST POINT DAIRY PRODUCTS

No. 367P93

Case below: 111 N.C.App. 427

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 4 November 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

CROMER v. WAYNE POULTRY

No. 347P93

Case below: 111 N.C.App. 265

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

EDWARDS v. EDWARDS

No. 360P93

Case below: 110 N.C.App. 1

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1993.

FOGLEMAN v. D & J EQUIPMENT RENTALS

No. 351P93

Case below: 111 N.C.App. 228

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

FULTON CORP. v. JUSTUS

No. 305A93

Case below: 110 N.C.App. 493

Motion by plaintiff to dismiss defendant's appeal for lack of substantial constitutional question denied 7 October 1993. Motion by defendant to dismiss plaintiff's 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.

GARRETT v. FLAUTT PROPERTIES

No. 228P93

Case below: 110 N.C.App. 314

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

GILBERT v. GREAT AMERICAN INS. CO.

No. 313P93

Case below: 110 N.C.App. 869

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

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

HAYES v. TOWN OF WAYNESVILLE

No. 219P93

Case below: 109 N.C.App. 696

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 October 1993.

HEDRICK v. NATIONWIDE MUT. FIRE INS. CO.

No. 389P93

Case below: 111 N.C.App. 690

Petition by defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

HODGE v. ADAM'S MARK HOTEL

No. 162P93

Case below: 109 N.C.App. 134

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

IN RE COLEY

No. 338A93

Case below: 111 N.C.App. 451

Motion by Attorney General to dismiss respondent's appeal for lack of substantial constitutional question allowed 7 October 1993.

IN RE HAYES

No. 336A93

Case below: 111 N.C.App. 384

Motion by Attorney General to dismiss respondent's appeal for lack of substantial constitutional question allowed 7 October 1993.

IN RE JOYNER

No. 337A93

Case below: 111 N.C.App. 454

Motion by Attorney General to dismiss respondent's appeal for lack of substantial constitutional question allowed 7 October 1993.

IN RE McCOLLOUGH v.
N.C. STATE BD. OF DENTAL EXAMINERS

No. 349P93

Case below: 111 N.C.App. 187

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

IN RE ROCK-OLA CAFE

No. 383PA93

Case below: 111 N.C.App. 683

Petition by Secretary of Revenue for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1993.

IN RE SCOTT

No. 339A93

Case below: 111 N.C.App. 453

Motion by Attorney General to dismiss respondent's appeal for lack of substantial constitutional question allowed 7 October 1993.

IN RE STATE EX REL. EMPLOYMENT
SECURITY COMM. v. HOPKINS

No. 374P93

Case below: 111 N.C.App. 437

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

IN RE TILLMAN

No. 196P93

Case below: 109 N.C.App. 696

Motion by Durham County DSS to dismiss appeal by Gunetta Tillman for lack of substantial constitutional question allowed 7 October 1993. Petition by Gunetta Tillman for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

INTERSTATE CASUALTY INS. CO. v.
INTERSTATE INSURORS, INC.

No. 322P93

Case below: 110 N.C.App. 870

Petition by defendant (Jennie H. Shackelford) for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

IVEY v. PUROLATOR PRODUCTS, INC.

No. 341P93

Case below: 111 N.C.App. 456

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

JONES v. HUGHES

No. 248P93

Case below: 110 N.C.App. 262

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

KAPLAN v. PROLIFE ACTION LEAGUE OF GREENSBORO

No. 350P93

Case below: 111 N.C.App. 1

Motion by plaintiffs to dismiss defendants' appeal for lack of substantial constitutional question allowed 7 October 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

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

LASSITER v. FAISON

No. 333P93

Case below: 111 N.C.App. 206

Petition by Integon General Insurance Corporation for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

MACO HOMES, INC. v. CHARLOTTE ZONING BD. OF ADJUSTMENT

No. 385P93

Case below: 111 N.C.App. 929

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

McDONALD'S CORP. v. DWYER

No. 355PA93

Case below: 111 N.C.App. 127

Motion by defendant Dwyer to dismiss appeal by plaintiff McDonald's for lack of substantial constitutional question denied 4 November 1993. Petition by plaintiff McDonald's for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1993.

MINTER v. MINTER

No. 371P93

Case below: 111 N.C.App. 321

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

MURPHY v. GLAFENHEIN

No. 329P93

Case below: 110 N.C.App. 830

Motion by defendant Glafenhein to dismiss appeal by defendant Manning for lack of substantial constitutional question allowed 7

October 1993. Petition by defendant Manning for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993. Petition by defendant Glafenhein for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

RHYNE v. VELSICOL CHEMICAL CORP.

No. 317PA93

Case below: 110 N.C.App. 870

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

RICHARDSON CORP. v. BARCLAYS AMERICAN/MORTGAGE CORP.

No. 363P93

Case below: 111 N.C.App. 432

Petition by defendant (Barclays American/Mortgage Corporation) for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

SCOTT v. EASTERN TURF EQUIPMENT, INC.

No. 376P93

Case below: 111 N.C.App. 456

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

SMITH v. SMITH

No. 388A93

Case below: 111 N.C.App. 460

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 4 November 1993.

STATE v. BOONE

No. 382P93

Case below: 111 N.C.App. 690

Motion by Attorney General to dismiss defendant's appeal for lack of substantial constitutional question allowed 4 November 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

STATE v. BROOKS

No. 356PA93

Case below: 111 N.C.App. 558

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 4 November 1993.

STATE v. BRUEHL

No. 369P93

Case below: 111 N.C.App. 267

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 4 November 1993.

STATE v. FORESTER

No. 302PA93

Case below: 111 N.C.App. 267

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 November 1993. Petition by defendant (Forester) for discretionary review pursuant to G.S. 7A-31 denied 7 November 1993.

STATE v. GRAY

No. 198P93

Case below: 109 N.C.App. 698

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

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

STATE v. HORTON

No. 451P93

Case below: 106 N.C.App. 706

Notice of appeal filed by defendant pursuant to G.S. 7A-30 dismissed 4 November 1993.

STATE v. KNOX

No. 352P93

Case below: 111 N.C.App. 268

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

STATE v. McDOUGAL

No. 348P93

Case below: 111 N.C.App. 268

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

STATE v. McKINNISH

No. 251P93

Case below: 110 N.C.App. 241

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

STATE v. RICHARDSON

No. 402P93

Case below: 112 N.C.App. 252

Petition by Attorney General for temporary stay allowed 13 October 1993 pending consideration and determination of the State's petition for discretionary review.

STATE v. SMITH

No. 362P93

Case below: 111 N.C.App. 458

Motion by Attorney General to dismiss defendant's appeal for lack of substantial constitutional question allowed 7 October 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993.

STATE v. WEBSTER

No. 358A93

Case below: 111 N.C.App. 72

Motion by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 4 November 1993.

STATE v. WHITAKER

No. 287P93

Case below: 109 N.C.App. 699

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 October 1993.

STATE v. WILLIAMS

No. 245P93

Case below: 110 N.C.App. 306

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

STATE v. WITHERS

No. 370P93

Case below: 111 N.C.App. 340

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

STATE EX REL. ART MUSEUM BLDG.
COMM. v. TRAVELERS INDEM. CO.

No. 375A93

Case below: 111 N.C.App. 330

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 4 November 1993.

TOWN OF NEWTON GROVE v. SUTTON

No. 366P93

Case below: 111 N.C.App. 376

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

WESTER v. KUHN

No. 384P93

Case below: 111 N.C.App. 691

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 November 1993.

YANDLE v. BROWN

No. 259P93

Case below: 334 N.C. 626
110 N.C.App. 318

Petition by plaintiff for reconsideration of the petition to this Court for review of the decision of the North Carolina Court of Appeals dismissed 4 November 1993.

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

PETITION TO REHEAR

BD. OF ADJT. OF THE TOWN OF SWANSBORO v. TOWN OF SWANSBORO

No. 16A93

Case below: 334 N.C. 421

Petition by plaintiff to rehear pursuant to Rule 31 denied 7 October 1993.

UNITED LABORATORIES, INC., A DELAWARE CORPORATION v. WILLIAM DOUGLAS KUYKENDALL AND SHARE CORPORATION, A WISCONSIN CORPORATION

No. 243PA91

(Filed 3 December 1993)

1. Unfair Competition § 1 (NCI3d); Election of Remedies § 2 (NCI4th) — tortious interference with contract — punitive damages, untrebled Chapter 75 damages and attorney fees — not inconsistent or duplicative

Plaintiff was not prohibited from recovering both punitive damages under its common law claim and untrebled compensatory damages and attorney fees in its unfair practice claim in a tortious interference with contract action arising from a non-competition employment agreement. Punitive damages on the tort claim and attorney fees in the unfair practice claim may be recovered because the conduct required for the award of attorney fees is different from the conduct required for an award of punitive damages and the two recoveries serve different interests, so that permitting the plaintiff to recover both will not result in double redress for a single wrong. Similarly, awards of untrebled compensatory damages in the unfair practices claim and punitive damages in the tortious interference claim serve completely different purposes, are calculated on entirely different bases, and are neither inconsistent nor duplicative.

Am Jur 2d, Election of Remedies §§ 8-13; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 542 et seq.

Practices forbidden by state deceptive trade practice and consumer protection acts. 89 ALR3d 449.

2. Unfair Competition § 1 (NCI3d) — attorney fees — findings supporting amount — insufficient

The Court of Appeals did not err by remanding an award of attorney fees for additional findings where the trial court awarded "reasonable attorneys fees in the amount of $250,000" to plaintiff pursuant to N.C.G.S. § 75-16.1 but made no further findings regarding the reasonableness of the award.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 542 et seq.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR4th 12.

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

Justice MEYER concurring in part and dissenting in part.

Justice WEBB joins in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 102 N.C. App. 484, 403 S.E.2d 104 (1991), affirming in part, reversing and remanding in part a judgment entered by Owens, J., on 19 July 1989 in Superior Court, Buncombe County. Heard in the Supreme Court 11 March 1992.

Petree Stockton, by Jackson N. Steele, for plaintiff-appellee.

Brock, Drye & Aceto, P.A., by Michael W. Drye, for defendant-appellant Share Corp.

EXUM, Chief Justice.

We allowed defendant Share Corporation's petition for discretionary review in order to consider whether and to what extent a claimant who successfully prosecutes both a common law claim and an unfair practices claim under Chapter 75 of our General Statutes is required to elect between remedies when both claims arise out of essentially the same conduct.

This case has occupied the parties and the courts for a number of years. The essence of it is that plaintiff, United Laboratories, Inc. (United), employed defendant Kuykendall to sell chemical products. The employment contract provided that Kuykendall would not call upon accounts which he serviced for United for eighteen months after his termination of employment with United. Defendant Share Corporation (Share), a competitor of United, induced Kuykendall to leave his employment with United in order to work as a sales representative for Share under circumstances which amounted to a breach of Kuykendall's non-competition agreement with United.

United filed this action against Kuykendall and Share in November 1985, claiming that Kuykendall had breached his non-

competition agreement, that Share had tortiously interfered with this agreement, and that Share had violated North Carolina's unfair practices law, codified in Chapter 75 of our General Statutes. At the first trial United, after having obtained a preliminary injunction against Kuykendall, also obtained directed verdicts against Kuykendall for breach of contract and against Share for tortious interference with contract and for violating the unfair practices law. A jury assessed general damages in favor of United in the amount of $77,477.77, which the trial court reduced to $38,738.89. The jury also found that United had incurred attorneys' fees and costs in the amount of $47,522.23, and the trial court entered judgment that defendants pay United this amount for its attorneys' fees and costs. The trial court also permanently enjoined Kuykendall from further violations of his agreement with United.

On defendants' first appeal this Court, reversing the Court of Appeals, concluded that the non-competition agreement was enforceable. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988). We also concluded that the trial court erred in directing a verdict in favor of United in its tortious interference claim and that the Court of Appeals erred in concluding that a directed verdict should have been entered on this claim for defendant Share. We held this claim should have been submitted to the jury for determination. *Id.* We affirmed the Court of Appeals' decision to remand the case for a new trial on United's unfair practices claim, agreeing that it was error for the trial court to direct a verdict in favor of United on this claim.[1]

At the retrial of the case issues were submitted and answered by the jury as follows:

> (1) What amount of damages is Plaintiff United entitled to recover of Defendant Kuykendall for breach of the Sales Representative Agreement and Supplemental Compensation Agreement?
>
> Answer: $11,700
>
> (2) Did Defendant Share unjustifiably induce Kuykendall not to perform his contract with United?
>
> Answer: Yes

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1. The Court of Appeals' initial decision is reported at 87 N.C. App. 296, 361 S.E.2d 292 (1987).

(3) What amount of damages, if any, is Plaintiff United entitled to recover of Defendant Share?

Answer: $1.00

(4) In your discretion, what amount of punitive damages, if any, should be awarded to Plaintiff United from Defendant Share?

Answer: $100,000

(5) Did Defendant Share do one or more of the following:

a. Offer to pay legal fees and costs to induce Kuykendall, in breach of his covenant not to compete, to attempt to divert to Share, unfairly, United's accounts;

Answer: Yes

b. Induce Kuykendall to use his relationship with United's accounts and knowledge of confidential business information to attempt to divert to Share, unfairly, United's accounts;

Answer: Yes

c. Offer to subsidize the income, draw and expenses of Kuykendall in the event of an injunction, to induce Kuykendall, to divert to Share, unfairly, United's accounts;

Answer: Yes

d. As a matter of routine practice, offer to pay legal fees and costs to induce experienced chemical sales representatives, in breach of the salesmen's covenant not to compete, to attempt to divert to Share, unfairly, the former employer's accounts.

Answer: Yes

(6) Was Defendant Share's conduct in commerce or did it affect commerce?

Answer: Yes

(7) Was Defendant Share's conduct a proximate cause of any injury to Plaintiff United's business?

Answer: Yes

(8) By what amount, if any, has the business of Plaintiff United been injured?

Answer: $15,000

Upon the coming in of the verdict, all parties seemed to agree that it was then a question of law for the trial court to determine whether defendant Share's conduct as found by the jury constituted a violation of the unfair practices law.[2] After the verdict was returned on 26 May 1989, the parties exchanged evidence pertaining to the issue of attorneys' fees and prepared for a posttrial hearing before Judge Owens on the question of whether Share's conduct as found by the jury amounted to a violation of the unfair practices law and, if so, what amount of attorneys' fees should be awarded to United. After the posttrial hearing on 5 July 1989 Judge Owens concluded that Share's conduct as found by the jury in Issue 5 constituted "unfair methods of competition and unfair trade practices in violation of N.C.G.S. § 75-1.1, and that plaintiff's damages found by the jury in Issue 8 shall be trebled pursuant to N.C.G.S. § 75-16." Judge Owens concluded further that Share "willfully engaged in the acts and practices which are the subject of this action and that there was an unwarranted refusal by [Share] to resolve the matter." Judge Owens found that United was entitled to recover from Share reasonable attorneys' fees in the amount of $250,000 pursuant to N.C.G.S. § 75-16.1. Judge Owens entered these conclusions as recitations in a "Judgment and Order" which further provided as follows:

> Plaintiff United Laboratories, not being permitted to recover both punitive damages and treble damages for unfair methods of competition and unfair trade practices, shall, within ten days of the filing of this Judgment, file a Motion in this cause electing between the recovery of punitive damages or the recovery of treble damages.
>
> NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

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2. This Court had pointed out in the first appeal that, "under N.C.G.S. § 75-1.1, it is a question for the jury as to whether the defendants committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975)." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. at 664, 370 S.E.2d at 389.

> That within ten days of the filing of this Judgment, plaintiff shall file a Motion in this cause electing between the recovery of punitive damages or the recovery of treble damages[.][3]

By motion in the cause filed 12 July 1989 United elected to recover from Share on its unfair practices claim $15,000 compensatory damages and attorneys fees and on its tortious interference claim, punitive damages of $100,000.

Judge Owens' final judgment, filed 19 July 1989, after reciting United's election, adjudged that United was entitled to recover against defendant Kuykendall $11,700 and against defendant Share $15,000. The judgment then provided as follows:

> [United's] compensatory damage recovery from defendant William Douglas Kuykendall and from defendant Share Corporation arises out of the same or similar circumstances and that plaintiff United Laboratories is entitled to a compensatory damage recovery of $15,000.00, with defendants William Douglas Kuykendall and Share Corporation being jointly and severally liable for $11,700.00 of such recovery, and defendant Share Corporation being solely responsible for the balance of $3,300.00[.]

Judge Owens further decreed that United should recover of defendant Share punitive damages in the amount of $100,000 and reasonable attorneys fees in the amount of $250,000 as part of the costs.

Defendants' motion to amend the final judgment so as to require plaintiff to make "a proper election of remedies" was denied. Defendant Share appealed from the final judgment and the order denying the motion to amend the judgment, assigning error to, among other things, the trial court's (1) allowing plaintiff to recover both punitive damages under its common law interference with contract claim and compensatory damages, untrebled, and attorneys

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3. Judge Owens was obviously advertent to and followed the procedure set out in *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E.2d 297, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986) ("We hold that it would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues and the trial court has determined whether to treble the compensatory damages found by the jury and that such election should be allowed in the judgment. Hence, we remand this case for such an election, which should be made by plaintiff by a motion in the cause. When plaintiff has made her election, a new judgment should be entered vacating the first judgment and allowing plaintiff recovery based on her election.").

fees under its statutory unfair practice claim; (2) failing to make findings in support of its award of attorneys fees; and (3) awarding attorneys fees in the absence of any evidence supporting the trial court's finding that Share willfully engaged in the conduct which was the subject of the unfair practices claim and engaged in an unwarranted refusal to resolve the matter as required by N.C.G.S. § 75-16.1.

The Court of Appeals affirmed the trial court's judgment as to the manner in which it handled the election of remedies issue. It also concluded that there was ample evidence in the record to support the trial court's finding that Share willfully engaged in the conduct which the trial court found violated the unfair practices law and that Share engaged in an unwarranted refusal to resolve the matter which constituted the basis of United's unfair practices claim. The Court of Appeals, consequently, held that the trial court did not abuse its discretion in its decision to award attorneys fees. The Court of Appeals, however, did conclude that the trial court failed to make the necessary findings of fact regarding the reasonableness of the attorneys fees awarded without which the appellate court could not properly review the reasonableness of the trial court's award. The Court of Appeals remanded this issue to the trial court for appropriate findings consistent with its opinion.

Share petitioned for further review of the election of remedies issue. In its response to Share's petition for further review, United, pursuant to N.C. R. App. P. 15(d), asked that if we granted Share's petition for further review, we also grant review of the Court of Appeals' remand of the attorneys' fee issue. This Court by order dated 3 October 1991 allowed further review of the election of remedies question and the attorneys' fee issue.

We conclude the Court of Appeals correctly decided both questions certified for review.

I.

[1] The first issue is whether United, having succeeded at trial on both its common law tortious interference claim and its unfair practices claim, may recover both punitive damages in its common

law claim and untrebled compensatory damages and attorneys fees in its unfair practices claim.[4]

Share argues that under the doctrine of election of remedies United must elect between recovering punitive damages in its common law claim for tortious interference, on one hand, and damages and attorneys fees in its unfair practices claim, on the other. United contends that no such election is required since the recoveries in question are neither inconsistent nor duplicative. Since we have not yet addressed this precise issue, we first review the claims involved and the damages they provide.

Chapter 75 of our General Statutes provides that "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce" are unlawful, N.C.G.S. § 75-1.1(a), and that "in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." N.C.G.S. § 75-16. Where "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit," the "presiding judge may, in his discretion, allow a reasonable attorney fee" to the prevailing party. N.C.G.S. § 75-16.1. This legislation was designed to supplement common law remedies that often proved ineffective to redress unfair or deceptive practices. *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981). Providing attorneys fees encourages private enforcement of the act. *Id.* at 549, 276 S.E.2d at 404. An award of treble damages achieves this same goal, but it also serves to deter future misconduct. *Id.* at 546, 276 S.E.2d at 402.

A claim for tortious interference with contract exists where the defendant knows of a contractual relationship between two

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4. At trial United did not assert that it was entitled both to nominal damages in its tortious interference claim ($1.00) and compensatory damages in its unfair practices claim ($15,000). Nor did it assert that it was entitled to both punitive damages in its tortious interference claim ($100,000) and trebled damages in its unfair practices claim ($45,000). Neither did it appeal from the trial court's judgment which did not permit these dual recoveries. Although United now argues that it should have been entitled to all damages under both claims and to attorneys fees on the basis that each claim arose from different conduct, this issue is not before us. We treat the questions before us on the basis that both claims arose out of the same conduct, which appears to have been the position of the parties before the trial court.

parties and without justification induces one party to breach the contract. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). In such a case, a plaintiff may recover his actual damages flowing from the tortious conduct. *Id.* As with other torts, a plaintiff may recover punitive damages "only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights." *Hardy v. Toler*, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975); Strong's North Carolina Index 4th *Damages* § 66 (1991). As with other torts, a plaintiff generally may not recover attorneys fees. *Matter of North Carolina Nat. Bank*, 52 N.C. App. 353, 278 S.E.2d 330, *disc. rev. denied*, 303 N.C. 544, 281 S.E.2d 393 (1981).

One aspect of the doctrine of election of remedies is that a plaintiff may not recover inconsistent remedies. *Redmond v. Lilly*, 273 N.C. 446, 160 S.E.2d 287 (1968). Remedies are inconsistent when one "must necessarily repudiate or be repugnant to the other." *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964) (citing 28 C.J.S. *Election of Remedies* § 4). Thus, a party may not sue for rescission of a contract and for its breach. *Standard Amusement Co. v. Tarkington*, 247 N.C. 333, 101 S.E.2d 398 (1958). Since recovering attorneys fees and punitive damages is not inconsistent, that aspect of the doctrine of election of remedies that precludes inconsistent remedies does not prevent plaintiff from recovering both.

Another aspect of the doctrine of election of remedies is to "prevent double redress for a single wrong." *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954); 25 Am. Jur. 2d *Election of Remedies* § 1 (1966) (citing *Smith*). Thus, a party may not recover punitive damages for tortious conduct and treble damages for a violation of Chapter 75 based on that same conduct. *Ellis v. Northern Star*, 326 N.C. 219, 227-28, 388 S.E.2d 127, 132 (1990); *Mapp v. Toyota World*, 81 N.C. App. 421, 426-27, 344 S.E.2d 297, 301, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 464 (1986); *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

> Where the same source of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for

the breach of contract, or for violation of G.S. 75-1.1, but not for both.

Marshall, 47 N.C. App. at 542, 268 S.E.2d at 103. We held in *Ellis* that plaintiffs, who sued for libel and for an unfair practice under Chapter 75 based on that libel, had to elect between recovering compensatory and punitive damages in the libel claim and treble damages in the unfair practice claim. *Ellis*, 326 N.C. at 227-28, 388 S.E.2d at 132.

Ellis and *Marshall* are distinguishable. Share's conduct which gives rise to an award of attorneys fees is not the same conduct that gives rise to an award of punitive damages. To recover punitive damages at common law a plaintiff must show that the defendant acted in a willful or oppressive manner. *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342. To recover attorneys fees for unfair practices, however, the plaintiff must also show that "there was an unwarranted refusal by [the defendant] to fully resolve the matter which constitutes the basis of . . . the suit." N.C.G.S. § 75-16.1(1). Since recovery of attorneys fees requires proof different from that which gives rise to punitive damages, the claims do not arise from "the same course of conduct." *Marshall*, 47 N.C. App. at 542, 268 S.E.2d at 103.

Furthermore, the policies behind recovering attorneys fees and recovering punitive damages are wholly different. Punitive damages are designed to punish willful conduct and to deter others from committing similar acts. *Shugar v. Guill*, 304 N.C. 332, 283 S.E.2d 507 (1981); *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976). The purpose of attorneys fees in Chapter 75, however, is to "encourage private enforcement" of Chapter 75.[5] *Marshall v. Miller*, 302 N.C. 539, 549, 276 S.E.2d 397, 404. An

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5. Defendant cites *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256, 263, *cert. denied*, 429 U.S. 978, 50 L. Ed. 2d 586 (1976), for the proposition that attorneys fees are punitive in nature. That case, however, concerned an award of attorneys fees based on the equitable powers of the trial court to award attorneys fees for acts done in "bad faith"; that case did not involve attorneys fees based on a statutory provision such as N.C.G.S. § 75-16.1. In construing N.C.G.S. § 75-16.1, our cases have never held that attorneys fees are punitive. *See, e.g.*, *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 379 (1981). *See also* Christopher B. Capel, Note, Unfair Trade Practices and Unfair Methods of Competition in North Carolina: Are Both Treble and Punitive Damages Available for Violations of Section 75-1.1?, 62 N.C. L. Rev. 1139, 1147 (1983) (stating that attorneys fees in Chapter 75 are not punitive).

award limited to attorneys fees plus treble damages will often prove inadequate to punish and deter the type of willful conduct that leads to punitive damages at common law. *See Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 338 S.E.2d 918, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986) (plaintiff awarded $1 in nominal damages, and thus $3 in treble damages for unfair practices violation). The only provision in Chapter 75 relating to willful acts provides that attorneys fees may be awarded, but this is in the discretion of the court and the amount is in no way related to the need to deter or punish. Similarly, recovery of punitive damages, although requiring willful conduct, does not account for an "unwarranted refusal by [one who commits unfair practices] to fully resolve the matter." N.C.G.S. § 75-16.1(1). Permitting recovery of punitive damages on the common law claim in addition to attorneys fees on the unfair practices claim best serves Chapter 75's policy of encouraging private enforcement of the Act.

Since these recoveries serve different interests and are not based on the same conduct, there is no "double redress for a single wrong," *Smith v. Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954), and plaintiff is not required to elect between them to prevent duplicitous recovery.

At least one other jurisdiction has permitted attorneys fees for an unfair practice and punitive damages for a tort based on the same conduct. *Verdonck v. Scopes*, 226 Ill. App. 3d 484, 486, 493, 590 N.E.2d 545, 546, 551 (1992) (permitting punitive damages under common law fraud claim and attorneys fees under Illinois Consumer Fraud Act for same conduct). We also note that in analogous situations other courts have permitted plaintiffs to recover attorneys fees under one theory and damages under another theory. In *Midamerica Federal Savings & Loan v. Shearson/American Express, Inc.*, the plaintiff sued for violations of state securities laws, which permitted attorneys fees, and for a breach of fiduciary duty based on the same conduct of defendants. *Midamerica Fed. Savs. & Loan v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1471 (10th Cir. 1992). The jury found for the plaintiff on both claims, awarding one million dollars more in compensatory damages for the breach of fiduciary duty claim than for the securities claim. *Id.* at 1471-72. The trial court aggregated the awards to maximize recovery, entering judgment on the fiduciary duty claim and awarding attorneys fees based on the statutory claim. *Id.* On appeal the defendant challenged this "mix and match" approach. The Tenth

Circuit upheld the judgment, reasoning: "This case . . . does not involve double recovery of a certain type of damages . . . . Accordingly, [plaintiff] is entitled to recover its attorneys fees because the award simply is not duplicative . . . ." *Id.* at 1473-74. Similarly, the Fourth Circuit Court of Appeals permitted the plaintiffs to recover attorneys fees under North Carolina's security laws and punitive damages for fraud and breach of fiduciary duties. *Hunt v. Miller*, 908 F.2d 1210, 1213-14, 1216-17 (4th Cir. 1990). *See also E.H. Boerth Co. v. Lad Properties*, 82 F.R.D. 635, 638, 645, 646 (D. Minn. 1979) (permitting plaintiff to recover attorneys fees for Minnesota securities violation and punitive damages for fraud; "while the plaintiff is entitled to the maximum amount of damages awarded, damage sums cannot be aggregated if to do so would allow a duplicative recovery").

We hold, therefore, that since the conduct required for an award of attorneys fees is different from the conduct required for an award of punitive damages and since the two recoveries serve different interests, permitting the plaintiff to recover both will not result in "double redress for a single wrong," *Smith v. Oil Corp.*, 239 N.C. at 368, 79 S.E.2d at 885; and United is not required to elect between the two. United may, therefore, recover punitive damages in its tort claim and attorneys fees in its unfair practice claim.

Similar to its argument regarding the election between punitive damages and attorneys fees' discussed above, Share contends that United must elect between the award of $15,000 in untrebled compensatory damages in the unfair practices claim[6] and the award of $100,000 in punitive damages in the tortious interference claim.

We disagree. These awards are neither inconsistent nor duplicitous. They serve completely different purposes and are calculated on entirely different bases. As mentioned earlier, punitive damages are awarded to punish and deter willful misconduct. *Newton*

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6. N.C.G.S. § 75-16 provides that if the plaintiff shows a violation of Chapter 75 "judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict." This provision gives the plaintiff an absolute right to treble damages. *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 338 S.E.2d 908, *disc. rev. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). Any right, whether statutory or constitutional, ordinarily may be waived by the party entitled to it. We see no reason why a plaintiff in an unfair practices claim may not waive the right to recover treble damages and elect instead, for reasons satisfactory to the plaintiff, to recover untrebled compensatory damages.

v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976). The amount of punitive damages necessary to effectuate this policy "rests in the sound discretion of the jury." *Id.* at 111, 229 S.E.2d at 300-01. Compensatory damages, however, whether available at common law or authorized by statute, are merely to compensate the plaintiff for the injuries caused by the defendant. There is, therefore, no double redress for a single wrong and no inconsistency when a plaintiff recovers untrebled compensatory damages under Chapter 75 and punitive damages under a tortious interference claim.

II.

[2] The next issue is whether the evidence and findings of the trial court are sufficient to support its award of attorneys fees. The trial court awarded "reasonable attorneys fees in the amount of $250,000" to plaintiff pursuant to N.C.G.S. § 75-16.1. The trial court made no further findings regarding the reasonableness of the award.

The Court of Appeals held that there was sufficient evidence before the trial court to support an award of attorneys fees pursuant to N.C.G.S. § 75-16.1, but it concluded the trial court made insufficient findings on the question of the reasonableness of the amount awarded. The Court of Appeals, therefore, remanded the case for findings of fact "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." 102 N.C. App. at 495, 403 S.E.2d at 111. For the reasons given in the Court of Appeals' opinion we affirm its decision on the attorneys fees issue.

In addition to these findings suggested by the Court of Appeals, the trial court should consider and make findings concerning "the novelty and difficulty of the questions of law"; "the adequacy of the representation," *Owensby v. Owensby*, 312 N.C. 473, 477, 322 S.E.2d 772, 774-75 (1984); the "difficulty of the problems faced by the attorney," *Dyer v. State*, 331 N.C. 374, 378, 416 S.E.2d 1, 3 (1992), especially any "unusual difficulties," *Little v. Trust Co.*, 252 N.C. 229, 255, 113 S.E.2d 689, 709 (1960); and "the kind of case . . . for which the fees are sought and the result obtained," *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 691, 695, 374 S.E.2d 868, 871 (1989). The court may also in its discretion consider and make findings on "the services expended by paralegals and secretaries acting as paralegals if, in [the trial court's opinion], it is reasonable to do so." *Id.*

For the reasons given the decision of the Court of Appeals is

AFFIRMED.

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

Justice MEYER concurring in part and dissenting in part.

I concur in that part of the majority opinion which affirms the Court of Appeals' remand of the case for findings as to a "reasonable" attorney's fee. I dissent from that part of the majority opinion which affirms the allowance of recovery of attorneys' fees in the Chapter 75 claim *and* punitive damages in the common law tortious interference claim.

Assuming *arguendo* that the majority is correct in its conclusion that this Court has not heretofore spoken to the issue presented regarding election of remedies, it is my view that it is contrary to the legislative intent in enacting Chapter 75 to allow the plaintiff to recover in both the common law action and the Chapter 75 action.

Heretofore, it has been the practice in this state to require the plaintiff to recover either the Chapter 75 statutory group of remedies (trebled compensatory damages and discretionary attorneys' fees) *or* the group of remedies available in the common law claim (compensatory and punitive damages).

Jennings Glass Co. v. Brummer, 88 N.C. App. 44, 362 S.E.2d 578 (1987), *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988), is a good example of the prior treatment. In *Jennings*, the Court of Appeals held that a plaintiff who sued for breach of contract and unfair practices but whose unfair practices claim was dismissed at trial had elected its remedy by appealing the dismissal of the unfair practices claim. *This was true even though the plaintiff had been awarded compensatory and punitive damages at trial for its breach of contract claim.* That court, in reversing the trial court's judgment, struck the previous breach of contract claim and award and remanded the case with orders that treble compensatory damages and an attorneys' fees determination be made and awarded under the statutory claim.

Implicit in the Court of Appeals' holding was its proper determination that the plaintiff was allowed only one remedy for the

defendant's unlawful conduct—either recovery under the breach of contract claim or recovery under the unfair practices claim. The Court of Appeals in *Jennings* did not allow the plaintiff to retain the punitive damages awarded at trial for the breach of contract claim and untrebled damages and attorneys' fees under the statutory unfair practices claim.

In the case *sub judice*, it is irrefutable that the common law tortious interference claim and the Chapter 75 unfair practices claims were based on the same underlying conduct. Each of the unfair practices found to exist at the trial court level was a type of interference with United's contract with Kuykendall. All of the conduct found by the trial court to constitute unfair practices also fell within United's interference claim.

I do not believe that United should be permitted to elect among individual components of the two remedies. United elected the following recovery:

	Compensatory Damages	Punitive Damages	Attorney's Fees
Interference Claim	(not elected)	$100,000	N/A
Unfair Practices Claim	$15,000 (not trebled)	N/A	$250,000

I believe that the majority errs by not requiring United to elect between the *full* remedy allowable under its tortious interference claim and the *full* remedy allowable under its unfair practices claim. In effect, the majority allows United to select individualized components of recovery under both of these claims as if it were selecting from a smorgasbord of remedies.

A proper election in the case at bar precludes recovery of common law damages (compensatory and punitive) and Chapter 75 statutory attorneys' fees. I believe that it is only when the plaintiff chooses the Chapter 75 mandatorily trebled compensatory damages that attorneys' fees may be awarded pursuant to N.C.G.S. § 75-16.1(1).

Given the complexity of modern commercial transactions, today's majority opinion will encourage litigants to plead statutory

and common law claims for the same conduct, yielding verdicts containing alternative compensatory damages, punitive damages, treble damages, and attorneys' fee awards. It invites plaintiffs to plead such claims, await the jury's verdict on all of them, and then pick and choose among the most beneficial components of each of them. This will result in artificially inflated recoveries based on the artful drafting of pleadings and jury verdict forms, transforming remedial statutes that authorize the recovery of attorneys' fees, such as Chapter 75, into vehicles for excessive recoveries. Surely this was not the intent of the legislature in enacting Chapter 75.

Justice Webb joins in this concurring and dissenting opinion.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 146 C. PRESTON CORNELIUS, RESPONDENT

No. 414A92

(Filed 3 December 1993)

Judges, Justices, and Magistrates § 36 (NCI4th) — censure of superior court judge — conduct prejudicial to administration of justice

A superior court judge is censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for violations of Canons 2A and 2B of the N.C. Code of Judicial Conduct based upon findings supported by uncontroverted evidence that the judge gave legal advice and counsel to an individual with regard to her discharge from employment with the Iredell County DSS, undertook in his official capacity to intervene on her behalf, and conveyed and permitted others to convey the impression that the discharged individual had special influence with him. However, the judge's conduct did not rise to the level of willful misconduct in office.

Am Jur 2d, Judges § 19.

Petition by respondent for hearing on the recommendation filed by the Judicial Standards Commission with the Clerk of the Supreme Court of North Carolina on 16 December 1992. Heard in the Supreme Court 12 May 1993.

Judicial Standards Commission, by William N. Farrell, Jr., Senior Deputy Attorney General, for petitioner-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Walter F. Brinkley, for respondent-appellant.

PER CURIAM.

This matter is before the Court upon the recommendation of the Judicial Standards Commission that respondent, C. Preston Cornelius, a Judge of the General Court of Justice, Superior Court Division, Twenty-Second Judicial District, be censured as provided in N.C.G.S. § 7A-376. The record filed with us in support of the recommendation of the Judicial Standards Commission (Commission) that Judge Cornelius (respondent) be censured reveals the following:

On 19 October 1990, Judge Cornelius was advised pursuant to Rule 7 of the Judicial Standards Proceedings that the Judicial Standards Commission had ordered a preliminary investigation concerning alleged misconduct by Judge Cornelius.

On 3 March 1992, special counsel to the Judicial Standards Commission filed with the Commission a complaint which alleged that the respondent threatened to convene a grand jury if a discharged employee of the Iredell County Department of Social Services was not reinstated or given a hearing on her discharge and did convene the grand jury when she was not reinstated or given a hearing. The complaint alleged that the actions of the respondent constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and constituted violations of the North Carolina Code of Judicial Conduct.

Notice of the complaint was served on respondent on 10 March 1992, and respondent filed an answer on 26 April 1992, denying the charges contained in the complaint.

An evidentiary hearing was held before the Commission on 7 and 8 October 1992, in Raleigh. On 24 November 1992, the Commission entered its recommendation containing findings of fact and conclusions of law and recommending that respondent be censured by the Supreme Court of North Carolina. More specifically, the Commission found that there was clear and convincing evidence to support the allegation that the respondent threatened to convene

a grand jury if a discharged employee of the Iredell County Department of Social Services was not reinstated or given a hearing on her discharge and did convene the grand jury when she was not reinstated or given a hearing. The Commission found that such conduct by the respondent violated Canons 2A and 2B of the North Carolina Code of Judicial Conduct[1] and amounted to willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission's formal "Recommendation" and the record of the proceedings was filed with the Clerk of this Court on 7 December 1992. On 9 December 1992, the Clerk notified respondent that the Judicial Standards Commission's Recommendation had been filed with the Court. On 17 December 1992, respondent, pursuant to Rule 2(b) of the Rules Governing Supreme Court Review of Recommendations of the Judicial Standards Commission, filed a petition with the Court for a hearing upon the Recommendation of the Commission. The matter was heard in this Court on 12 May 1993.

The Commission found the pertinent facts as follows:

> 9. On July 3, 1990, Iredell County Department of Social Services (DSS) Director Donald C. Wall met with Rebecca L. Shell along with DSS program administrator Mary Deaton and Lisa York, Ms. Shell's supervisor. During this meeting, Mr. Wall informed Ms. Shell that based on his review of her evaluation as a probationary employee, he was terminating her employment effective July 5, 1990, and he gave her specific reasons for his decision.
>
> 10. Over the course of the next several days, Ms. Shell contacted numerous people, including the respondent, in order to protest her termination and to seek assistance in regaining her job. The respondent personally met with Ms. Shell and

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1. Canon 2A of the North Carolina Code of Judicial Conduct provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2B provides: "A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence. He should not testify voluntarily as a character witness."

discussed her situation. In the course of their discussion, the respondent advised Ms. Shell to seek legal counsel concerning her employment termination and offered to look into her assertion that Mr. Wall had unfairly terminated her employment because of her dispute with a local housing authority over housing for the Bines family.

11. Soon thereafter, the respondent again met with Ms. Shell; in fact, there were several conferences or discussions between the respondent and Ms. Shell in the period of early July, 1990, to early August, 1990. In the interim between the respondent and Ms. Shell's first meeting and this subsequent meeting, the respondent had decided Ms. Shell was entitled to a hearing, and he tried to find some means or method by which she could establish a record of her contentions regarding the reasons for her termination since the respondent believed such a record would be important for purposes of any future legal action by Ms. Shell. At this subsequent meeting, the respondent and Ms. Shell discussed the possibilities for establishing a record of her grievance against DSS, and one of those possibilities discussed was his convening a grand jury before which she could appear and testify.

12. Thereafter, the respondent received a telephone call on July 11, 1990, from Iredell County Commissioner and DSS Board Chairperson Alice M. Stewart whom Ms. Shell also had contacted by telephone several times concerning her termination. During this conversation, Ms. Stewart, who previously had not had any disagreements with the respondent, told the respondent that Ms. Shell had represented to her that: 1) the respondent was a personal friend of Ms. Shell's, 2) he was advising Ms. Shell, and 3) he felt Ms. Shell was entitled to a hearing before the DSS board. Ms. Stewart also told the respondent that she wanted to determine his interest in Ms. Shell's situation in light of Ms. Shell's representations to her.

13. At this point the respondent interrupted by asserting his beliefs that Ms. Shell had not been treated fairly by DSS and she was entitled to a hearing and by stating that he had advised Ms. Shell to seek a hearing before the DSS Board. When Ms. Stewart responded that there was no provision for a hearing for probationary employees such as Ms. Shell, the respondent referred to having received numerous complaints

about DSS, none of which he specified and none of which he had ever brought to Ms. Stewart's attention.

14. The respondent then related his consideration of convening the grand jury to investigate these complaints and told Ms. Stewart she could use her influence to see that Ms. Shell received a hearing, stating that Ms. Stewart could make it easy or hard. Ms. Stewart's unequivocal reply to the respondent was that she had no intention of using any influence she might have to obtain a hearing before the DSS Board for Ms. Shell. Having concluded the conversation, Ms. Stewart clearly believed that in order to avoid a grand jury investigation of DSS, she would have to give Ms. Shell a hearing.

15. Subsequent to his telephone conversation with Ms. Stewart, the respondent arranged a meeting with Mr. Wall, and a meeting was scheduled and held around noon on July 13, 1990. Although Mr. Wall had never received any communication from the respondent regarding complaints against DSS prior to this time, he asked DSS attorney William H. McMillan to attend this meeting since Mr. Wall had not been informed of the meeting's subject matter. Mr. McMillan agreed to attend and was in fact present during the July 13, 1990, meeting between the respondent and Mr. Wall.

16. The respondent began the meeting on July 13, 1990, with Mr. Wall and Mr. McMillan by saying he had received numerous complaints about DSS which needed correction and indicated Mr. Wall apparently was not doing a good job. When Mr. Wall asked the respondent to specify the complaints against DSS, the respondent did refer to the Sarno case as an example, but he did not present any documentation concerning that or any other complaint against DSS despite his policy that such alleged complaints were to be reduced to writing and signed by the complainant.

17. The respondent continued and said he was considering convening the grand jury to investigate DSS. At this point the respondent specifically referred to Ms. Shell and her termination. The respondent related that after talking with her, he felt she should be reinstated, and he threatened to convene the grand jury if she was not reinstated, saying to Mr. Wall, "Say you are not going to reinstate Mrs. Shell and I'll call a hearing—a grand jury hearing." When Mr. Wall replied that

he would not reinstate Ms. Shell, the respondent said, "Okay, I'll call for a hearing."

18. The respondent persisted and wanted to know the reasons for Ms. Shell's termination even though Mr. Wall advised the respondent that she had been informed of the reasons. In light of the respondent's persistence, Mr. Wall commented that he had never encountered such judicial and political pressure, and the respondent's reply was to characterize the pressure as legal pressure.

19. Seeking to intervene in the situation, Mr. McMillan interjected with the suggestion that even though a termination hearing was not required for a probationary employee (an opinion which Mr. Wall had also expressed), he would do some research to see if Ms. Shell could have a hearing. The respondent reacted favorably to this proposal and indicated such a hearing would be a satisfactory solution and would prevent a grand jury from being convened. The respondent concluded the meeting by telling Mr. McMillan to call him on Monday, July 16, 1990, with the results of his research regarding the possibility of a hearing for Ms. Shell.

20. Later in the day on July 13, 1990, Mr. McMillan communicated a recommendation to Mr. Wall for the DSS Board to grant Ms. Shell a hearing in order to obviate having a grand jury convened to conduct an investigation into DSS. However, when Mr. McMillan's recommendation was proposed to Ms. Stewart by Mr. Wall, she rejected it, and Mr. McMillan subsequently informed the respondent of Ms. Stewart's rejection on July 16, 1990.

21. Thereafter and as a direct consequence of DSS' refusal to reinstate or grant a hearing to Ms. Shell, the respondent sent letters dated August 1, 1990, to Ms. Stewart, Mr. Wall, Ms. Deaton, and Ms. York who were the four (4) individuals who had participated in the decision to terminate Ms. Shell's employment with DSS or the decisions not to reinstate or give a hearing to Ms. Shell. These letters informed the recipients that the grand jury would begin an investigation of allegations against DSS. The letters to Mr. Wall and Ms. Stewart also contained misstatements as to: 1) the existence of pending lawsuits against them, 2) the existence of a preliminary opinion of the Attorney General's office that Ms. Stewart's service

as a county commissioner and DSS Board chairperson constituted a conflict of interest, and 3) the advice of Mr. McMillan concerning the necessity of a termination hearing for an employee.

22. The respondent also: 1) had his secretary provide to the media announcements of a grand jury investigation which gave his office telephone number as a contact for persons with grievances who wished to make an appointment for an appearance before the grand jury, 2) had his secretary summon the grand jurors for the week of August 6, 1990, when he was commissioned to hold court, and 3) arranged for a court reporter to be present during the grand jury proceedings so there would be a record of the testimony of each witness, a record of Ms. Shell's contentions regarding the reasons for her termination, and a record for purposes of any future legal action by Ms. Shell.

23. Finally, the respondent did in fact formally convene an Iredell County Investigative Grand Jury on August 7, 1990, without providing any written documentation of any complaints against DSS, but rather by instructing the grand jury members that this was a special grand jury investigation of allegations against DSS concerning which the grand jury was to make findings of fact and recommendations after listening to the testimony of the witnesses who appeared before them, the first of whom was Ms. Shell.

24. This Iredell County Investigative Grand Jury was in session from August 7, 1990, through August 9, 1990, and during this session, it received sworn testimony from witnesses and made recommendations calling for the reinstatement of Ms. Shell and the immediate resignation, termination, or reprimand of a number of DSS personnel.

Respondent asks this Court not to adopt the recommendation of the Commission. He contends: (1) the allegations in the complaint are not sufficient to support the charge against him, (2) the ultimate facts required to support the findings and conclusions of the Commission are not supported by clear and convincing evidence, and (3) the evidence is not sufficient to support a finding that any misconduct on the part of the respondent was willful. Special counsel to the Commission argues that this Court should accept the findings and recommendation of the Commission because the Commission

properly found the facts by clear and convincing evidence and made appropriate conclusions on clear and convincing evidence that the actions of respondent constitute conduct which violates the North Carolina Code of Judicial Conduct, constitute willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and warrant the Commission's recommendation of censure. We consider respondent's contentions seriatim.

Respondent contends *inter alia* that the allegations in the complaint are not sufficient to support the charges against him because he had the authority to convene the grand jury to conduct a noncriminal investigation of the Iredell County Department of Social Services. Respondent reasons that he cannot be guilty of misconduct in threatening to convene the grand jury, for whatever purpose, because he had the lawful authority to do so. Special counsel, on the other hand, contends that respondent did not have the authority to convene a grand jury to make an investigation in this case and that the convening of the grand jury by respondent was improper for that reason. As our decision to follow the Commission's recommendation of censure rests upon another ground revealed in the findings and recommendation of the Commission, however, it is unnecessary for us to address these contentions by the respondent and counsel for the Commission.

Respondent's second contention is that the findings and conclusions of the Commission regarding respondent's course of conduct are not supported by clear and convincing evidence.

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

In re Bullock, 328 N.C. 712, 717, 403 S.E.2d 264, 266 (1991). The quantum of proof in proceedings before the Commission, by clear and convincing evidence, is a burden greater than that of proof

by a preponderance of the evidence and less than that of proof beyond a reasonable doubt. *See In Re Nowell*, 293 N.C. 235, 247, 237 S.E.2d 246, 254 (1977). Once this Court determines that the findings of fact by the Judicial Standards Commission are supported by ample competent, clear and convincing evidence, we may adopt them as our own. *See In Re Kivett*, 309 N.C. 635, 664, 309 S.E.2d 442, 459 (1993).

The basis of the Commission's recommendation in this case is, in essence, that respondent conveyed a threat to exercise his judicial powers for an improper purpose, that is to convene a grand jury to investigate DSS unless DSS complied with respondent's wishes that DSS either reinstate a discharged probationary employee or give the employee a hearing on her termination. Respondent argues that if the threat occurred, it took place during a conference at which only three persons were present—DSS Director Donald Wall, DSS Attorney William McMillan and respondent. Respondent analyzes the testimony of these three individuals as follows: (a) DSS Director Wall testified that respondent made the threat; (b) respondent testified that he did not make the threat; and (c) Attorney McMillan's testimony is inconclusive. Thus, according to respondent, the evidence cannot be clear and convincing since the evidence is in conflict and there is no corroborative testimony. Again, as our decision to follow the recommendation of the Commission is based upon a different ground revealed in findings of the Commission and supported by essentially uncontroverted evidence, we find it unnecessary to determine here whether clear and convincing evidence before the Commission would support a finding or conclusion that the respondent conveyed a "threat" to convene a grand jury for the purposes of retribution or punishing anyone if Ms. Shell was not reinstated or given a hearing. *See* Webster's Third International Dictionary, 2382 (1976) ("threat" as an expression of intent to "inflict evil, injury or damage on another usu. as retribution or punishment. . . .")

There was uncontroverted evidence before the Commission that on 11 July 1990—two days before the 13 July conference between the respondent, Mr. Wall, and Mr. McMillan—Iredell County Commissioner and DSS Board Chairperson Alice M. Stewart telephoned respondent and told him that a discharged probationary DSS employee, Rebecca Shell, had represented to Ms. Stewart that: (1) the respondent was a personal friend of said employee, (2) the respondent was advising the employee, and (3) the respond-

ent felt that the employee was entitled to a hearing before the DSS Board. Ms. Stewart's purpose in calling respondent was to determine his particular interest in the case of the discharged employee in light of this employee's representations to Ms. Stewart.

The respondent interrupted Ms. Stewart and said that Ms. Shell "was a friend of his," that he "felt like she had been treated wrongly by the Department of Social Services" and that he "had advised her that she should seek a hearing before the Board of Social Services and that she should get her job back." Respondent told Ms. Stewart that she "should clean the Department up for one thing, and said that Becky Shell (the discharged employee) should have her job back and that I could use my influence to see that she got a hearing and was rehired, and that I could make this as easy as I wanted to or as hard as I wanted to."

The uncontroverted evidence tending to show that the respondent took it upon himself to give legal advice and counsel to Ms. Shell with regard to her discharge from employment by DSS and undertook in his official capacity to intervene on her behalf is sufficient to establish violations of the North Carolina Code of Judicial Conduct. Specifically, such uncontroverted evidence establishes that the respondent violated Canon 2A by failing to conduct himself "in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary." Canon 2A (emphasis added). Additionally, such evidence establishes that the respondent violated Canon 2B by lending "the prestige of his office to advance the private interests of" Ms. Shell and by conveying or permitting others to convey the impression that Ms. Shell had special influence with him. For the foregoing reasons—which differ from those of the Commission—we agree with the Commission's conclusion that the respondent's conduct in this case violated Canons 2A and 2B of the North Carolina Code of Judicial Conduct and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Respondent's final contention is that even if his actions were improper in this case, they do not constitute willful misconduct in office. We find merit in this contention. We note that nothing else appearing, a violation of Canons 2A and 2B would not necessarily constitute willful misconduct in office.

> *Wilful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally,

> or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. *In re Edens*, *supra* at 305, 225 S.E. 2d 5, 9. *See Spruance v. Commission*, 13 Cal. 3d 778, 796, 532 P.2d 1209, 1221, 119 Cal. Rptr. 841, 853; *Geiler v. Commission on Judicial Qualifications*, *supra* at 287, 515 P.2d at 11, 110 Cal. Rptr. at 211; *In re Haggerty*, 257 La. 1, 39, 241 So. 2d 469, 478.

In re Nowell, 293 N.C. 235, 248, 237 S.E.2d 246, 255 (1977). In *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), we took note of this Court's attempt to define willful misconduct and conduct prejudicial to the administration of justice in general terms. "Like fraud," we said,

> these terms are "so multiform" as to admit of no precise rules or definition. *Garrett v. Garrett*, 229 N.C. 290, 296, 49 S.E. 2d 643, 647 (1948). It suffices now to say that conduct prejudicial to the administration of justice, unless knowingly and persistently repeated, is not per se as serious and reprehensible as wilful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. N. C. Const., art. IV, § 4, art. IV, § 8.

Id. at 157-58, 250 S.E.2d at 918.

We conclude that while the respondent's course of conduct in this case constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute, it does not rise to the level of willful misconduct in office. The evidence shows that while respondent was performing his duties in the capacity of Senior Resident Judge of the Twenty-Second Judicial District, complaints began to be made in increasing numbers regarding the manner in which the Department of Social Services was being administered. Concerned about these complaints, and in an attempt to prevent what he deemed to be an injustice to an employee, respondent first sought to bring the problems to the attention

of the DSS officials. When these efforts were not effective, he considered the idea of an investigation which might reveal the source of the problems and concluded that under the law the grand jury could be used for this purpose. While there is conflicting evidence regarding some of the details of the conduct involved, we give consideration to the fact that respondent has served with distinction as a district court judge and a superior court judge over a period of twenty-two years and the uncontradicted evidence from respected members of the bar to the effect that his character has been excellent. We note further that there was no evidence that respondent was motivated by any desire for personal gain or by the desire to harm or injure any person.

For the reasons stated herein, we conclude that respondent's course of conduct in this case constitutes conduct in violation of Canons 2A and 2B of the North Carolina Code of Judicial Conduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. We conclude that respondent's conduct does not rise to the level of willful misconduct in office.

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

VIRGINIA P. ABELS v. RENFRO CORPORATION

No. 33PA93

(Filed 3 December 1993)

1. Rules of Civil Procedure § 50 (NCI3d)— motion for judgment n.o.v.—motion for directed verdict—same standard

In essence, a motion for judgment notwithstanding the verdict is a renewal of the movant's prerequisite motion for a directed verdict, and the same standard should be used in the determination of the sufficiency of the evidence with regard to both motions. N.C.G.S. § 1A-1, Rule 50(b)(1).

Am Jur 2d, Trial §§ 862, 863, 1953.

2. Rules of Civil Procedure § 50.3 (NCI3d)— motion for directed verdict—consideration and sufficiency of evidence

A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury. In making its determination of whether to grant the motion, the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. If the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied.

Am Jur 2d, Trial §§ 850 et seq.

3. Labor and Employment § 75 (NCI4th)— retaliatory discharge for workers' compensation claim—sufficiency of evidence

There was sufficient evidence to support an inference that plaintiff was fired because defendant employer anticipated her good-faith filing of a workers' compensation claim so that her claim for retaliatory discharge in violation of former N.C.G.S. § 97-6.1 was properly submitted to the jury where plaintiff's evidence tended to show that she worked for defendant from 1949 until 1962 and then again from 1972 until she was discharged in 1987; after her first injury in 1984, she was allowed to engage in light work until she could return to her regular duties; her production was good throughout her employment, even after her second injury in 1987; defendant was aware that plaintiff had been injured again in 1987 while at work and that her doctor had requested that she be given a one-month leave of absence; plaintiff was discharged shortly after her second injury; and plaintiff later filed a workers' compensation claim based upon the injuries sustained while working for defendant.

Am Jur 2d, Workers' Compensation §§ 39 et seq.

4. Labor and Employment § 75 (NCI4th); Evidence and Witnesses § 108 (NCI4th)— retaliatory discharge claim—comparative evidence—treatment of similarly situated employees

In an action under N.C.G.S. § 97-6.1 for retaliatory discharge for filing a workers' compensation claim, evidence of the em-

ployer's treatment of similarly situated employees is admissible to show the employer's motive for discharging plaintiff employee. Therefore, evidence offered by defendant of the discharge for poor quality work of other employees who never filed workers' compensation claims and evidence of other employees who filed workers' compensation claims and returned to work without incident should have been admitted to support defendant's defense under N.C.G.S. § 97-6.1(c) that plaintiff was fired because of the continued low quality of her work after repeated warnings.

Am Jur 2d, Evidence §§ 298 et seq.; Workers' Compensation §§ 39 et seq.

5. **Labor and Employment § 75 (NCI4th); Damages § 29 (NCI4th)— retaliatory discharge—insufficient evidence of emotional distress**

Assuming *arguendo* that plaintiff may recover damages for emotional distress in an action for retaliatory discharge for filing a workers' compensation claim and that plaintiff's allegations of such damages were adequate, the evidence was insufficient to show any mental or emotional disturbance on the part of plaintiff resulting from defendant's actions.

Am Jur 2d, Damages § 185; Workers' Compensation §§ 39 et seq.

6. **Evidence and Witnesses § 1380 (NCI4th)— findings in workers' compensation action—not res judicata in retaliatory discharge action**

Findings by the Industrial Commission that plaintiff's injuries were not compensable were not *res judicata* in plaintiff's action for retaliatory discharge for filing a workers' compensation claim since plaintiff's retaliatory discharge claim is not dependent upon a finding of compensability of plaintiff's injuries and the two actions do not involve the same claim. Therefore, the trial court properly refused to admit those findings in plaintiff's retaliatory discharge action.

Am Jur 2d, Evidence §§ 738 et seq.

7. **Labor and Employment § 75 (NCI4th)— retaliatory discharge—conflicting evidence—judgment n.o.v. not warranted**

The trial court did not err by denying defendant employer's motion for judgment notwithstanding the verdict in plaintiff's

action for retaliatory discharge on the ground that defendant had a policy of discharging employees if they were not able to return to work after a six-month leave of absence due to injury and that plaintiff should not be allowed to recover for any compensation she lost beyond that point, or on the alternative ground that the evidence showed that plaintiff was able to work after her injury and should have been held responsible for mitigation of damages by engaging in other employment, where the evidence in support of each of these two contentions was conflicting.

Am Jur 2d, Workers' Compensation §§ 39 et seq.

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 a unanimous decision of the Court of Appeals, 108 N.C. App. 135, 423 S.E.2d 479 (1992), affirming a judgment for plaintiff entered 25 March 1991 on a claim of retaliatory discharge in violation of N.C.G.S. § 97-6.1[1] by Long (James M.), J., after a jury trial at the 22 January 1991 Civil Session of Superior Court, Surry County, and an order entered 26 March 1991 denying defendant's motion, *inter alia*, for judgment notwithstanding the verdict. Heard in the Supreme Court 14 September 1993.

Franklin Smith for plaintiff-appellee.

Constangy, Brooks & Smith, by W.R. Loftis, Jr., and Robin E. Shea, for defendant-appellant.

MEYER, Justice.

In this case we decide, *inter alia*, whether, in an employee discharge case instituted pursuant to N.C.G.S. § 97-6.1, evidence of the employer's treatment of similarly situated employees is admissible to show the employer's motive for discharging the employee. We hold that such evidence is admissible.

Plaintiff began her employment as a knitter with defendant in 1949 and continued working until she became pregnant in 1962. Plaintiff resumed her employment with defendant in 1972. At the

1. After initiation and trial of this action, this statute was repealed; the pertinent statute is now N.C.G.S. § 95-241.

time of her discharge on 19 August 1987, plaintiff's duties included overseeing approximately forty knitting machines and inspecting the quality of manufactured socks.

Plaintiff alleged that she was injured when she slipped and fell on some cardboard boxes on 15 June 1984. Plaintiff reported this injury to defendant but did not file a workers' compensation claim at that time. Plaintiff also alleged a second injury, which occurred on 26 June 1987 when an employee of defendant, in the process of moving boxes, struck her from behind, injuring the back of her head, her upper back, her neck, and her ribs.

Defendant discharged plaintiff on 19 August 1987. Approximately six weeks after her termination, plaintiff filed workers' compensation claims for her alleged 15 June 1984 and 26 June 1987 injuries. Plaintiff filed suit against defendant on 25 November 1987, alleging that defendant violated N.C.G.S. § 97-6.1 by discharging her in retaliation for her anticipated filing of workers' compensation claims. Defendant argued that plaintiff was fired due to the poor quality of her work and that prior to her discharge, she received several warnings from management to either improve the quality of her work or face termination.

Plaintiff's workers' compensation claims were denied. The Industrial Commission found that her 1984 claim was barred by the statute of limitations and that the 1987 claim was not based on a compensable injury. This decision was affirmed by the full Commission on 13 June 1989 and by the Court of Appeals on 21 August 1990.

A jury trial on the retaliatory discharge claim began on 22 January 1991. On 23 January 1991, the trial court ruled that defendant could not introduce as substantive evidence the findings of the Deputy Commissioner, the full Commission, or the Court of Appeals with regard to the injuries alleged to have been sustained by plaintiff.

On 28 January 1991, the jury returned a verdict finding that plaintiff was wrongfully discharged in violation of N.C.G.S. § 97-6.1 and awarded her $82,200 in damages as follows: $60,000 for loss of earnings, $12,000 for loss of health insurance benefits, $7,200 for loss of defendant's contributions to Social Security, $2,000 for loss of profit sharing, and $1,000 for mental and emotional distress.

On 25 March 1991, the trial court entered judgment for that amount and ordered plaintiff's reinstatement to her former position.

Defendant's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial was denied by the trial court on 26 March 1991.

Defendant appealed to the Court of Appeals, which unanimously affirmed the decision of the trial court. *Abels v. Renfro Corp.*, 108 N.C. App. 135, 423 S.E.2d 479 (1992).

Defendant brings forth five assignments of error. In its first assignment of error, defendant contends that the Court of Appeals erred in affirming the trial court's denial of defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant suggests that this Court adopt the complicated analysis used in federal employment discrimination cases as a model for how a retaliatory discharge case based upon the filing of a workers' compensation claim should be developed in our North Carolina courts. We decline to do so. Instead, we rely on the terms of the statute itself to determine what showing is necessary to withstand a motion for directed verdict and subsequent motion for judgment notwithstanding the verdict.

[1] We first note that Rule 50 of the North Carolina Rules of Civil Procedure provides that a motion for judgment notwithstanding the verdict "shall be granted if it appears that the motion for directed verdict could properly have been granted." N.C.G.S. § 1A-1, Rule 50(b)(1) (1990). In essence, a motion for judgment notwithstanding the verdict is a renewal of the movant's prerequisite motion for a directed verdict. *Taylor v. Walker*, 320 N.C. 729, 360 S.E.2d 796 (1987); *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). Accordingly, the same standard should be used in the determination of the sufficiency of the evidence with regard to both motions. *E.g.*, *Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987), *reh'g denied*, 321 N.C. 747, 366 S.E.2d 855 (1988); *Northern Nat'l Life Ins. v. Miller Machine Co.*, 311 N.C. 62, 316 S.E.2d 256 (1984).

[2] A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury. *In Re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923 (1993); *United Labs v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). In making its determination of whether to grant the motion, the trial court must

examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence. *Anderson v. Butler*, 284 N.C. 723, 730-31, 202 S.E.2d 585, 590 (1974). If, after undertaking such an analysis of the evidence, the trial judge finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied. *In Re Will of Jarvis*, 334 N.C. 140, 143, 430 S.E.2d 922, 923; *Braswell v. Braswell*, 330 N.C. 363, 367, 410 S.E.2d 897, 899 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992).

Plaintiff in this case bases her claim on N.C.G.S. § 97-6.1, the pertinent portion of which reads as follows:

> (a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

N.C.G.S. § 97-6.1(a) (1991) (repealed effective October 1992). As the Court of Appeals noted, in order for a plaintiff to recover in an action brought pursuant to N.C.G.S. § 97-6.1, "plaintiff must show that her discharge was caused by her good faith institution of the workers' compensation proceedings or by her testimony or her anticipated testimony in those proceedings." *Abels v. Renfro Corp.*, 108 N.C. App. 135, 143, 423 S.E.2d 479, 483 (1992) (citing *Hull v. Floyd S. Pike Electrical Contractor*, 64 N.C. App. 379, 307 S.E.2d 404 (1983)). The Court of Appeals has also held that a plaintiff can survive a Rule 12(b)(6) motion to dismiss his claim even if he is fired before he files his workers' compensation claim. In *Wright v. Fiber Industries, Inc.*, 60 N.C. App. 486, 299 S.E.2d 284 (1983), the Court of Appeals noted that

> [i]f G.S. 97-6.1 were limited only to retaliatory acts which occurred after the employee filed his claim, an employer could easily avoid the statute by firing the injured employee before he filed.

Id. at 491, 299 S.E.2d at 287. We agree.

[3] A careful reading of the transcript reveals that the evidence taken in the light most favorable to the plaintiff was as follows:

Plaintiff testified that she worked for defendant, Renfro Corporation, from 1949 until 1962, and then again from 1972 until she was discharged in 1987. She testified that throughout her employment, even after her second injury, her production was good. There was evidence that after her first injury in 1984, she was allowed to engage in light work until she could return to her regular duties. There was also evidence that Renfro Corporation was aware that plaintiff had been injured again in 1987 while at work and that her doctor had requested that she be given a one-month leave of absence. Shortly after the injury, she was discharged. Plaintiff later filed a workers' compensation claim based upon the injuries sustained while working for defendant Renfro Corporation.

We conclude that, although the evidence of causal connection between the discharge and filing of the workers' compensation claim is weak, the jury could have inferred that Renfro, having earlier escaped a workers' compensation claim by allowing plaintiff to continue earning her salary at lighter duties, eventually concluded, upon her second injury, that this prospect was no longer to be avoided and that, in order to forestall the anticipated filing of a workers' compensation claim, the most expedient remedy would be to discharge plaintiff. We thus hold that there was sufficient evidence to support an inference that plaintiff was fired because defendant Renfro Corporation anticipated her good-faith filing of a workers' compensation claim, and accordingly, defendant's motion for a judgment notwithstanding the verdict was properly denied.

[4] We next address the question of whether it was error for the trial court to prohibit defendant from introducing evidence of its treatment of similarly situated employees. We hold that it was error requiring a new trial.

Defendant Renfro Corporation offered substantial evidence that plaintiff was discharged, not because of any anticipated filing of a workers' compensation claim, but because of the continued low quality of plaintiff's work after repeated warnings. Defendant also attempted to introduce evidence of the discharge for poor quality work of other employees who never filed workers' compensation claims and evidence of other employees who filed workers' compensation claims and returned to work without incident. This evidence was offered to rebut plaintiff's assertion that she was fired because defendant anticipated her filing a workers' compensation claim as a result of her 1984 and 1987 injuries.

We first note that under Rule 401 of the North Carolina Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). What defendant would have attempted to prove by the introduction of comparative evidence was that plaintiff was discharged "for failure to meet employer work standards not related to the Workers' Compensation Claim," a specifically listed defense to the cause of action established by N.C.G.S. § 97-6.1. N.C.G.S. § 97-6.1(c). It thus becomes apparent that, in this type of claim, after it has been established that the employee was in fact discharged and that she had filed or was about to file a workers' compensation claim, the question of the motive of the employer is determinative. "The *motive* which prompts a person to do a particular act is seldom an essential element of a cause of action or defense, and therefore it need not ordinarily be proved." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 83 (3d ed. 1988). In this type of case, however, the employer's motivation is critically important. This particular statute was designed to protect employees who have been fired because the employee has instituted, or those whom the employer anticipates will in good faith institute, a proceeding under the North Carolina Workers' Compensation Act. N.C.G.S. § 97-6.1(a). The statute contains several specifically listed defenses to such an action:

> (c) Any employer shall have as an affirmative defense to this section the following: willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of an employer's property; or for *failure to meet employer work standards not related to the Workers' Compensation Claim*; or malingering; or embezzlement or larceny of employer's property; or for violating specific written company policy of which the employee has been previously warned and for which the action is a stated remedy of such violation.

N.C.G.S. § 97-6.1(c) (emphasis added).

The employer's primary defense in these cases rests upon its ability to present evidence that the employee was fired for other reasons, particularly those reasons listed in the statute as defenses to the claim.

This Court, in its first employment discrimination case brought under N.C.G.S. § 143-422.2, noted that it would "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Though not controlling, we note that federal courts have long allowed this type of comparative evidence in employment discrimination cases. *E.g., McDonnell Douglas v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973); *Miller v. CertainTeed Corp.*, 971 F.2d 167 (8th Cir. 1992); *Canady v. J.B. Hunt Transport, Inc.*, 970 F.2d 710 (10th Cir. 1992).

In a case such as this, the motivation of the employer in the dismissal of the employee is the primary issue to be decided by the jury. It is unlikely that either plaintiff or defendant will be able to present any direct evidence of the employer's state of mind in the making of the decision. Thus, critical to this determination would be evidence of how the employer has treated similarly situated employees in the past and how it was treating them at the time of the disputed discharge. This evidence, though circumstantial in nature, is perhaps the best indication, other than the testimony of the parties themselves, of the rationale of the employer for the discharge. We conclude that in this case, defendant was deprived of the only effective means available to it to rebut plaintiff's claim of wrongful or retaliatory discharge. We therefore hold that defendant should be afforded an opportunity to present this evidence to the jury in a new trial.

[5] Defendant also contends that the issue of emotional distress should not have been presented to the jury. We agree. Plaintiff's complaint alleged that she had "suffered great mental and emotional disturbance as a result of the cruel and barbaric treatment and manner and way she has been treated by the Defendant corporation." Assuming *arguendo* that plaintiff may recover for such damages under the terms of the statute in question and that the allegations of such damages in this case are adequate, the transcript of the evidence presented reveals no evidence whatsoever of mental or emotional disturbance on the part of plaintiff resulting from defendant's actions. The trial court erred in submitting this issue to the jury.

[6] Defendant next contends that the Court of Appeals erred in affirming the trial court's refusal to admit the Industrial Commis-

sion's findings that plaintiff's injuries were not compensable. Defendant argues that these findings are *res judicata*, and as such, counsel for defendant should have been allowed to present these findings as evidence that Renfro Corporation did not engage in any wrongdoing with regard to plaintiff's filing of her workers' compensation claims. Defendant's reliance on the doctrine of *res judicata* is misplaced. "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citing *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). The claim brought before the Industrial Commission concerned the compensability of plaintiff's injuries under the Workers' Compensation Act. The present claim is in no way dependent upon a finding of compensability of the injuries alleged to have been sustained by plaintiff. The focus of a claim under N.C.G.S. § 97-6.1 is the determination of whether plaintiff was discharged because she filed or intended to file a workers' compensation claim. The two actions do not involve the same claim. Accordingly, the doctrine of *res judicata* does not apply.

[7] We now turn to defendant's argument that because Renfro Corporation had a policy of discharging employees if they were not able to return to work after a six-month leave of absence due to injury, plaintiff should not be allowed to recover for any compensation she alleges to have lost beyond that point. Defendant bases this contention on a statement made by plaintiff in a deposition, taken some eight months after her discharge, that she was, at that time, still unable to work. Based upon this remark by plaintiff, defendant contends that it is entitled to a judgment notwithstanding the verdict or to a new trial, as the evidence did not support the damage award. In the alternative, defendant contends that other evidence showed that plaintiff was able to work after her injury, and accordingly, she should have been held responsible for the mitigation of damages by engaging in other employment. Without engaging in a discussion of the merits of defendant's alternative arguments, we simply note that the evidence in support of each of these two contentions is by its very nature in conflict, and accordingly, a judgment notwithstanding the verdict is not proper.

We conclude that it was prejudicial error for the trial court to exclude defendant's comparative evidence of similarly situated employees and that, as a result, defendant is entitled to a new trial. We also hold that it was error to submit the issue of emotional distress to the jury, as there was insufficient evidence to support such a finding. We affirm the Court of Appeals' decisions on the denial of the judgment notwithstanding the verdict on grounds that there was no evidence of retaliatory motive, the exclusion of the findings of the Industrial Commission, and the denial of the judgment notwithstanding the verdict on grounds that the damage award was not supported by the evidence. The case is remanded to that court for further remand to the Superior Court, Surry County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

STATE OF NORTH CAROLINA v. CALVIN WILSON, JR.

No. 68A93

(Filed 3 December 1993)

1. Criminal Law § 460 (NCI4th)— murder—prosecutor's argument concerning defendant's alibi—no error

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's closing argument where defendant introduced alibi evidence that he had been in a motel when the shooting occurred and the prosecutor attempted to discredit defendant's alibi by arguing that money could buy a lot of things, including a motel record. Although defendant contended that the argument was without basis in the record because there was no evidence that he had purchased the registration record, the prosecutor did not argue that the record had been bought. The argument was a legitimate inference because defendant could legitimate-

ly create such a record by renting a motel room if he had the money whether he intended to use the room or not.

Am Jur 2d, Trial §§ 609 et seq.

2. **Evidence and Witnesses § 761 (NCI4th)— testimony that State's witness on drugs—excluded—no prejudice**

There was no prejudice in a first-degree murder prosecution, assuming error, where the court excluded testimony from a defense witness that a State's witness to the murder had been on drugs at the time. The defense witness also testified that the State's witness was not at the scene, so that whether the witness was on drugs would be irrelevant if the defense witness was believed. Moreover, the State's witness herself testified on direct examination that she was addicted to heroin and cocaine at the time of the murder and used drugs on that day.

Am Jur 2d, Appeal and Error § 806.

3. **Evidence and Witnesses § 2954 (NCI4th)— first-degree murder—cross-examination—whether witness paid to testify—no error**

There was no error in a first-degree murder prosecution where the court allowed the prosecutor to ask a defense witness whether defendant had paid her to testify where the trial court required the prosecutor to give his basis for the question and the prosecutor stated that he had received information that the witness sold drugs for defendant, was unemployed and lived at defendant's house, and inferred that the witness would do anything she could to help defendant.

Am Jur 2d, Witnesses § 888.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Beal, J., at the 20 July 1992 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 17 September 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.

PARKER, Justice.

Defendant was charged in an indictment, proper in form, with the first-degree murder of William Sanders. There being no evidence of aggravating circumstances, defendant was tried noncapitally and convicted by the jury of first-degree murder on the theory of premeditation and deliberation. The trial court imposed the mandatory sentence of life imprisonment. We find defendant received a fair trial free of prejudicial error.

State's evidence tended to show that on 18 June 1991 around 8:30 p.m., Lynn Ellen Morrow was at the home of defendant's sister, Teresa, who lived on Wayt Street in Charlotte, North Carolina. Morrow looked out the living room window and saw defendant, whom she knew as "Wine," drive up in a black Jeep. Morrow knew defendant because the two had grown up in the same residential area of Charlotte and attended the same junior high school. In junior high school, defendant's brother was Morrow's boyfriend. Defendant came into Teresa's house and asked Morrow if she knew where William Sanders and Larry Manns were. Morrow answered that she thought Sanders, who had been at Teresa's house about an hour earlier, was in South Carolina. Sanders had rented and was driving a white Pontiac automobile. Defendant responded that he had seen Sanders' car parked near Teresa's house. He said to Morrow, "Come on, I'll show you." The two went out of the house and began walking toward Oaklawn Avenue. The weather was clear; it was still daylight. As they approached the Pontiac, it began to pull out of a driveway, and defendant started running toward the car. Morrow saw defendant reach into his shirt and pull out a pistol. Morrow also began to run and asked defendant, "Wine, what are you doing?" When defendant reached the car, he shot into the car two or three times. Morrow stopped running about twenty-five feet from the car. She could see that the victim was the driver of the car. Another person, who was in the passenger seat, got out of the car and ran away. Morrow could see only the back of the person who fled. Defendant shot into the car again, and it rolled across Wayt Street and struck a utility pole. Defendant ran to his Jeep and drove away. Morrow also left and went to the residence of Richard Latimer, where she purchased heroin.

Harvey Neal Hinton testified that on 18 June 1991 he was visiting his mother, who resided at 2008 Wayt Street. Around 8:30 p.m., Hinton was sitting at the kitchen table eating dinner. It was

still light outside, and as Hinton looked out the window he saw the victim, whom Hinton knew, and another man, whom Hinton did not know, get into a car. In a few seconds Hinton again looked out the window and saw that the car had pulled into Wayt Street. Hinton saw a third man who "had been running. He ran up to the car. From the way he was leaning, seemed like he had just stopped running, really. And he just started shooting into the car." Hinton recognized the shooter as defendant. Defendant, who held the gun in his right hand, fired three shots, turned away slightly to the left, turned back, fired twice more, and then ran away.

Eric Lorenzo Davis testified that he was in the car with the victim that day. Davis did not know the victim well, but the victim had offered Davis a ride home. Davis got into the front passenger seat of the white car. The victim started the car, and as it rolled out of the driveway, Davis looked to his left and saw a revolver. Davis immediately got out of the car and ran away. He heard about five shots in all. He described a revolver as "[t]he gun that you got it and you don't have to put no clips in it."

State's medical evidence showed that two bullets were removed from the victim's body. The cause of death was a gunshot wound to the victim's chest. Other evidence showed that no spent casings were recovered from the victim's automobile, but holes in the interior of the vehicle were consistent with shots having been fired from the driver's side. Although no murder weapon was recovered, the two bullets from the victim's body and another bullet found on the floorboard of the car were all of nine millimeter caliber. All had been fired from the same gun, likely a revolver.

Defendant's evidence included the testimony of Valerie Wall, who stated that on 18 June 1991 around 7:00 p.m. she went to Richard Latimer's house on Abelwood Street in Charlotte. State's witness Morrow was there and remained there until Wall left, around 11:30 p.m. Marilyn Sloan testified that she gave Wall a ride to Latimer's and saw Morrow standing in the doorway of the house.

Zubair Ahmed, general manager of a motel on Statesville Road, authenticated a motel registration record indicating defendant was a guest there on 18 June 1991. Ahmed testified the record showed defendant checked in at 2:35 p.m. In addition, defendant's alibi evidence included testimony by his girlfriend, Brenda Alexander,

that she was with defendant when he checked into the motel and the two remained there until midmorning of the next day.

The trial court denied defendant's motions to dismiss made at the close of State's evidence and at the close of all evidence. Additional facts necessary to an understanding of defendant's contentions are included in the discussion which follows.

[1] Defendant's first contention is that the trial court erred in overruling defense counsel's objection to the prosecutor's closing argument. We disagree with this contention.

In arguing to the jury the prosecutor attempted to discredit defendant's alibi as follows:

> I would contend to you that the defendant knew what he was going to do and he knew that he needed an alibi. What better place to get an alibi than a motel room?
>
> I mean what they want you to believe, that he has a girlfriend who he just happened, on June 18th, to want to go to a motel with. He's got a big house over there with that big fence around it. On Munsee. On Munsee Street. It's over there. She knows where it is. Doesn't make sense. All of a sudden they want to go to a motel. Don't believe that.
>
> . . . [The defendant's girlfriend] wasn't no bit more over at no motel with that defendant than the man in the moon. Doesn't make any sense.
>
> . . . .
>
> And money. Money. Money can buy a lot of things. Money can buy this [indicating defendant's Exhibit 4, the motel record.]

Defendant argues that since no evidence showed he purchased the registration record, the prosecutor's remarks constituted argument without any basis in the record or expression of a personal belief or suspicion. We do not find these arguments persuasive.

In closing argument, an attorney may not make arguments based on matters outside the record but may, based on "his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230 (1988). In addition, this Court has summarized its holdings on this question as follows:

> We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. *E.g., State v. Covington*, 317 N.C. 127, 343 S.E.2d 524 (1986); *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985). Counsel may argue the facts in evidence and all reasonable inferences that may be drawn therefrom together with the relevant law in presenting the case. *State v. Covington*, 317 N.C. 127, 343 S.E.2d 524. Whether counsel has abused this right is a matter ordinarily left to the sound discretion of the trial court. *Id.* Counsel may not, however, place before the jury incompetent and prejudicial matter by expressing personal knowledge, beliefs, and opinions not supported by evidence. *Id.* Upon objection, the trial court has the duty to censor remarks not warranted by the evidence or law and may, in cases of gross impropriety, properly intervene *ex mero motu. Id.*

State v. Anderson, 322 N.C. 22, 37, 366 S.E.2d 459, 468, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).

Applying these principles, we find the prosecutor's argument was within the wide latitude allowed counsel in stating contentions and drawing inferences from the evidence. The prosecutor argued first and made no mention of defendant's alibi argument. Defense counsel argued next, emphasizing the veracity of the motel record. Arguing last, and in response, the prosecutor did not express a personal opinion or belief by suggesting that money could buy such a record. Instead, this was a legitimate inference, as defendant could legitimately create such a record by renting a motel room if he had the money whether he intended to use the room or not. The prosecutor did not argue that the record had in fact been bought. Therefore, we conclude the trial court did not err in overruling defendant's objection.

[2] Defendant next contends the trial court erred by excluding testimony from defense witness Wall that State's witness Morrow was under the influence of drugs at the time of the murder. Defendant preserved the alleged error by making an offer of proof during Wall's testimony. We disagree with defendant's contention.

Wall testified that Morrow was not on Wayt Street when the murder occurred. Accordingly, if Wall's testimony were believed by the jury, Morrow could not have seen the events to which she testified. Hence, whether Morrow was under the influence of drugs would be irrelevant, and exclusion of Wall's

testimony on this point could not have prejudiced defendant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." N.C.G.S. § 8C-1, Rule 401 (1992). Evidence that is not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402 (1992). To show prejudice defendant must demonstrate that there was a reasonable possibility that had the alleged error not occurred, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Morrow herself testified on direct examination that she was addicted to heroin and cocaine at the time of the murder and used these drugs on that day. Under these circumstances, assuming *arguendo* that exclusion of the evidence was error, we conclude defendant has failed to show prejudice arising from exclusion of the proffered evidence, *see id.; State v. Weeks*, 322 N.C. 152, 169, 367 S.E.2d 895, 905 (1988) (finding no prejudice where substantially the same testimony was also admitted), and the trial court did not err in excluding it.

[3] Finally defendant contends the trial court erred by permitting the prosecutor to inquire of defense witness Sloan whether defendant paid her to testify. Again we disagree. The Rules of Evidence permit cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992). This Court has said that the scope of cross-examination is subject to the control of the trial judge and "the questions must be asked in good faith." *State v. Williams*, 279 N.C. 663, 675, 185 S.E.2d 174, 181 (1971); *see also* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 111 (3d ed. 1988) (reiterating good faith requirement).

We note first that the trial court required the prosecutor to give his basis for asking the challenged question. The prosecutor stated he had received information from an acquaintance of Sloan that Sloan sold drugs for defendant. From this the prosecutor inferred that Sloan would do "anything she can to help [defendant]." In addition, the prosecutor argued that Sloan testified she was unemployed and lived at defendant's house on Munsee Street. From the record, we conclude the trial court did not err in overruling defendant's objection to the prosecutor's question.

For the foregoing reasons we hold defendant received a fair trial free of prejudicial error.

NO ERROR.

IN THE MATTER OF: THE APPEAL OF PHILIP MORRIS U.S.A. FROM THE DECISION OF THE CABARRUS COUNTY BOARD OF EQUALIZATION AND REVIEW FOR PERSONAL PROPERTY TAXES YEARS 1984-1989

No. 49PA93

(Filed 3 December 1993)

Taxation § 25.3 (NCI3d)— ad valorem taxes—business property audit agreement—contingent fee—no public policy violation

A county's business personal property audit agreement with a private auditor which compensated the auditor at the rate of thirty-five percent of taxes owed on discovered property did not violate public policy, and the resulting discovery of taxable property was not void, since the legislature in N.C.G.S. § 105-299 authorized counties to employ private auditors, and the legislature's failure to prohibit contingent fees for a private tax auditor's services constitutes a determination that such contingent fee contracts are not contrary to public policy.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 493 et seq.; State and Local Taxation § 728.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 108 N.C. App. 514, 424 S.E.2d 222 (1993), affirming a final decision of the North Carolina Property Tax Commission. Heard in the Supreme Court on 13 September 1993.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker; and Blakeney & Alexander, by David L. Terry, for the appellant Cabarrus County.

Hunton & Williams, by William S. Patterson, Jean Gordon Carter, James W. Shea, and David A. Agosto, for the appellee Philip Morris U.S.A.

Robinson Maready Lawing & Comerford, by Michael L. Robinson, on behalf of Durham County, amicus curiae.

James B. Blackburn III, General Counsel, N.C. Association of County Commissioners, and S. Ellis Hankins, General Counsel, N.C. League of Municipalities, amici curiae.

Floyd Allen & Jacobs, by Jack W. Floyd and Robert V. Shaver, Jr., on behalf of Guilford Mills, Inc., amicus curiae.

Poyner & Spruill, by J. Phil Carlton, on behalf of Investment North Carolina, Inc., amicus curiae.

S. Davis Phillips, Secretary of Commerce, on behalf of The North Carolina Economic Development Board, amicus curiae.

Johnson Gamble Mercer Hearn & Vinegar, by Charles H. Mercer, Jr., and M. Blen Gee, Jr.; and Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr., Nancy S. Rendleman, and Linda F. Nelson, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

MITCHELL, Justice.

The controlling facts in this case are undisputed. In May of 1988, the Cabarrus County Tax Assessor entered into a contract, denominated "Business Personal Property Audit Agreement," with Tax Management Associates, Inc. ("TMA"). The Cabarrus County Board of Commissioners approved the contract on 16 January 1989. Under the terms of the contract, TMA agreed to provide Cabarrus County with audit services "on a reasonable sample of the County's business personal property taxpayers" in accordance with applicable North Carolina General Statutes, specifically N.C.G.S. §§ 105-283, 105-317.1 and 105-312. The fee arrangement provided for in the contract required Cabarrus County to pay TMA thirty-five percent of taxes owed on property TMA discovered, including any penalties. To "discover" property in this context means to identify taxable property that was not listed for taxation or property that was listed but was substantially undervalued in its listing by the taxpayer. *See* N.C.G.S. § 105-272(6b) (1992).

In November of 1988, TMA contacted Philip Morris U.S.A. to initiate an audit of the tax returns of Philip Morris for the years 1986 and 1987. The audit was later expanded to include Philip Morris' tax returns for all years from 1983 through 1989 and resulted in the "discovery" of a substantial amount of taxable property. Based on the audit and acting pursuant to N.C.G.S. § 105-312, the Cabarrus County Tax Assessor issued a final decision concluding that understatements of tangible personal property on the tax returns of Philip Morris exceeded $100 million per year for each of the years 1984 through 1989 and cumulatively totaled

$923,339,510. Philip Morris filed a formal request for a review of the Tax Assessor's final decision by the Cabarrus County Board of Equalization and Review. A hearing was held, and in a decision dated 7 November 1990, the Board ordered an assessment of discovered personal property in the amount of $599,426,934.

Philip Morris then appealed to the North Carolina Property Tax Commission ("Commission"). Philip Morris included among its grounds for appeal a contention that the contingent fee contract for private auditing services between Cabarrus County and TMA was against public policy and rendered the discovery of Philip Morris' property void. The Commission, sitting as the State Board of Equalization and Review, heard arguments of counsel and received exhibits on the parties' motions. On 24 May 1991, the Commission rendered its final decision concluding by a 3-2 vote that the contingent fee contract "was void as against public policy from its inception." Therefore, the Commission held that Cabarrus County's discovery and assessment of Philip Morris' property was void "because it resulted directly from the County's entry into a contingent fee contract that was void as against public policy."

Cabarrus County gave notice of appeal to the Court of Appeals. Philip Morris then filed a cross-notice of appeal. The Court of Appeals affirmed the decision of the Commission. On 11 March 1993, this Court allowed Cabarrus County's petition for discretionary review.

Cabarrus County contends that the Court of Appeals erred in concluding that the contingent fee contract for a private tax auditor's service in the present case violates public policy. We agree and, therefore, reverse the decision of the Court of Appeals.

Only a few courts in other jurisdictions have considered the validity of contingent fee contracts for tax audits. The results reached by those courts are completely mixed and establish no clear line of authority. *E.g.*, *Jackson Lumber Co. v. McCrimmon*, 164 F. 759 (N.D. Fla. 1908) (contingent fee arrangement not against public policy); *Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 410 S.E.2d 4 (1991) (contingent fee contract violates public policy); *Simpson v. Silver Bow County*, 87 Mont. 83, 285 P. 195 (1930) (contingent fee contract not against public policy); *Murphy v. Swanson*, 50 N.D. 788, 198 N.W. 116 (1924) (contingent fee contract violates public policy). We do not find such authorities from other jurisdic-

tions persuasive or particularly helpful in resolving the issue before us in this case.

The general rule in North Carolina is that absent "constitutional restraint, questions as to public policy are for legislative determination." *State v. Whittle Communications*, 328 N.C. 456, 470, 402 S.E.2d 556, 564, *reh'g denied*, 328 N.C. 735, 404 S.E.2d 878 (1991) (quoting *Gardner v. North Carolina State Bar*, 316 N.C. 285, 293, 341 S.E.2d 517, 522 (1986)). Therefore, we must consider whether the legislature has determined the public policy with regard to the issue before us.

North Carolina General Statute § 105-299 authorizes boards of county commissioners to employ firms to assist county tax assessors. It expressly provides that the "board of county commissioners may employ appraisal firms, mapping firms or other persons or firms having expertise in one or more duties of the assessor to assist him or her in the performance of such duties." N.C.G.S. § 105-299 (1992). The General Assembly has, therefore, specifically authorized each county to employ private auditors, and we conclude that a power incidental to that grant of authority is the power to decide the basis upon which the private auditors are to be employed. Thus, the statute is the expression of the legislature regarding the public policy on this matter.

Our legislature has specifically prohibited contingent fees in certain settings when it has deemed them to be contrary to the interests of the public. For example, North Carolina law prohibits real estate appraisers giving valuations based on contingent fee arrangements, N.C.G.S. § 93A-80(a)(3), and N.C.G.S. § 120-47.5 outlaws contingent fees for lobbying. Therefore, we conclude that had the General Assembly intended that private tax auditors employed to assist county tax assessors be restricted to an hourly wage or to fixed fee remuneration, it would have expressly said so. Additionally, North Carolina courts have long upheld contingent fee contracts when they are entered into, *inter alia*, in good faith and without undue influence. *See, e.g., High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921) (fee of one-third of recovery held not unreasonable); *In re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986) (contingent fee contract approved in equitable distribution proceeding).

It is clear that our legislature is well aware of the existence of contingent fee contracts and knows how to forbid them when

it wishes to do so, but it has chosen not to place any restriction on such contracts in N.C.G.S. § 105-29. Therefore, we conclude that our legislature has determined that contingent fee contracts for private tax auditor's services are not contrary to public policy. *Cf. Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 627, 319 S.E.2d 217, 221 (1984) (absence of legislative prohibition held to support the validity of insurance contracts covering punitive damages). We express no opinion on the wisdom of any public policy established by the legislature, of course, as the determination of whether a particular policy is wise or unwise is for determination by the General Assembly. *Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970).

For the foregoing reasons, we conclude that the Court of Appeals erred in holding that the contingent fee contract in question here was void as against public policy and in holding that the resulting discovery of taxable property of Philip Morris was null and void. The decision of the Court of Appeals is reversed and this case is remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

EDWARD L. HALE v. AFRO-AMERICAN ARTS INTERNATIONAL, INC. AND RICK SLADE

No. 291A93

(Filed 3 December 1993)

Appeal and Error § 8 (NCI4th)— waiver of service of notice of appeal—jurisdiction of Court of Appeals

Plaintiff waived service of notice of defendants' appeal by not raising the issue by motion or otherwise and by participating without objection in the appeal, and the Court of Appeals thus had jurisdiction of the appeal and should have considered the case on its merits.

Am Jur 2d, Appeal and Error §§ 316 et seq.

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 621, 430 S.E.2d 457 (1993), dismissing defendants' appeal from a judgment signed 28 March 1991 and an order signed 24 February 1992 by Albright, J., presiding in Superior Court, Guilford County. Heard in the Supreme Court 15 November 1993.

Lee D. Andrews for plaintiff-appellee.

James W. Swindell for defendant-appellants.

PER CURIAM.

A majority of the Court of Appeals on its own motion dismissed defendants' appeal after the record on appeal had been served on the appellee and docketed without objection in the Court of Appeals and after all briefs had been duly filed. The basis for the dismissal was that while the record on appeal contained the proper notice of appeal, "[n]othing in the notice . . . shows that plaintiff was given notice of the appeal through service as required by [Appellate] Rule 26(b)." 110 N.C. App. 621, 623, 430 S.E.2d 457, 458. The majority concluded that this was a jurisdictional defect which both the parties and the court were powerless to remedy.

Judge Wynn, dissenting, concluded that failure to serve the notice of appeal was a defect in the record analogous to failure to serve process. Therefore, a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here. Judge Wynn concluded that plaintiff had thereby waived service of the notice of appeal and that the Court of Appeals had jurisdiction of the appeal and should consider the case on its merits.

For the reasons given in Judge Wynn's dissenting opinion, we reverse the decision of the Court of Appeals dismissing defendants' appeal and remand the case to that court for consideration on the merits.

REVERSED AND REMANDED.

JOYCE M. DANIEL v. CAROLINA SUNROCK CORPORATION, A NORTH CAROLINA CORPORATION, AND BRYAN PFOHL, INDIVIDUALLY

No. 261A93

(Filed 3 December 1993)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 110 N.C. App. 376, 430 S.E.2d 306 (1993), affirming in part, reversing in part, and remanding the judgment entered by Hobgood, J., on 30 January 1992 in Superior Court, Granville County. Heard in the Supreme Court 15 November 1993.

Pulley, Watson & King, P.A., by Tracy Kenyon Lischer, for plaintiff-appellee.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts III, and Lucretia D. Smith, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion by Judge Lewis, 110 N.C. App. at 384, 430 S.E.2d at 311, the decision of the Court of Appeals on the issue of wrongful discharge, the only issue before this Court, is reversed.

REVERSED.

ANGELA BROWN GABRIEL FLANDERS v. JOEL PARKS GABRIEL

No. 270A93

(Filed 3 December 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, 110 N.C. App. 438, 429 S.E.2d 611 (1993), affirming an order entered by Horton, J., in District Court, Cabarrus County, on 31 December 1991, awarding custody of the parties' minor child to the plaintiff. Heard in the Supreme Court 18 November 1993.

Susan V. Thomas for plaintiff appellee.

Helms, Cannon, Hamel & Henderson, P.A., by Thomas R. Cannon and William B. Hamel, for defendant appellant.

PER CURIAM.

AFFIRMED.

CAMERON W. CANTWELL v. JANET A. CANTWELL

No. 186PA93

(Filed 3 December 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 109 N.C. App. 395, 427 S.E.2d 129 (1993), affirming an order by Cash, J., dismissing defendant's claim for alimony, entered 2 December 1991 in District Court, Buncombe County. Heard in the Supreme Court 17 November 1993.

Dennis J. Winner, P.A., by Dennis J. Winner, for plaintiff-appellee.

Gum, Hillier and Friesen, P.A., by Howard L. Gum; and Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant-appellant.

PER CURIAM.

After reviewing the record proper and the briefs of the parties and considering the oral arguments of counsel, we conclude that defendant-appellant's petition for discretionary review was improvidently allowed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ANDERSON v. NORMAN

No. 357P93

Case below: 111 N.C.App. 265

Petition by defendants and third-party plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

BRADLEY CO. v. TOWN OF CHAPEL HILL

No. 436P93

Case below: 112 N.C.App. 135

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

BROWN v. O'TOOLE

No. 378PA93

Case below: 111 N.C.App. 265

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

BUNCOMBE COUNTY EX REL. ANDRES v. NEWBURN

No. 434P93

Case below: 111 N.C.App. 822

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

COBB v. ROCKY MOUNT BD. OF EDUCATION

No. 379P93

Case below: 111 N.C.App. 690

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

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

DEPT. OF TRANSPORTATION v. OVERTON

No. 426PA93

Case below: 111 N.C.App. 857

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

FAIN v. FAIN

No. 456P93

Case below: 112 N.C.App. 365

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

FIELDS v. FARMER BOY, AG, INC.

No. 405P93

Case below: 111 N.C.App. 928

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

GRANDFATHER VILLAGE v. WORSLEY

No. 413P93

Case below: 111 N.C.App. 686

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

HALES v. N.C. INSURANCE GUARANTY ASSN.

No. 418PA93

Case below: 111 N.C.App. 892

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

HARGETT v. HOLLAND

No. 377PA93

Case below: 111 N.C.App. 200

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

KRAFT FOODSERVICE, INC. v. HARDEE

No. 468P93

Case below: 111 N.C.App. 928

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993 for the purpose of entering the following order:

The Court of Appeals' opinion dismissing defendant's appeal and the order denying defendant's Motion to Amend the Record on Appeal are reversed; the record on appeal is deemed amended to include the Order of Summary Judgment entered 7 December 1992; and the case is remanded to the Court of Appeals for consideration of the merits of the appeal.

MASHBURN v. FIRST INVESTORS CORP.

No. 396P93

Case below: 111 N.C.App. 398

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1993.

MORGAN v. CAVALIER ACQUISITION CORP.

No. 380P93

Case below: 111 N.C.App. 520

Petition by defendant (Coca-Cola Bottling Co.) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993. Petition by defendant (Cavalier) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

NISSAN MOTOR CORP. v. FRED ANDERSON NISSAN

No. 422PA93

Case below: 111 N.C.App. 748

Petition by defendant (Fred Anderson Nissan) for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

PETERSEN v. ROGERS

No. 427PA93

Case below: 111 N.C.App. 712

Motion by the plaintiffs to dismiss the appeal for lack of substantial constitutional question denied 2 December 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

ROGERS v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORP.

No. 440PA93

Case below: 112 N.C.App. 365

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

STATE v. BARTLETT

No. 461P93

Case below: 112 N.C.App. 135

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. BYNUM

No. 430P93

Case below: 111 N.C.App. 845

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. CHAMBERS

No. 488P93

Case below: 112 N.C.App. 545

Petition by Attorney General for temporary stay allowed 2 December 1993 pending determination of petition for discretionary review.

STATE v. CLEMMONS

No. 395P93

Case below: 111 N.C.App. 569

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1993.

STATE v. DOUGHTY

No. 467P93

Case below: 110 N.C.App. 491

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. HARPER

No. 505P93

Case below: 112 N.C.App 636

Petition by Attorney General for temporary stay allowed 2 December 1993 pending determination of petition for discretionary review.

STATE v. HARRIS

No. 381P93

Case below: 111 N.C.App. 930

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 2 December 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. HASTY

No. 414P93

Case below: 111 N.C.App. 930

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. HODGE

No. 409P93

Case below: 112 N.C.App. 136

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. MINTER

No. 469P93

Case below: 111 N.C.App. 40

Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1993.

STATE v. PENDLEY

No. 424P93

Case below: 111 N.C.App. 931

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. RICHARDSON

No. 402PA93

Case below: 112 N.C.App. 252

Petition by Attorney General for writ of supersedeas allowed 2 December 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993.

STATE v. STEPHENS

No. 423P93

Case below: 111 N.C.App. 932

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. USSERY

No. 425P93

Case below: 111 N.C.App. 932

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. WALLACE

No. 368P93

Case below: 111 N.C.App. 581

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

SWAIN v. LEAHY

No. 429P93

Case below: 111 N.C.App. 884

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

UNCC PROPERTIES, INC. v. GREEN

No. 433P93

Case below: 111 N.C.App. 391

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 2 December 1993.

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

WALKER v. N.C. DEPT. OF E.H.N.R.

No. 419P93

Case below: 111 N.C.App. 851

Petition by respondent intervenor for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

WEEKS v. AUTRY

No. 391P93

Case below: 111 N.C.App. 691

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE OF NORTH CAROLINA v. DANIEL BRIAN LEE

No. 247A90

(Filed 28 January 1994)

1. **Indigent Persons § 19 (NCI4th)— funds to hire mental health expert—provision of report to State not condition**

The trial court's provision of funds to defendant for the employment of a mental health expert was not conditioned upon a requirement that the expert provide the State with a report of his evaluation of defendant where the record shows that the trial court simply informed defendant of the State's discovery rights which would arise under N.C.G.S. § 15A-905(b) if defendant intended to call the expert as a witness at trial.

Am Jur 2d, Criminal Law § 955.

2. **Constitutional Law § 344 (NCI4th)— court's private conferences with prospective jurors—showing of harmless error**

When a trial court conducts private unrecorded conferences with prospective jurors, the trial court commits reversible error unless the State can show that the error was harmless beyond a reasonable doubt. The State may show that the error was harmless beyond a reasonable doubt where the transcript reveals the substance of the trial court's conversation with the juror or where the trial court reconstructs the substance of the conversation on the record.

Am Jur 2d, Criminal Law §§ 695, 696.

3. **Constitutional Law § 344 (NCI4th)— excusal of jurors—absence of defendant—reasons shown by record—harmless error**

The trial court's excusal of two prospective jurors outside defendant's presence was harmless error where the record shows that one juror was excused due to her mother's illness and impending surgery and that the second juror was excused due to her own illness, and these are proper grounds for the excusal of jurors.

Am Jur 2d, Criminal Law §§ 695, 696.

4. Constitutional Law § 344 (NCI4th)— unrecorded bench conference—excusal of juror by defense counsel—no violation of defendant's right to be present

The excusal of a prospective juror following an unrecorded bench conference did not violate defendant's right to be present at all stages of his capital trial where the record clearly reflects that the subject of the bench conference was the possibility of prejudice on the part of the juror; both defense counsel were present at the conference; defendant was present in the courtroom during the conference, was able to observe the context in which it arose, and could inquire of his attorneys regarding its substance; and the juror was excused by defense counsel rather than by the trial court.

Am Jur 2d, Criminal Law §§ 695, 696.

5. Constitutional Law § 344 (NCI4th)— court's ex parte conversation with juror—substance shown by record—harmless error

The trial court's unrecorded *ex parte* conversation with a juror in a capital trial was harmless beyond a reasonable doubt where the record sufficiently reveals that the substance of the conversation concerned the juror's acquaintance with defendant's sister, a defense witness, and the juror's desire to bring that fact to the court's attention.

Am Jur 2d, Criminal Law §§ 695, 696.

6. Constitutional Law § 342 (NCI4th)— unrecorded bench conferences with counsel—absence of defendant—failure to show usefulness of presence

Defendant failed to meet his burden of showing the usefulness of his presence at thirty-nine unrecorded bench conferences with trial counsel so that his constitutional rights were not violated by his absence from the bench conferences where the majority of the conferences concerned questions of law or logistical matters; the record shows that nothing occurred, either procedurally or substantively, as a result of the remainder of these bench conferences; defense counsel was present at each of these conferences and defendant was present in the courtroom; and defense counsel did not object to anything that occurred during any of the unrecorded conferences.

Am Jur 2d, Criminal Law §§ 694 et seq., 901 et seq.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

7. **Criminal Law § 507 (NCI4th)— private bench conferences with counsel—recordation not required by statute**

The trial court's denial of defendant's pretrial motion to record all bench conferences in a capital sentencing proceeding did not violate the statute which requires that an "accurate record of all statements from the bench and all other proceedings" be kept by the court reporter, N.C.G.S. § 15A-1241(a), since this statute does not apply to private bench conferences between trial judges and attorneys. However, when a party requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing, as accurately as possible, the matter discussed.

Am Jur 2d, Appeal and Error §§ 397 et seq.

8. **Criminal Law § 1322 (NCI4th)— capital sentencing—parole eligibility—instruction not to consider**

When the jury in a capital sentencing proceeding sent a note to the court asking whether the defendant could ever be eligible for parole from sentences imposed for crimes against a second victim, the trial court did not err by failing to inform the jury that defendant would not be eligible for parole in the other case for eighty years and by instructing the jury that it should not consider eligibility for parole in reaching a verdict but should determine the question as though life imprisonment means imprisonment for life.

Am Jur 2d, Trial §§ 1118, 1443.

9. **Jury § 111 (NCI4th)— capital sentencing—pretrial publicity—denial of individual voir dire**

The trial court did not abuse its discretion in refusing to allow individual *voir dire* of prospective jurors in a capital sentencing proceeding to enable defendant to examine jurors about their exposure to pretrial publicity where the record shows that the ruling was a reasoned decision by which the court attempted to conserve judicial resources without foreclosing the possibility of allowing individual *voir dire* if it became necessary to ensure a fair jury selection process. Moreover,

any error in the denial of defendant's motion for individual *voir dire* was harmless where defendant was not prevented from making any relevant inquiry necessary to determine whether prospective jurors had been exposed to pretrial publicity and whether any such exposure affected their impartiality, and jurors who had heard about the case and had formed opinions as to the appropriate punishment for defendant were successfully challenged for cause.

Am Jur 2d, Jury §§ 195 et seq.

10. Jury § 141 (NCI4th)— capital sentencing—jury voir dire—exclusion of questions about parole and life imprisonment

The trial court did not err by refusing to allow the defendant to question prospective jurors in a capital sentencing proceeding about parole eligibility and their understanding as to the meaning of "life imprisonment" since these matters are irrelevant to issues to be determined during the sentencing proceeding.

Am Jur 2d, Jury §§ 195 et seq.

11. Jury § 148 (NCI4th)— capital sentencing—jury voir dire—attitude toward death penalty—exclusion of questions

The trial court did not err by refusing to allow defendant to ask prospective jurors in a capital sentencing proceeding questions as to why they held their death penalty beliefs, whether they believed the death penalty has a deterrent effect, whether they believed human life is sacred, and whether they believed the death penalty should be reserved for the worst cases where all jurors who were eventually selected stated that they had formed no opinion as to the appropriateness of the death penalty in this case; defendant was not prevented from asking whether jurors believed that life imprisonment may be an appropriate sentence for some first-degree murder cases or whether they believed that the death penalty was appropriate in all cases; and defendant was allowed adequate latitude to assess juror attitudes toward the death penalty and to determine whether the jurors were predisposed to return a recommendation of death or whether they would follow the law and equally consider the evidence in mitigation and aggravation.

Am Jur 2d, Jury §§ 195 et seq.

12. Jury § 131 (NCI4th)— capital sentencing—jury voir dire—questions about understanding of law and belief in jury system—exclusion not prejudicial

Defendant was not prejudiced by the trial court's refusal to permit him to ask a prospective juror in a capital sentencing proceeding whether she believed in and understood the applicable principles of law where the juror was successfully challenged for cause by the State. Nor was defendant prejudiced by the court's refusal to permit him to ask a prospective juror whether the juror believed in the jury system where defendant received an answer to this question immediately after it was disallowed when the trial judge gave a short explanation of the jury's role in a capital sentencing proceeding, the judge then asked all jurors in the jury box whether any of them disagreed with the jury's role as he had explained it, and no juror indicated disagreement.

Am Jur 2d, Jury §§ 195 et seq.

13. Jury § 139 (NCI4th)— capital sentencing—jury voir dire—failure of defendant to testify—exclusion of question—cure of error

Any error in the trial court's refusal to permit defendant to ask jurors in a capital sentencing proceeding whether they would hold it against him if he did not testify was cured when, immediately after the State's objection to this question was sustained, the trial court instructed the jurors as to defendant's right not to testify and inquired as to whether they disagreed with this principle of law.

Am Jur 2d, Jury §§ 195 et seq.

14. Evidence and Witnesses § 1671 (NCI4th)— photographs not properly authenticated

Two photographs purportedly depicting defendant as a child and as a high school senior were not properly authenticated so that their exclusion was not erroneous where the witness through whom defendant sought to introduce the photographs did not know defendant at the time the photographs were taken.

Am Jur 2d, Evidence § 789.

15. Evidence and Witnesses § 2787 (NCI4th)— cross-examination of expert—disagreement with another expert—no expression of opinion on evidence by prosecutor

Where a neurosurgeon testified in a capital sentencing proceeding that brain damage suffered by defendant was located in an area of the brain that is related to motor skills and he could only hypothesize that the damage affected defendant's behavior, and a neuropsychologist described in detail how defendant's brain damage could have caused the behavioral changes that resulted in defendant's commission of the crimes with which he was charged, the prosecutor did not express his personal opinion that the testimony of the two witnesses was contradictory when he asked the neuropsychologist on cross-examination whether he disagreed with the neurosurgeon since the prosecutor was merely attempting to determine whether testimony by the two witnesses was inconsistent and thus less credible, and witness credibility is a proper and relevant matter for cross-examination.

Am Jur 2d, Witnesses § 1032.

16. Criminal Law § 1310 (NCI4th); Evidence and Witnesses § 2282 (NCI4th)— capital sentencing—expert witnesses—apparent inconsistencies in testimony—refusal to permit explanation—harmless error

The trial court erred in a capital sentencing proceeding by refusing to permit a neuropsychologist who testified as a defense witness to attempt to explain apparent inconsistencies between his testimony and testimony by a neurosurgeon, another defense witness, as to whether abrupt changes in defendant's behavior and his commission of the crimes charged were attributable to a brain aneurysm and subsequent surgery. However, there was no reasonable possibility that a different result would have been reached at trial if the error had not occurred where the neurosurgeon's expertise was in identifying those portions of defendant's brain that were damaged and the neuropsychologist's expertise was in identifying the behavioral manifestations of those injuries; the testimony by the two experts was consistent overall and this general consistency must have been apparent to the jury; and defendant failed to make an offer of proof as to what the neuro-

psychologist's testimony would have been had the trial court not improperly intervened.

Am Jur 2d, Criminal Law §§ 527 et seq.; Expert and Opinion Evidence § 241.

17. Criminal Law § 1314 (NCI4th)— capital sentencing—emotional state of defendant—drugs or alcohol—proper question

The trial court did not err by allowing the State to ask a neurosurgeon in a capital sentencing proceeding whether defendant's flat emotional state could have been caused by defendant's prolonged use of marijuana and alcohol where the witness had testified that he found that defendant did not appear to be emotionally affected by the criminal charges he was facing; there was evidence that defendant was a user of marijuana and alcohol prior to his arrest; and whether defendant's flat emotional state was the result of marijuana and alcohol or the result of a brain aneurysm and surgery as defendant contended was a proper subject of inquiry.

Am Jur 2d, Criminal Law §§ 527 et seq.; Expert and Opinion Evidence § 241.

18. Criminal Law § 1345 (NCI4th); Evidence and Witnesses § 1113 (NCI4th)— capital sentencing—statements by defendant—admissions of party opponent—relevancy to prove heinous, atrocious, or cruel aggravating circumstance

Statements made by defendant to a kidnapping and rape victim that a first-degree murder victim had "died a slow and painful death" and that he had beat the murder victim's head with a stick, kicked her in the throat, and stood on her back while strangling her with her sweater were admissible in the capital sentencing proceeding for the first-degree murder as admissions of a party opponent which were relevant to prove the "especially heinous, atrocious, or cruel" aggravating circumstance because they showed that the murder was unnecessarily torturous and that it exceeded the level of brutality normally present in a first-degree murder. Defendant's statement to the witness that he sexually assaulted the victim prior to killing her was corroborative of evidence that the victim suffered pre-death bruising in her anal area and was also relevant to prove the heinous, atrocious, or cruel circumstance because evidence that defendant sodomized the vic-

tim prior to killing her tended to show the presence of dehumanizing aspects not normally present in a first-degree murder. N.C.G.S. § 8C-1, Rule 801(d).

Am Jur 2d, Criminal Law §§ 527 et seq.; Expert and Opinion Evidence § 241.

19. Criminal Law § 1347 (NCI4th)-- capital sentencing—crimes against second victim—course of conduct aggravating circumstance

Evidence of defendant's crimes against a second victim were relevant and admissible in a capital sentencing proceeding to show that the murder of the victim in this case was part of a course of conduct in which defendant engaged and which included acts of violence against another person where the evidence tended to show that in each case defendant abducted a female victim, whom he believed to be an Appalachian State University student, as she was exercising on the streets of Boone; defendant drove each victim to the same area of the county; defendant sodomized both victims and stole their watches and articles of their clothing which he kept as mementos; defendant told the second victim that he planned to kill her as he had killed the first victim; and defendant committed the crimes against the second victim just five days after he kidnapped and murdered the first victim. N.C.G.S. § 15A-2000(e)(1).

Am Jur 2d, Criminal Law §§ 527 et seq.; Expert and Opinion Evidence § 241.

20. Evidence and Witnesses § 1695 (NCI4th)— photographs of murder victim's body

Although the victim's identity and the cause of her death were not in dispute in this sentencing proceeding for first-degree murder, photographs depicting the victim's nude body in an advanced stage of decomposition, the manner in which she was strangled, and injuries to her head were admissible to show the circumstances of her death which were relevant in the sentencing proceeding.

Am Jur 2d, Homicide § 417.

21. Criminal Law § 1309 (NCI4th)— capital sentencing—foundational evidence

Testimony by a murder victim's family and friends describing how they learned of the victim's disappearance and how they came to be involved in the search to find her was not inadmissible "victim impact" evidence but was foundational in nature and properly admitted in this capital sentencing proceeding.

Am Jur 2d, Criminal Law §§ 527 et seq.

22. Criminal Law § 1309 (NCI4th)— capital sentencing—subsequent sentencing for other crimes—evidence properly excluded

The trial court in a capital sentencing proceeding properly excluded evidence that the court would sentence defendant for kidnapping the victim and for crimes against a second victim at the conclusion of the capital sentencing proceeding since this evidence was not a circumstance that would justify a sentence less than death for the murder for which defendant was being sentenced and was irrelevant. Moreover, any error in the exclusion of this evidence was harmless where defendant was permitted to present evidence that he had previously entered pleas of guilty to the other crimes and that he could receive four life sentences plus fifty years for those crimes.

Am Jur 2d, Criminal Law §§ 527 et seq.

23. Criminal Law § 441 (NCI4th)— capital sentencing—jury argument—contradictory testimony by defendant's experts—supporting evidence

The prosecutor's jury argument in a capital sentencing proceeding that defendant's expert witnesses had contradicted one another was supported by the evidence where a neurosurgeon testified that he could only hypothesize that defendant's brain damage had caused his emotional and behavioral changes and a neuropsychologist testified that behavioral and emotional changes experienced by defendant were definitely the direct result of defendant's brain aneurysm and subsequent brain surgery.

Am Jur 2d, Trial §§ 305, 306.

24. Criminal Law § 455 (NCI4th)— capital sentencing—jury arguments for death penalty—signal to others—prevention of defendant from killing again

It was not improper for the prosecutor to argue to the jury in a capital sentencing proceeding that a recommendation of death would be a signal to others that capital felons would be dealt with severely and that the only way to prevent defendant from killing again was for the jury to return a recommendation of death.

Am Jur 2d, Trial § 229.

25. Criminal Law § 681 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—peremptory instruction not required

The trial court did not err by refusing to give the jury in a capital sentencing proceeding a peremptory instruction that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the murder because this mitigating circumstance was not supported by uncontroverted evidence where one of defendant's expert witnesses was unable to testify with a reasonable degree of medical certainty that defendant's brain injury resulted in any change in defendant's condition other than some diminution in his motor skills; testimony by other witnesses describing a deterioration in defendant's physical appearance and changes in defendant's sexual attitudes following his brain surgery falls short of showing the impaired capacity mitigating circumstance; and testimony by the sheriff tended to show that defendant was able to conform his conduct to the requirements of the law while in jail and when being transferred to and from various court proceedings.

Am Jur 2d, Criminal Law §§ 598, 599.

26. Criminal Law § 732 (NCI4th)— capital sentencing—instructions—use of "tending to show"

The trial court's use of the phrase "tending to show" in reviewing the evidence in a capital sentencing proceeding did not constitute an expression of judicial opinion on the evidence.

Am Jur 2d, Trial §§ 527 et seq.

27. Criminal Law § 1347 (NCI4th)— capital sentencing—crimes against another victim—consideration

The trial court did not err in allowing the jury in a capital sentencing proceeding to consider defendant's crimes against another victim on the issues of "plan," "scheme," and "motive" since (1) the course of conduct aggravating circumstance submitted to the jury is proved by showing that a "plan" or "scheme" existed in the mind of the defendant involving both the murder and other crimes of violence; and (2) similarity of motive is relevant to determining the existence of the course of conduct circumstance.

Am Jur 2d, Criminal Law §§ 527 et seq.

28. Criminal Law § 1344 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—supporting evidence

The evidence in a capital sentencing proceeding supported the trial court's submission of the "especially heinous, atrocious, or cruel" aggravating circumstance where it tended to show that the victim was kidnapped at gunpoint, stripped naked, and driven to another location where she was forced to walk or run to the place where she was beaten on the head, kicked in the throat, and strangled by the defendant, and that defendant told a witness that the victim died a slow and painful death.

Am Jur 2d, Criminal Law §§ 527 et seq.

29. Criminal Law § 629 (NCI4th)— capital sentencing—statement by defendant—corpus delicti rule inapplicable

The *corpus delicti* rule for confessions did not apply in a capital sentencing proceeding to render inadmissible defendant's uncorroborated statement to a witness that the victim had died a slow and painful death where defendant's plea of guilty to first-degree murder established that a crime had been committed.

Am Jur 2d, Criminal Law §§ 527 et seq.; Evidence §§ 530, 1142.

30. Criminal Law § 1343 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—instruction not unconstitutionally vague

The trial court's instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance in a capital sentencing proceeding was not unconstitutionally vague.

Am Jur 2d, Criminal Law §§ 527 et seq.

31. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances—instructions comporting with McKoy decision

The trial court's pattern capital sentencing instructions which informed the jury in Issue Three that it *must* weigh any mitigating circumstances it found to exist against the aggravating circumstances and that each juror "may" consider any mitigating circumstance or circumstances that he or she determined to exist by a preponderance of the evidence did not allow jurors to disregard properly found mitigating circumstances and fully comported with *McKoy v. North Carolina*, 494 U.S. 433. Furthermore, each juror was not required by *McKoy* to consider, at Issue Three and Issue Four, mitigating circumstances which he or she did not find but which were found by one or more other jurors.

Am Jur 2d, Trial § 1760.

32. Criminal Law § 1357 (NCI4th)— capital sentencing—mitigating circumstances—mental defect—refusal to submit—subsumption by other circumstances found by jury

The trial court did not err by refusing to submit as a nonstatutory mitigating circumstance in a capital sentencing proceeding that defendant's inability to "conform his conduct to the requirements of the law was by reason of his mental defect and not of his own making" where this circumstance was subsumed by the statutory "impaired capacity" and "mental or emotional disturbance" mitigating circumstances found by the jury and by the nonstatutory mitigating circumstance found by the jury that "defendant did not himself know or fully appreciate his mental condition and dangerousness at the time of the murder, or . . . he had not been warned that his mental condition might lead to an inability to control his conduct or to conform it to the requirements of the law."

Am Jur 2d, Trial § 1760.

33. Criminal Law § 1323 (NCI4th)— capital sentencing—instructions—definitions of aggravating and mitigating circumstances

The trial court did not err by refusing to give defendant's requested instruction in a capital sentencing proceeding that aggravating circumstances are those "that tend to make a specific defendant particularly appropriate for the most serious and final punishment prescribed by law" and by instructing that "an aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." Nor did the court err by instructing that "a mitigating circumstance . . . is a fact or group of facts which . . . may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders."

Am Jur 2d, Trial § 1760.

34. Criminal Law § 1328 (NCI4th)— capital sentencing—instruction on cruel or unusual punishment not proper

The trial court did not err by refusing to charge the jury in a capital sentencing proceeding that it should return a recommendation of life imprisonment if it determined, in light of the defendant's individual circumstances, that the punishment of death would be cruel or unusual since the determination of whether a sentence constitutes cruel or unusual punishment is a question of law and not a question for the jury, and North Carolina's capital sentencing scheme does not violate the constitutional prohibition against cruel or unusual punishments.

Am Jur 2d, Criminal Law §§ 527 et seq.

35. Criminal Law § 824 (NCI4th)— instruction defining expert

The trial court did not commit plain error by instructing the jury that an expert is one who "purports to have specialized skill or knowledge."

Am Jur 2d, Trial §§ 1237-1241.

36. Criminal Law § 496 (NCI4th)— capital sentencing—denial of jury's request for expert testimony—proper exercise of discretion

The trial court did not abuse its discretion by denying the jury's request in a capital sentencing proceeding to have a copy of the testimony of two expert witnesses where it is clear from the record that the trial court was aware of its discretionary authority to allow the jury to review the experts' testimony and that the court's decision was made to conserve time and to ensure that all evidence received equal consideration. N.C.G.S. § 15A-1233(a).

Am Jur 2d, Criminal Law §§ 527 et seq.

37. Criminal Law § 109 (NCI4th)— capital sentencing—defendant's psychologist—preparation of report for State

The trial court did not err by requiring a psychologist who testified as an expert for defendant in a capital sentencing proceeding to prepare and furnish to the State a written report of his examination of defendant since it is within the purview of N.C.G.S. § 15A-905(b) that the State be provided in advance of a mental expert's testimony with a meaningful report which the State can use in preparation for trial.

Am Jur 2d, Depositions and Discovery § 449.

38. Criminal Law § 1329 (NCI4th)-- capital sentencing—denial of jury poll on mitigating circumstances

The trial court did not err in the denial of defendant's request that the jurors in a capital sentencing proceeding be polled as to how they individually answered each of the proffered mitigating circumstances since N.C.G.S. § 15A-2000(b) only contemplates polling the jurors regarding their final recommendation, and nothing in the statute indicates that jurors should be polled as to their individual answers to the various issues addressed during sentencing deliberations.

Am Jur 2d, Trial §§ 1763, 1772.

39. Criminal Law § 1363 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—supporting evidence—jury's failure to find mitigating value

Although there was supporting evidence in a capital sentencing proceeding for submitted nonstatutory mitigating cir-

cumstances that defendant had entered pleas of guilty to every crime he was accused of committing, he had a good work history, and he had adjusted well to incarceration and would be of benefit to society if sentenced to life imprisonment, these circumstances do not have mitigating value as a matter of law, and the jury's failure to find that these circumstances have mitigating value does not require that defendant's sentence of death be set aside.

Am Jur 2d, Trial § 1760.

40. Criminal Law § 1373 (NCI4th) -- first-degree murder -- death sentence not disproportionate

A sentence of death imposed upon defendant was neither excessive nor disproportionate to the penalty imposed in the pool of similar cases considering both the crime and the defendant where the record clearly supported the jury's findings of the aggravating circumstances that the murder was committed in the course of a kidnapping, was especially heinous, atrocious, or cruel, and was a part of a course of conduct involving crimes against another person; pertinent traits of the defendant were his law abiding history, his mental or emotional disturbance, and his lack of capacity to conform his conduct to the law; defendant's conviction was based on the theory of premeditation and deliberation; defendant methodically sought out Appalachian State University female students as they exercised on the streets of Boone; defendant kidnapped the victim with the intent to sexually assault and murder her; defendant perpetrated unnatural and violent sexual acts upon the victim; the crimes defendant committed against the victim occurred over a period of several hours; and the victim experienced extreme psychological and physical torture during this time.

Am Jur 2d, Criminal Law § 628.

Justices WHICHARD and PARKER did not participate in the consideration or decision of this case.

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Lamm, J., at the 26 April 1990 Criminal Session of Superior Court, Avery County, upon a sentence recommendation by the jury after the defendant pled guilty to first degree murder. Heard in the Supreme Court 13 November 1991.

The defendant pled guilty to first degree murder and a sentencing hearing was held. The State's evidence tended to show that on 24 September 1989, the defendant kidnapped, sexually assaulted, and murdered the victim, Jennifer Gray. The defendant left the victim's body on a logging road in a remote area of Watauga County. On 29 September 1989, the defendant kidnapped, raped, sodomized and robbed Leigh Cooper. Ms. Cooper managed to escape and to supply law enforcement authorities with the information which led to the defendant's arrest. On 10 October 1989, the Watauga County Grand Jury returned true bills of indictment charging the defendant with the first degree murder of Ms. Gray, first degree kidnapping of Ms. Gray, and first degree sexual offense against Ms. Gray. The grand jury also returned a multi-count true bill of indictment charging the defendant with committing numerous felonies against Ms. Cooper.

Upon the motion of the defendant, venue was changed to Avery County due to extensive pretrial publicity. On 16 April 1990, prior to the commencement of jury selection in this case, the defendant entered pleas of guilty to first degree murder and first degree kidnapping. A capital sentencing proceeding was commenced in the murder case on 16 April 1990. The State presented evidence of, and the jury found, the aggravating circumstances that the murder was especially heinous, atrocious, or cruel, was committed while defendant was engaged in a kidnapping, and was part of a course of conduct in which defendant engaged and which included crimes of violence by the defendant against another person. N.C.G.S. § 15A-2000(5), (9), (11) (1988).

The defendant's penalty phase evidence tended to show that at the time of the murder he was twenty-three years old. In May of 1988, the defendant was struck on the head with a tree limb while on an outing in the country with his girlfriend. That night, the defendant began to suffer from head pain and loss of physical function. He was taken to a hospital emergency room where the attending physician found the defendant to be suffering from severe

frontal headaches, confusion, loss of consciousness, loss of bowel function and vomiting. Further examination by physicians at North Carolina Baptist Hospital in Winston-Salem revealed that the defendant was suffering from a life threatening aneurysm deep inside his brain.

Following surgery to repair the aneurysm, the defendant remained hospitalized for several weeks before returning home for further recuperation. Numerous witnesses, including the defendant's father and former girlfriend, testified that the defendant's behavior underwent extreme changes following the surgery. The defendant was described as having changed from being a polite, non-violent, considerate, and clean young man to one who was unclean, lethargic, and unreliable. The defendant's girlfriend testified that the defendant's sexual behavior changed from being gentle and considerate to perverse and demanding.

Two expert witnesses testified that the defendant's brain aneurysm and ensuing surgery had resulted in permanent brain damage which caused the defendant to suffer from behavioral and emotional abnormalities. Dr. Sciara, a neuropsychologist, testified that the defendant's decreased hygiene, decreased ambition, changed and unusual sexual behavior, and lack of consideration for others, was consistent with the defendant's type of brain damage.

Based on this evidence, the jury found five mitigating circumstances related to the defendant's mental and emotional disturbance and his non-violent and law abiding history. Nevertheless, the jury found that the mitigating circumstances did not outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty. Based on these findings, the jury returned a recommendation of death. The trial court sentenced the defendant to death in accordance with this recommendation. The defendant appeals.

Lacy H. Thornburg, Attorney General, by Joan Herre Byers, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, and Jeffery M. Hedrick, for defendant appellant.

WEBB, Justice.

[1] Prior to trial, the defendant made an *ex parte* application for the appointment of a psychiatric expert. The trial court granted the defendant's motion and ordered that certain funds be made available to the defendant for the employment of a mental health expert. The defendant contends that the trial court erroneously ordered, as a pre-condition to employing an expert, that the expert provide the State with a report of his evaluation of the defendant. We disagree.

The record reveals that the court's provision of funds to hire an expert was unconditional. After stating that he would order that funds be made available to the defendant, the judge said:

> I would also propose to provide in this Order, I'll hear any objections either of you may have, that after you receive whatever reports you receive, if you intend to use any of these experts as a witness, that you at that time give the State notice, and comply with the rules of discovery with regard to that[.]

N.C.G.S. § 15A-905, which governs the State's right of pretrial discovery in criminal cases, provides that the State is entitled to:

> results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case . . . which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1988).

Thus, the record clearly shows that the court simply informed the defendant of the State's discovery rights which would arise if the defendant intended to call the expert as a witness at trial. Because the record clearly shows that the trial court imposed no conditions on the defendant's employment of an expert, this assignment of error is overruled.

Jury Selection

[2] By his next assignment of error, the defendant contends that the trial court violated his state and federal constitutional rights by excusing prospective jurors, and conducting private

unrecorded bench conferences, outside of his presence. N.C. Const. art. I, § 23. When a trial court conducts private unrecorded conferences with prospective jurors, the trial court commits reversible error unless the State can show that the error was harmless beyond a reasonable doubt. *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990); *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991); *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 136 (1993). The State may show that the error was harmless beyond a reasonable doubt where the transcript reveals the substance of the trial court's conversation with the juror, or where the trial judge reconstructs the substance of the conversation on the record. *Id.*

[3] In the instant case, the defendant contends that prospective jurors Gragg, Holtzclaw and Dugger were excused outside his presence and that he was not present during a private conversation between the trial court and juror Hughes. The record shows that at the commencement of jury selection, the following transpired when the judge instructed the clerk to place twelve jurors in the jury box.

> CLERK: Leonard Fisher, please take the back row seat in the corner, in the orange seat. Sherrill Johnson; Ronda Tatum; Roma Gragg, Your Honor I think that's one you excused—
>
> THE COURT: Yes, sir, I have excused her for medical reasons.

Later during jury selection, the trial court instructed the clerk to call three more prospective jurors to the jury box. At that point the following transpired.

> CLERK: Karen Holtzclaw take seat number one.
>
> CLERK TAYLOR: Your Honor, she's the one that called this morning and said she had the flu.
>
> THE COURT: Okay, lay her aside.

These recorded exchanges show that jurors Gragg and Holtzclaw sought, by private communication with the trial court, excusal from jury service. These exchanges reveal the substance of the communication between the court and the jurors. The trial court stated that juror Gragg was being excused for medical reasons and that juror Holtzclaw had informed the court, through Clerk Taylor, that she had the flu and that the court, therefore, excused her from service.

The record on appeal, by stipulation of the parties, includes the affidavits of Clerk Taylor and juror Gragg which purport to describe the substance of the communications which led to the excusals of jurors Gragg and Holtzclaw. Although these affidavits are unnecessary to show the substance of the communications, they do confirm that juror Gragg was excused due to her mother's illness and impending surgery and that juror Holtzclaw was excused due to her own illness. These are proper grounds for the excusal of jurors. Thus, we hold that the defendant's absence from the trial court's communications with these jurors was harmless beyond a reasonable doubt.

[4] The defendant next contends that his constitutional rights were violated by the excusal of juror Dugger following an unrecorded bench conference. The record shows that during the State's *voir dire* examination of Mr. Dugger, he stated that he had been charged with a criminal offense in 1972 and that his son had been murdered in 1985. The State passed Mr. Dugger to the defense whereupon defense counsel requested to approach the bench. An unrecorded bench conference ensued during which all counsel were present. During this conference, the trial court asked Mr. Dugger to approach the bench and the conference continued. At the conclusion of the bench conference, defense counsel excused Mr. Dugger. The defendant now says that the excusal of this juror following the unrecorded bench conference, with all counsel present, violated his constitutional right to be present at all stages of his capital trial. We do not agree.

The record clearly reflects that the subject of the bench conference was the possibility of partiality on the part of Mr. Dugger. Furthermore, the trial judge's unrecorded communication with Mr. Dugger was not the type of cloistered conversation resulting in the juror's excusal by the trial judge that this Court has previously found to require a new trial. *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362; *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991). Rather, both defense counsel were present at the conference and free to keep the defendant apprised of everything that transpired during the conference. Likewise, the defendant was actually present in the courtroom during the conference, was able to observe the context in which it arose, and remained free to inquire of his attorneys regarding its substance. Perhaps most significantly, defense counsel, not the trial judge, excused Mr. Dugger. For the foregoing reasons, this assignment of error is overruled.

[5] Finally, the defendant says the trial court committed reversible error by engaging in an unrecorded conversation with juror Hughes outside of the defendant's presence. The record reveals that during the course of the sentencing proceeding the trial court stated:

> THE COURT: Gentlemen, before we begin with the evidence this morning, and in the absence of the jurors I mentioned to you what Ms. Hughes, juror number ten had related to me Friday afternoon after they were discharged. So, for the record I'm going to bring her out and ask her a few questions and then give each of you gentlemen the opportunity to ask her any questions that you wish.

The trial court then inquired of the juror as to whether her acquaintance with the defendant's sister, a defense witness, would in any way affect her ability to be fair and impartial. The State conducted a similar examination of the juror. However, the defendant elected not to question juror Hughes and she remained on the jury without objection.

This record sufficiently reveals that the substance of the trial court's *ex parte* communication with Ms. Hughes concerned her acquaintance with the defendant's sister and her desire to bring that fact to the court's attention. Therefore, we hold that the court's unrecorded *ex parte* conversation with Ms. Hughes was harmless beyond a reasonable doubt.

[6] By his next assignment of error, the defendant contends the trial court erred by conducting bench conferences outside his presence. In *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991), we addressed the identical question. In *Buchanan*, we held that, generally, a defendant's right to be present is not violated if defense counsel is present at the bench conference and the defendant is actually in the courtroom. However, we further held in *Buchanan*, that if the subject matter of the conference implicates the defendant's confrontation rights, or is of the nature that the defendant's presence would have a reasonably substantial relation to the defendant's opportunity to defend, the defendant's constitutional rights are violated if he is not present. *State v. Buchanan*, 330 N.C. at 223-224, 410 S.E.2d at 845. The burden is on the defendant to show the usefulness of his presence at the unrecorded bench conference. *Id.* We must therefore determine whether the defendant has met his burden of showing the usefulness of his presence.

There were thirty-nine unrecorded conferences with trial counsel. However, the record is sufficient to allow this Court to discern the substance of the majority of these conferences. The record shows, and the defendant concedes, that the majority of the bench conferences concerned questions of law or logistical matters, such as the scheduling of recesses or preparation for a witness' testimony. The defendant does not suggest, and we cannot determine, how his presence at these conferences would have served any useful purpose.

Although the record is silent as to the substance of the remainder of the conferences, it shows that defense counsel was present at each of these conferences and that the defendant was actually in the courtroom. The record also shows that nothing occurred, either procedurally or substantively, as a result of these conferences. Following each conference, the proceedings continued in ordinary fashion. Importantly, defense counsel did not object to anything that occurred during any of these unrecorded conferences. For these reasons, we hold that the defendant has failed to meet his burden of showing how he was prejudiced by his absence from these conferences. This assignment of error is overruled.

[7] By his next assignment of error, the defendant contends that the trial court erred by denying his pretrial motion to record all bench conferences. The defendant contends that this ruling violated N.C.G.S. § 15A-1241(a), which requires that an "accurate record of all statements from the bench and all other proceedings" be kept by the court reporter.

In *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992), we held that the Legislature, by enactment of this statute, did not intend to disturb the time-honored practice of off-the-record bench conferences between trial judges and attorneys, but that it was intended to allow appellate review of statements made within earshot of jurors or others present in the courtroom. *State v. Cummings*, 332 N.C. at 498, 422 S.E.2d at 698. Therefore, the trial court's refusal to require recordation of private bench conferences was not erroneous.

However, a defendant is not precluded from having the record reflect the substance of private bench conferences. As we held in *Cummings*, when a party "requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing,

as accurately as possible, the matter discussed." *Id.* at 498, 422 S.E.2d at 698.

In this case, defense counsel was present at each of the unrecorded conferences, none of the conferences resulted in any significant ruling, and most dealt with purely logistical matters. Most importantly, the record is devoid of any objection by defense counsel. In the event that anything prejudicial to the defendant occurred during these bench conferences, it was the duty of defense counsel, who were aware that the conferences were not being recorded, to have the record reflect the substance of the prejudicial matter. Therefore, even if the denial of the defendant's motion was erroneous, which it was not, the error was harmless. We overrule this assignment of error.

[8] The defendant next assigns error to the court's denial of his request that the court give an instruction during the jury selection defining life imprisonment "to be just that: life imprisonment" and the refusal of the court to give a similar instruction during the jury deliberations. During its deliberations, the jury sent a note to the court asking whether the defendant could ever be eligible for parole from the sentences imposed for the crimes against Leigh Cooper. The Court, pursuant to *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955), instructed the jury that they should not consider eligibility for parole in reaching a verdict but should determine the question as though life means imprisonment for life. The court instructed the jury to decide the case "wholly uninfluenced by consideration of what another arm of the government might or might not do in the future."

The defendant concedes that the instructions given by the court are correct under our cases. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 316, 98 L. Ed. 2d 226 (1987). He says that ordinarily these instructions would be sound if we assume the jury knows nothing of parole and considers a life sentence to mean life in prison. In this case, however, he says the jury knew of the possibility of parole and it was error not to inform them that the defendant would not be eligible for parole for eighty years.

We find no error in this charge which has been approved in many cases. We will assume the jury followed the court's in-

struction and did not consider the possibility of parole in reaching its decision. This assignment of error is overruled.

[9] The defendant next assigns error to the trial court's refusal to allow individual *voir dire* of prospective jurors. The defendant says the trial court abused its discretion in refusing his request and thereby denied him his constitutional right to due process of law. The defendant argues that because there was extensive pretrial publicity about this case, as well as the cases involving Ms. Cooper, individual *voir dire* was necessary to enable him to examine adequately the jurors about their exposure to the pretrial publicity without tainting the remainder of the jury pool.

A trial judge may, in his discretion and for good cause shown, order that jurors be selected one at a time. *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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); N.C.G.S. § 15A-1414(j) (1988). An abuse of discretion is shown only where the court's ruling "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986); *See also State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

In denying defendant's motion, the trial judge indicated that if, during the sentencing proceeding, a matter were to arise which would require "individual attention in order to have a fair selection process," he would consider allowing individual *voir dire* at that time. The judge also indicated that this ruling was based, at least in part, on his desire to avoid an unnecessarily lengthy jury selection process. We hold that the record shows that the judge's ruling was a reasoned decision by which he attempted to conserve judicial resources without foreclosing the possibility of allowing individual *voir dire* if it became necessary to ensure a fair jury selection process.

However, even if we assume it was error to deny the defendant's motion, the record shows that the defendant was not prevented from making any relevant inquiry necessary to determine whether prospective jurors had been exposed to pretrial publicity and, if so, whether that exposure affected their impartiality. During jury selection, prospective jurors were examined with regard to their exposure to pretrial publicity about the case. Those jurors who stated that they had heard about the case through the media were then asked whether they had formed an opinion as to the ap-

propriate punishment for the defendant. Those jurors who had formed such an opinion were successfully challenged for cause. Of the jurors who were selected, four had not heard about the case prior to the hearing. The remainder of the jurors who were selected stated that although they had previously heard about the case, they had not formed opinions as to the appropriate punishment and would be able to give equal consideration to the State's and the defendant's evidence. Therefore, any error by the trial court in denying the defendant's motion for individual *voir dire* was harmless. This assignment of error is overruled.

By his next assignments of error, the defendant contends that the trial court erred by unduly restricting *voir dire* of prospective jurors regarding their understanding as to the meaning of "life imprisonment," their attitudes toward the death penalty, their belief in the jury system, and whether they would hold it against the defendant if he chose not to testify.

A trial judge has broad discretion to regulate jury *voir dire*. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby. *Id.*

[10] As we held above, the subject of parole eligibility and the meaning of "life imprisonment" are irrelevant to the issues to be determined during the sentencing proceeding. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 279. The trial court did not abuse its discretion by refusing to allow the defendant to question jurors regarding these subjects.

[11] Nor did the court err by refusing to allow the defendant to ask certain questions regarding juror attitudes and beliefs about the death penalty. The defendant sought to ask the jurors whether they believed in the death penalty, why they held those beliefs, whether they believed the death penalty has a deterrent effect, whether they believed human life is sacred, and whether they believed the death penalty should be reserved for the worst cases.

The record shows that all jurors who were eventually selected stated they had formed no opinion as to the appropriateness of the death penalty in this case. The jurors related that they would

be able to follow the law and that they would consider the defendant's evidence with impartiality. The defendant was permitted to ask how frequently the jurors thought about and discussed the death penalty. The defendant was not prevented from asking whether the jurors believed that life imprisonment may be an appropriate sentence in some first degree murder cases, or whether they believed that the death penalty was appropriate in all such cases. *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991).

The defendant was entitled to determine, by way of *voir dire*, whether the prospective jurors were predisposed to return a recommendation of death, and whether they would follow the law and equally consider the evidence in mitigation and aggravation. *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684, *rehearing denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993). Because we believe that the defendant was allowed adequate latitude to assess juror attitudes toward the death penalty, we find no abuse of discretion by the court.

The defendant next contends he was prejudiced by the court's refusal to allow him to ask the jurors whether they believed in the jury system, whether they understood and believed in the principles of law that were to be applied, whether they understood the consequences of their potential decision and whether they would stand by their convictions during deliberations. For the following reasons, we disagree with this contention.

[12] The juror whom the defendant sought to ask whether she believed in and understood the applicable principles of law was successfully challenged for cause by the State. Therefore, defendant has failed to show how he was prejudiced by the court's refusal to allow him to ask the question. Nor was defendant prejudiced by the court's refusal to allow him to ask a juror whether the juror believed in the jury system. The record shows that immediately after the question was asked, the judge gave a short explanation of the jury's role in a capital sentencing proceeding and then asked all the jurors in the jury box whether any of them disagreed with the jury's role as he had explained it. No juror indicated any disagreement. Because defendant received answers to the question he was prevented from asking, defendant suffered no prejudice.

Contrary to defendant's contentions, the court did not prevent him from asking whether the jurors understood the consequences of their potential decision. Rather, the court sustained the State's

objection to defendant's characterization of a particular statute as a "good law." This objection was properly sustained.

[13] Finally, the defendant says it was error not to let him ask the jurors whether they would hold it against him if he did not testify. Immediately after sustaining the State's objection to this question, the court instructed the jury as to the defendant's right not to testify and inquired as to whether they disagreed with this principle of law. This cured any error which may have occurred in sustaining the objection to the defendant's question.

Sentencing Proceeding

[14] The defendant next assigns as error the trial court's exclusion of two photographs of the defendant from the evidence. One photograph purported to depict the defendant as a child. The other purported to depict the defendant as a high school senior. The defendant says that it was error to exclude these photographs while allowing the State to introduce a photograph of the defendant taken at the time of his arrest. We disagree.

In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be. N.C.G.S. § 8C-1, Rule 901(a) (1992). A photograph is admissible if it can be properly authenticated as a correct portrayal of the person depicted. *State v. Young*, 291 N.C. 562, 231 S.E.2d 577 (1977). The record reveals that the witness through whom the defendant sought to introduce the photographs did not know the defendant at the times the photographs were taken. A witness who did not know the defendant at the time the photographs were taken could not testify that the photographs accurately portrayed the defendant's appearance at the relevant times. This assignment of error is overruled.

Next, the defendant contends that errors were committed during cross-examination of Anthony Sciara, a neuropsychologist who testified as an expert for the defendant. During the prosecution's cross-examination of Dr. Sciara, the following exchange occurred.

> Q: Now Doctor, the brain damage was in the motor skills areas of his brain, is it not, sir?
>
> A: No, not exactly.

Q: You would disagree with your predecessor on the witness stand, you heard his testimony?

A: I heard his testimony, but that's not what he said.

Q: All right. Doctor—

A: That was—let me explain that because I think it's important.

THE COURT: Well, the jury has heard his testimony too, it's for them to decide what his testimony is, not for you to explain it to them, what somebody else's testimony was, Doctor.

A: Yes, sir.

[15] The defendant first argues that the prosecutor's cross-examination improperly inferred that the testimony of the defendant's two experts was contradictory. The defendant says that the prosecutor's cross-examination was improper because it amounted to an expression of his personal opinions and beliefs about the witnesses' testimony. We disagree.

Counsel is allowed great latitude on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985); *State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991). The control of cross-examination is left to the sound discretion of the trial court and its rulings thereon will not be disturbed absent a showing of abuse of discretion. *State v. Hinson*, 310 N.C. 245, 311 S.E.2d 256, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984). Cross-examination of a witness as to any matter relevant to any issue, including credibility, is proper. N.C.G.S. § 8C-1, Rule 611(b) (1992); *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992).

Dr. Lindley, the neurosurgeon who testified prior to Dr. Sciara, described the injury to the defendant's brain. On direct examination, Dr. Lindley testified that the defendant's brain damage was due to a brain aneurysm and that the damage was located in an area of the brain related to motor skill functions. He further testified that brain damage like the defendant's did "[n]ot classically" affect behavior, but that there is "some behavioral function" ascribed to the area of the defendant's brain that was damaged. The nature of the brain damage suffered by the defendant was uncommon and may have affected the limbic system. Damage to the limbic system tends "to change things such as behavior[.]" With brain damage like the defendant's, there "is the potential for some drastic

behavior changes." Nevertheless, on cross-examination, Dr. Lindley repeatedly testified that he could only hypothesize that the defendant's brain damage caused changes in his personality and behavior. Dr. Lindley testified that he relies on persons with expertise in the field of neuropsychology to make such determinations.

Dr. Sciara, the neuropsychologist, testified that the defendant "has suffered brain damage and that that brain damage is in an area of the brain that deals with control, with sexuality, with aggressiveness, so all of those findings would be consistent with his behavior." Dr. Sciara further described in detail how the defendant's brain damage could have caused the behavioral changes that resulted in the defendant committing the crimes with which he had been charged.

We believe the prosecutor's cross-examination of Dr. Sciara was for the purpose of determining whether his testimony was consistent with the testimony of Dr. Lindley. If, by asking Dr. Sciara whether he disagreed with Dr. Lindley, the prosecutor inferred that the expert's testimony was contradictory, the inference was not improper. Dr. Lindley testified that the brain damage suffered by the defendant was located in an area of the brain that is related to motor skill functions and he could only hypothesize that the damage affected the defendant's behavior. On the other hand, Dr. Sciara's testimony was definite with regard to the defendant's brain damage having affected his behavior.

Moreover, we do not believe that by asking Dr. Sciara whether he disagreed with the testimony given by Dr. Lindley, the prosecutor was expressing his personal opinion about the evidence. Rather, the prosecutor was attempting to determine whether the two witnesses' testimony was consistent. If the experts' testimony was inconsistent, it would also tend to be less credible. Because witness credibility is a proper and relevant matter for cross-examination, *State v. McAvoy*, we find no abuse of discretion by the trial judge in his control of cross-examination.

[16] The defendant next says that the trial court erred by intervening *ex mero motu* during cross-examination to prevent Dr. Sciara from explaining that his testimony was consistent with the earlier testimony of Dr. Lindley. This contention has merit.

The State contends that any attempt by Dr. Sciara to testify concerning the evidence given by Dr. Lindley would have been

hearsay not within an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 801(c) defines hearsay 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." In the instant case, any testimony by Dr. Sciara concerning the testimony of Dr. Lindley would not have been offered for the truth of the matter asserted. Rather, such testimony would have been offered for the purpose of explaining that his testimony did not conflict with Dr. Lindley's testimony. We hold it was error for the trial court to refuse to allow Dr. Sciara to attempt to resolve any of the apparent conflicts between his and Dr. Lindley's testimony.

We must now determine whether the trial court's error was prejudicial to the defendant. The error at issue involved a ruling on the evidence and did not implicate a right arising under the federal or state Constitution. Therefore, the test is whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at the trial. N.C.G.S. § 15A-1443(a) (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). The defendant bears the burden of showing that such a reasonable possibility exists. *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992). For the following reasons, we hold that the defendant has failed to carry his burden.

As we have said, the effect of the trial court's ruling was to prevent Dr. Sciara from explaining that his testimony was consistent with Dr. Lindley's testimony. Therefore, if it would have been apparent to the jury that the witnesses' testimony was actually consistent, there would be no reasonable possibility that the trial court's ruling affected the result of the defendant's trial. Our review of the record shows that the experts' testimony was overall consistent and that this general consistency must have been apparent to the jury.

On direct examination, Dr. Lindley testified concerning the injury and damage to the defendant's brain that was caused by the aneurysm. He described what an aneurysm is, where the defendant's aneurysm was located, and what parts of the defendant's brain were affected. Dr. Lindley further described the surgical procedure which was used to treat the defendant's condition and how the defendant suffered a certain amount of brain damage as a result of the surgical procedure.

Dr. Lindley conducted a post-surgery, mental status examination of the defendant which revealed that the defendant was unconcerned about the criminal charges pending against him; that his effect was flat. The area of the defendant's brain that was damaged classically affects movement. However, the defendant's brain damage was in many ways unique and may well have affected his personality and behavior. Nevertheless, Dr. Lindley could not render an expert opinion as to whether the defendant's brain damage caused behavioral changes because such diagnoses are ordinarily left to persons with expertise in the fields of neuropsychology and neuropsychiatry.

Dr. Sciara, an expert in the field of neuropsychology, testified regarding the defendant's behavioral changes. He testified that the defendant suffered damage in the frontal lobe and old brain portions of his brain. Dr. Sciara opined that damage to these portions of the defendant's brain caused behavioral changes in the defendant and contributed to his committing the crimes with which he had been charged. This opinion was based on the doctor's review of the defendant's hospital records, research, and interviews with persons closely associated with the defendant prior to and after his brain injury.

Although the testimony of the defendant's expert witnesses was not entirely congruous, it was at the very least complementary. The surgeon's expertise was in identifying those portions of the defendant's brain that were damaged and the psychologist's expertise was in identifying the behavioral manifestations of those injuries. We do not believe that there is any reasonable possibility that the jury could have found the expert's testimony to have been contradictory, or that it would have accepted any such inference.

In addition, the defendant failed to make an offer of proof as to what Dr. Sciara's testimony would have been had the trial court not improperly intervened. While we agree with the defendant that it is apparent from the context that Dr. Sciara would have attempted to explain any inconsistencies in the evidence, the record fails to reveal exactly how he would have done so. Therefore, we hold that there is no reasonable possibility that if the error had not occurred, a different result would have been reached at the trial.

[17] Under his next assignment of error, the defendant contends that the trial court erred by allowing the State to ask Dr. Lindley

whether it was possible that the defendant's "flat effect" could have been caused by the defendant's prolonged use of marijuana or alcohol or a combination of the two. The defendant says that this question was improper because it was irrelevant to the defendant's state of mind at the time of the killing. The defendant also says that there was no evidence of prolonged drug use by the defendant. This argument is meritless.

A witness may be cross-examined on any matter relevant to any issue including credibility. N.C.G.S. § 8C-1, Rule 611(b) (1992); *State v. Freeman*, 319 N.C. 609, 356 S.E.2d 765 (1987). In this case, the defendant's mental and emotional condition at the time of the murder was a significant issue. Dr. Lindley testified on direct examination that he found the defendant to exhibit little concern over the criminal charges that he was facing and that he did not appear to be emotionally affected by those charges. There was also evidence the defendant was a user of marijuana and alcohol prior to and until the date of his arrest. Whether the defendant's flat emotional state was the result of drug use, or as the defendant contended, the result of a brain aneurysm and subsequent surgery, was a proper subject of inquiry.

[18] By his next assignment of error, the defendant contends that Ms. Leigh Cooper was erroneously allowed to testify concerning the defendant's crimes against her. Specifically, the defendant says that this evidence did not show a "course of conduct," N.C.G.S. § 15A-2000(e)(11), was inadmissible character evidence, and that even if the evidence was admissible for the limited purposes described in N.C.G.S. § 8C-1, Rule 404(b), its probative value was outweighed by the danger of undue prejudice. N.C.G.S. § 8C-1, Rule 403 (1992).

The State's evidence in this case tended to show that on 24 September, the defendant kidnapped Ms. Gray as she was exercising on the streets of Boone, North Carolina. The defendant believed that Ms. Gray was a student at Appalachian State University. The defendant drove her into the mountainous countryside where he sexually assaulted her and then strangled her to death. Ms. Gray's underpants and watch, which she was shown to have been wearing at the time of her disappearance, were never recovered although the remainder of her clothing was found.

Ms. Cooper testified that five days after the disappearance of Ms. Gray, in the late afternoon of 29 September, she was jogging along a street in Boone when the defendant, driving his car, blocked

her path, pointed a pistol at her and ordered her into his car. As the defendant drove Ms. Cooper away from town, he asked her name, how old she was and whether she was a student at the university. The defendant then ordered her to remove her clothes and to begin performing oral sex on the defendant. The defendant stated that he intended to keep her brassiere and underpants. Upon arrival in an isolated area, the defendant repeatedly raped and sodomized Ms. Cooper.

During the course of the defendant's attack upon Ms. Cooper, the defendant told her that on the previous Saturday he had seen her jogging and that he had also seen another girl that he was going to "get" but that there had been too many people in the vicinity. The defendant stated that he did not find anyone until Sunday (24 September). He then asked Ms. Cooper if she had read the newspapers and whether she knew about Ms. Gray. The defendant admitted that he kidnapped and killed Ms. Gray and that he had left her body a half mile from their present location. The defendant stated that Ms. Gray had died a slow and painful death. The defendant admitted that he had beaten Ms. Gray with a large stick, kicked her in the throat and then, standing on her back, strangled her with her sweater. The defendant asked Ms. Cooper if she wanted to die a fast or a slow death. The defendant told Ms. Cooper that he would not kill her until he had performed various sexual acts with her or until the following morning. The defendant also made a comparison between his sexual assault against Ms. Gray and his rape of Ms. Cooper. The defendant later stole Ms. Cooper's watch.

The defendant's statements concerning his crimes against Ms. Gray, if relevant, were admissible pursuant to N.C.G.S. § 8C-1, Rule 801(d). Rule 801(d) provides that the admissions of a party opponent are excepted from the general prohibition against the admission of hearsay evidence.

The defendant's statements were relevant because they tended to show that the murder "was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). A murder is especially heinous, atrocious, or cruel if it is a conscienceless or pitiless crime which is unnecessarily torturous to the victim and the brutality involved exceeds that normally present in a first degree murder. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). This aggravating circumstance may

also be found in those cases that present dehumanizing aspects not usually present in a first degree murder case. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

The defendant told Ms. Cooper that the victim had "died [a] slow and painful death." The defendant admitted beating the victim's head with a stick, kicking her in the throat and finally standing on her back and strangling her. This evidence, which was corroborative of the findings of a pathologist, was relevant to show that the murder was unnecessarily torturous and that it exceeded the level of brutality normally present in a first degree murder.

The defendant's statement that he sexually assaulted the victim prior to killing her was corroborative of evidence that the victim suffered pre-death bruising in her anal area. Evidence that the defendant sodomized the victim prior to killing her has the tendency to show that there existed in this case dehumanizing aspects not normally present in a first degree murder. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783. We find no error in the admission of these statements.

[19] The "other crimes" evidence, the evidence of the defendant's crimes against Ms. Cooper, was relevant if it tended to show that the murder was part of a course of conduct in which the defendant engaged which included acts of violence against another person. N.C.G.S. § 15A-2000(e)(11) (1988). Evidence tends to show a "course of conduct" if it shows that the "other crimes of violence were parts of a pattern of intentional acts directed toward the perpetration of such crimes of violence which establishes that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of [the victim] and other crimes of violence." *State v. Cummings*, 332 N.C. 487, 508, 422 S.E.2d 692, 704 (1992), *quoting*, *State v. Williams*, 305 N.C. 656, 685, 292 S.E.2d 243, 261 (1982). In determining whether to submit the course of conduct aggravating circumstance, the trial court must consider "a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated*, --- U.S. ---, 112 L. Ed. 2d 7 (1990).

In *Cummings*, we held that this aggravating circumstance was properly submitted where the evidence showed that the defendant killed two women over a twenty-six month period. The defendant's

motivation for the murders was nearly identical and his *modus operandi* was the same. We also held in *Cummings* that in determining whether submission of this circumstance is proper, it weighs heavily in favor of submission where the multiple victims are from some associated group.

Ms. Cooper's testimony tended to show that in both cases the defendant's motivation and *modus operandi* were the same, the crimes were committed in close temporal proximity, and the defendant believed that both victims were members of an associated group. In each case, the defendant abducted the female victim, whom he believed to be an Appalachian State University student, as she was exercising on the streets of Boone. The defendant drove each of the victims to the same area of the county. The defendant sodomized both victims and stole their watches and articles of their clothing which he kept as mementos. The defendant told Ms. Cooper that he would have abducted her on a previous occasion, but that there were too many people around. He also told her that he planned to kill her as he had killed Ms. Gray. The defendant committed these crimes against Ms. Cooper just five days after he kidnapped and murdered Ms. Gray. We hold that this evidence was relevant to show a "course of conduct" because it tended to show that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of the victim and other crimes of violence.

The defendant also assigns as error the admission of photographs of the victim and evidence of injury to her rectum. In addition, the defendant says it was error to admit evidence of the victim's disappearance, her friend's and family's concern for her safety, and the massive effort of law enforcement officers to locate her. The defendant says that this evidence was irrelevant. We disagree.

As previously discussed, evidence that the defendant anally raped the victim prior to murdering her was relevant to show that the murder was especially heinous, atrocious, or cruel. Thus, admission of evidence of injury to the victim's rectum was proper.

[20] Whether to admit photographic evidence requires a weighing of the evidence's probative value against the danger of unfair prejudice to the defendant. *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988); *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). N.C.G.S. § 8C-1, Rule 403 (1986). Where the victim's identity and the cause

of his or her death are uncontroverted, a trial court may nevertheless allow in evidence photographs showing the condition of the body and its location when found. *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991).

The photographs at issue depicted the victim's nude body in an advanced stage of decomposition. The photographs also purported to depict the manner in which the victim was strangled and the injuries to her head. Although the victim's identity and the cause of her death were not in dispute, these photographs showed the circumstances of her death which were relevant to the issues to be determined in the sentencing proceeding. We find no error in admitting these photographs into evidence.

[21] The defendant's contention that the trial court allowed inadmissible "victim impact" evidence is without merit. Having reviewed the testimony to which the defendant assigns error, we have failed to find any testimony which in any way described how the defendant's crimes impacted the victim's family and friends. Rather, the witnesses described how they learned of the victim's disappearance and how they came to be involved in the search to find her. This testimony was foundational in nature and its admission was proper. This assignment of error is overruled.

[22] The defendant next assigns as error the trial court's exclusion of evidence that the trial court would sentence the defendant for his crimes against Ms. Cooper and his kidnapping of Ms. Gray after the conclusion of the capital sentencing proceeding. The defendant says that he was entitled to have the jury consider anything that it might deem to justify a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and that evidence that he would receive appropriate sentences for his other crimes might mitigate against a sentence of death in this case. *Harris v. Maryland*, 312 Md. 225, 539 A.2d 637 (1988). Defendant says that in the absence of this evidence, the jury might conclude that its sentence recommendation was to apply to all the crimes committed by the defendant during his course of violent conduct. We disagree.

The excluded evidence would have tended to suggest that the statutorily available sentences would actually be imposed. Because such evidence was purely speculative, it was properly excluded. Additionally, the evidence was inadmissible on the ground that it was irrelevant. In *State v. Price*, 331 N.C. 620, 418 S.E.2d

169 (1992), *sentence vacated*, --- U.S. ---, 122 L. Ed. 2d 113 (1993), we held it was irrelevant in a sentencing proceeding "[t]hat defendant is currently serving a life sentence for another unrelated crime [because that sentence] is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced." *Price*, 331 N.C. at 634, 418 S.E.2d at 177. Likewise, that the defendant in this case would be sentenced for his other crimes was not a circumstance that would justify a sentence less than death for the murder for which he was being sentenced. Thus, we hold that the trial court did not err by excluding this evidence.

Assuming *arguendo* that the court's ruling was erroneous, the record shows that the defendant offered, and the court admitted, evidence that the defendant had previously entered pleas of guilty to the other crimes and that the defendant could receive four life sentences plus fifty years for those crimes. Thus, contrary to the defendant's argument, the jury was informed of what sentences might be imposed for his other crimes and that these sentences would be separate and distinct from his sentence for murder. Therefore, any error was harmless beyond a reasonable doubt. This assignment of error is overruled.

Jury Argument

[23] The defendant next argues that the trial court erred by allowing the prosecutor to argue that the defendant's expert witnesses had contradicted one another. We disagree.

Where, as here, the defendant failed to object to the prosecutor's argument, the trial judge was required to intervene *ex mero motu* only if the argument was grossly improper. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). A prosecutor "may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence." *State v. Taylor*, 289 N.C. 223, 226, 221 S.E.2d 359, 362 (1976). Arguments before the jury are left largely to "the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts." *Id.*

In this case, the prosecutor argued in relevant part as follows:

> You heard from a doctor from Bowman Gray Hospital, Dr. Lindal [sic], Chief Resident Neurosurgeon at Baptist Hospital. He told you that Daniel Gray [sic] had some brain damage. That it was in a motor skill area. . . . And he said the chances that that might cause some personality change was pure hypothesis. A pure, as he told the Judge, a pure guess that it might. . . .
>
> [Y]ou recall after Dr. Lindal [sic] the next witness who testified, he was not a medical doctor, he was a psychologist [Dr. Sciara]. . . .
>
> [H]e came in and said I know for a fact that this brain damage has caused this change, this drastic change in Daniel Lee. And I want you to think about that. Here is a psychologist, who is totally, totally contradicting what the Chief Resident of Neurosurgery at Baptist Hospital says.

We have reviewed the record and find that the prosecutor's argument was supported by the evidence. Dr. Lindley was unable to testify to a reasonable degree of medical certainty that the defendant's behavioral and emotional changes were symptoms of his brain damage. Rather, Dr. Lindley could only hypothesize that the defendant's brain damage had caused such changes. Dr. Sciara, however, testified in no uncertain terms that the behavioral and emotional changes experienced by the defendant were the direct result of the defendant's brain aneurysm and subsequent brain surgery.

In his argument, the prosecutor identified this difference in the witnesses' testimony as the basis for his argument that the experts had contradicted one another. Given the wide latitude that is afforded counsel during jury arguments, and considering the differences in the witnesses' testimony, we hold that the prosecutor could properly argue that the evidence was contradictory. This assignment of error is overruled.

[24] The defendant next asserts that the trial court should have intervened *ex mero motu* to prevent the following portion of the prosecutor's argument:

> The time has come to say . . . to Daniel Lee we will not tolerate these terrible conscienceless crimes that you have committed. To say to those who would follow in his footsteps beware, beware.

> Why capital punishment? Because there is only one way that we can insure that no other person shall ever fall pray [sic] to Daniel Brian Lee.

The crux of this argument was twofold. First, the prosecutor asserted that if the jury returned a recommendation of death, it would be signaling the community that capital felons would be dealt with severely. Second, the prosecutor argued the only way to prevent the defendant from killing again was for the jury to return a recommendation of death.

In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, this court found proper a prosecutor's argument that its verdict would " 'send a message to the community' about what may befall a person convicted of murder in a court of justice." 325 N.C. at 329, 384 S.E.2d at 499. In *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979), this Court found no error in a prosecutor's repeated argument that the only way to insure that the defendant would not kill again was to sentence him to death.

Considering the prosecutor's argument in the present case in light of these prior decisions, we hold that this was a proper argument. This assignment of error is overruled.

Jury Instructions

[25] Under his next assignment of error, the defendant contends that the trial court erred by refusing to instruct the jury peremptorily that at the time of the murder, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6) (1988). The defendant argues that this mitigating circumstance was supported by credible and uncontroverted evidence, thus requiring the court to give a peremptory instruction. *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985). We disagree.

As we have already discussed, the defendant's expert witness, Dr. Lindley, was unable to testify with a reasonable degree of medical certainty that the defendant's brain injury resulted in any change in the defendant's condition other than some diminution in his motor skills. Other witnesses described the defendant's physical appearance both before and after his hospitalization. These witnesses

generally described the defendant's physical appearance as having deteriorated following his brain surgery. They described the defendant as being more withdrawn and less goal-oriented. Other witnesses described changes in the defendant's sexual attitudes.

While this evidence tends to show some psychological changes in the defendant, it falls short of showing that the defendant suffered from an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

In addition, there was other evidence which tended to show the nonexistence of this mitigating circumstance. Sheriff Lyons testified that the defendant had always obeyed the rules that governed inmates in the Watauga County jail; that he always followed the Sheriff's instructions when he was being transferred to and from various court proceedings; that the defendant's behavior in jail had been inconsequential; and, that the defendant had never attempted to escape from custody. This evidence tended to show that the defendant was capable of conforming his conduct to the requirements of the law. Therefore, we hold that the evidence of this statutory mitigating circumstance was not uncontroverted. The trial court properly refused the defendant's request for a peremptory instruction.

The defendant next contends that the trial court improperly instructed the jury concerning its use of the evidence of the defendant's crimes against Ms. Cooper. The trial court instructed, in accordance with the pattern jury instruction, as follows:

> Evidence has been received *tending to show* that certain acts occurred between the defendant and the witness, Leigh Cooper. This evidence was received solely for the purpose of showing that the defendant had a motive for the commission of the crime charged in this case, the murder of Jennifer Gray, and that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case. If you believe this evidence you may consider it, but only for the limited purpose for which it was received. (Emphasis added.)

The defendant argues that this instruction was erroneous because the phrase "tending to show" amounted to an impermissible judicial comment on the evidence; the instruction allowed the jury to con-

sider the evidence on the issue of a "plan" or "scheme," when the evidence was only relevant to the "course of conduct" aggravating circumstance; and, the instruction permitted consideration of the evidence on the question of motive which the defendant says was irrelevant. We disagree.

[26] This Court has consistently held that a trial court's use of the phrase "tending to show" in reviewing the evidence does not constitute an expression of judicial opinion on the evidence. *State v. McKoy*, 331 N.C. 731, 417 S.E.2d 244 (1992); *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989). We hold that the trial court's use of these words in the present case was proper.

[27] Nor did the trial court err by allowing the jury to consider the defendant's crimes against Ms. Cooper on the issue of "plan," "scheme," and "motive." As we have already discussed, and as the trial court instructed the jury, the "course of conduct" aggravating circumstance is proven by showing that there existed a "plan" or "scheme" in the mind of the defendant involving both the murder and other crimes of violence. *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692; *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243. Likewise, similarity of motive is relevant to determining the existence of the "course of conduct" circumstance, *State v. Cummings*, and could properly be considered by the jury. This assignment of error is overruled.

[28] By his next assignment of error the defendant contends that the trial court erred by submitting the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). The defendant contends that the evidence was insufficient to support submission of this aggravating circumstance. We disagree.

A murder is "especially heinous, atrocious, or cruel" if it is a conscienceless or pitiless crime which is unnecessarily torturous to the victim or where the level of brutality involved exceeds that normally found in a first degree murder. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984). The first of two types of first degree murders where submission of this circumstance are proper are those which are physically agonizing for the victim or which are in some other way dehumanizing. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. The second type are those where the victim is psychologically tortured; where the victim is aware of but unable to prevent her impending death. *Id.*

The State's evidence showed the victim was kidnapped at gun point, stripped naked, driven to another location where she was forced to walk or run to the place where she was beaten on the head, kicked in the throat and strangled by the defendant. The defendant said the victim died a slow and painful death. We believe the jury could find from this evidence that the victim's death was particularly dehumanizing and was especially cruel.

[29] The defendant, relying on *State v. Trexler*, 316 N.C. 528, 342 S.E.2d 878 (1986), argues that the *corpus delicti* rule as to the admission of confessions should be applied to the proof of an aggravating circumstance. He says that the testimony of Ms. Cooper, that the defendant told her Ms. Gray had died a slow and painful death, was not corroborated by independent evidence and it should have been excluded.

The *corpus delicti* rule, as stated in *Trexler*, has no application to this case. The defendant pled guilty to first degree murder. This established that a crime had been committed. The testimony as to the defendant's description of the crime was admissible.

[30] The defendant next contends that the trial court committed plain error in its instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance. The defendant, relying on the United States Supreme Court decisions in *Shell v. Mississippi*, 498 U.S. 1, 112 L. Ed. 2d 1 (1990) and *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372 (1988), says that the instruction given in this case was unconstitutionally vague. We disagree.

The instruction given in the instant case is virtually identical to the instruction given in *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). The instruction given in both cases came from N.C.P.I.—Crim. 150.10. In *Fullwood*, we considered the defendant's argument, based on the *Maynard* decision, that this instruction was unconstitutionally vague. In that case we held, pursuant to *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913 (1978), that the instruction given by the trial court on this aggravating circumstance provided the jury with adequate guidance in determining the existence of this circumstance. The United States Supreme Court's *per curiam* decision in *Shell* adds nothing to its prior decision in *Maynard*. Because we have already determined, after considering the *Maynard* decision, that the instruction given in this case passes constitutional muster, we overrule this assignment of error.

[31] By his next assignment of error, the defendant challenges the constitutionality of the pattern capital sentencing instructions which were adopted as a result of the decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

In *McKoy*, the United States Supreme Court held that the unanimity requirement of North Carolina's capital sentencing scheme was unconstitutional because it prevented "the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." *McKoy*, 494 U.S. at 435, 108 L. Ed. 2d at 376. A sentencer may not be precluded from giving effect to all mitigating evidence. *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988); *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973. In *Mills*, on which the *McKoy* decision was based, the Court reasoned that a unanimity requirement allows a single juror's holdout vote on a particular mitigating circumstance to prevent the remainder of the jury from giving that circumstance any effect when weighing mitigating circumstances against aggravating circumstances. *Mills*, 486 U.S. at 376, 100 L. Ed. 2d at 393.

In the instant case, the trial court instructed the jury in Issue Two, in accordance with *McKoy*, that if *one or more* jurors found a mitigating circumstance to exist they should write "yes" in the space provided. With regard to the third sentencing issue, the weighing issue, the court instructed in pertinent part as follows:

> If you find from the evidence one or more mitigating circumstances, you *must* weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror *may* consider any mitigating circumstance or circumstances that *he or she determined to exist* by a preponderance of the evidence in Issue Two. (Emphasis added.)

With regard to determining the fourth issue, whether the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, the court instructed:

> In deciding this Issue Four, you are not to consider the aggravating circumstances standing alone. You *must* consider them in connection with any mitigating circumstances *found by one or more of you.* When making this comparison, each juror *may* consider any mitigating circumstance or circumstances *that juror determined to exist* by a preponderance of the evidence. (Emphasis added.)

The defendant says these instructions were improper because they utilized the permissive word "may" instead of the imperative words "shall" or "must." The defendant argues that these instructions allowed jurors to disregard properly found mitigating circumstances. The defendant also contends that each juror should be required to consider every mitigating circumstance found by any one of the jurors. We disagree.

The jury was instructed under Issue Three that it *must* weigh any mitigating circumstances it found to exist against the aggravating circumstances. This directive to weigh the mitigating circumstances against the aggravating circumstances is not ambiguous. The next sentence of the instruction describes which mitigating circumstances are to be considered by the jurors in this weighing process. The word "may" indicates that each juror is allowed to consider those mitigating circumstances that he or she may have found to exist by a preponderance of the evidence.

The rule of *McKoy* is that jurors may not be prevented from considering mitigating circumstances which they found to exist in Issue Two. Far from precluding a juror's consideration of mitigating circumstances he or she may have found, the instant instruction expressly instructs that the evidence in mitigation *must* be weighed against the evidence in aggravation. Thus, the instruction given by the trial court fully comports with the decision in *McKoy*.

Nor are we persuaded by the defendant's contention that *McKoy* requires a juror to consider, at Issue Three and Issue Four, those mitigating circumstances which he or she did not find, but which were found by one or more other jurors. Were we to adopt this reading of *McKoy* and its progenitors, we would create an anomalous situation where jurors are required to consider mitigating circumstances which are only found to exist by a single holdout juror. We do not believe that the decisions in *McKoy* or *Mills* intended this anomalous result. The jury charge given in this case did not preclude the jurors from giving effect to all mitigating evidence they found to exist. This charge eliminates the defect found unconstitutional in *McKoy*. This assignment of error is overruled.

[32] By his next assignment of error, the defendant asserts the trial court erred by refusing to submit as a nonstatutory mitigating circumstance that "Daniel Lee's inability to . . . conform his conduct to the requirements of the law was by reason of his mental defect

and not of his own making." For the following reasons, we hold that the trial court properly refused to submit this nonstatutory mitigating circumstance.

A trial court errs if it refuses a defendant's written request to submit a nonstatutory mitigating circumstance which is sufficiently supported by the evidence unless the requested circumstance is subsumed by a mitigating circumstance which is submitted. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). In this case, the trial court submitted two statutory mitigating circumstances that concerned the defendant's mental or emotional condition at the time of the killing. These were N.C.G.S. § 15A-2000(f)(6) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired" and N.C.G.S. § 15A-2000(f)(2) "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance." The court also submitted the following nonstatutory mitigating circumstance:

> [W]hether the defendant did not himself know or fully appreciate his mental condition and dangerousness at the time of the murder, or whether he had not been warned that his mental condition might lead to an inability to control his conduct or to conform it to the requirements of the law, and whether you deem this to have mitigating value.

The jury found all three of these mitigating circumstances. We believe these three mitigating circumstances which were submitted allowed the jury to determine whether the defendant's mental condition was self induced. This assignment of error is overruled.

[33] The defendant next contends there was error in the court's instruction in which it defined aggravating and mitigating circumstances. The defendant requested that the court charge the jury that aggravating circumstances are circumstances "that tend to make a specific Defendant particularly appropriate for the most serious and final punishment prescribed by law." The court refused this request and charged the jury that "[a]n aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." The court also charged that "[a] mitigating circumstance or factor is a fact or group of facts, which . . . may be considered as extenuating or reducing the moral culpability of the killing or

making it less deserving of extreme punishment than other first degree murders."

The defendant says the instruction of the court caused the jury to focus on the crime rather than the defendant as required by *South Carolina v. Gaithers*, 490 U.S. 805, 104 L. Ed. 2d 876 (1989). This charge as to aggravating and mitigating circumstances was approved in *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 and *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). This assignment of error is overruled.

[34] The defendant next assigns as error the trial court's refusal to charge the jury that Article I, Section 27 of the North Carolina Constitution provides that no person shall be subjected to either cruel or unusual punishment and that if the jury determined, in light of the defendant's individual circumstances, that the punishment of death would be cruel or unusual, that the jury should return a recommendation of life imprisonment.

Whether a sentence constitutes cruel or unusual punishment is a question of law and is therefore not a question to be resolved by a jury. Moreover, we have repeatedly determined that North Carolina's capital sentencing scheme does not violate the constitutional prohibition against cruel or unusual punishments. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 939 (1988); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991). We hold that the trial court's refusal to give the defendant's proffered instruction was not error.

[35] By his next assignment of error, the defendant contends that the trial court committed plain error in its instruction regarding expert testimony. The instruction described an expert as one who "purports to have specialized skill or knowledge." The defendant says this instruction was plainly erroneous because an expert, as a matter of law, is a person who has been determined by the court to have such skill or knowledge. We disagree.

In *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), we considered the propriety of a virtually identical instruction and found it to be sufficient. We have reviewed the court's entire charge and found it to be a correct explanation of the basis for and use of expert opinions and cannot say that it was erroneous.

[36] Next, the defendant contends that the trial court erred by denying the jury's request to "have a copy of the testimony of the neurosurgeon and the neuropsychologist?" N.C.G.S. § 15A-1233(a) provides in pertinent part:

> The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

Whether to allow the jury to review a witness's testimony is a matter solely addressed to the discretion of the trial court. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653.

The defendant contends that the trial judge did not exercise his discretion in denying the jury's request and that even if he did exercise his discretion, he did so improperly. We disagree. The record shows that in denying the jury's request, the judge made the following statement:

> For you to have that and not have a copy of all of the testimony might cause something to be taken out of context or unduly—place undue emphasis on this. It is your duty to use your own recollection and recall the evidence as you heard it from the witness stand.

In response to defense counsel's request that the testimony be provided to the jury, the judge continued:

> [I]t is not in a form where it can be readily copied without a great deal of time, and as I said the Court has determined that it might unduly emphasize that testimony to the exclusion of other testimony and it's the duty of the jury to consider and recall all of the testimony they heard. . . .

It is clear from this record that the trial court was aware of its authority to exercise its discretion and allow the jury to review the expert's testimony. It is also clear that the court's decision was made in an effort to conserve time and to ensure that all evidence received equal consideration. The defendant has not shown that the trial court abused its discretion by denying the request or that the reasons stated for the denial were improper. This assignment of error is overruled.

[37] The defendant next assigns error to the requirement by the court that Dr. Sciara, the psychologist who testified as an expert

for the defendant, furnish the State a written report of his examination of the defendant. The State paid for the psychological examination pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985).

The defendant does not contend it would have been error to require Dr. Sciara to furnish the State with a report if he had previously prepared it. He says the court could not require such a written report. The defendant argues that the State does not have the right to this discovery at common law and there is not a statute providing for the type discovery allowed in this case.

N.C.G.S. § 15A-905(b) provides for the inspection and copying by the State of reports of mental examinations which relate to the testimony of a witness. It does not mention the authority of the court to require that a written report be prepared, but we believe that within the meaning of the statute is the requirement that the State be provided in advance of the witness' testimony with a meaningful report which the State can use in preparation for trial. We hold that it was not error under the statute for the court to order Dr. Sciara to prepare such a report in this case.

Verdict

[38] By his next assignment of error, the defendant argues that the trial court erred by refusing his request that the jurors be polled as to how they individually answered each of the proffered mitigating circumstances. The defendant says that the trial court's ruling hampers this Court's ability to conduct meaningful proportionality review. We disagree.

N.C.G.S. § 15A-2000(b) states that "[u]pon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned." Clearly, this statute only contemplates polling the jurors regarding their final recommendation. Nothing in this statute indicates that jurors should be polled as to their individual answers to the individual issues addressed during sentencing deliberations. The trial court's refusal to poll the jurors regarding their individual answers to the proffered mitigating circumstances was not error. *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732, *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1981). We overrule this assignment of error.

[39] By his next assignment of error, the defendant contends that his death sentence should be vacated on the ground that the jury failed to find several nonstatutory mitigating circumstances which, the defendant contends, "were manifestly supported by the evidence and mitigating as a matter of law[.]" The mitigating circumstances which the defendant says should have been found were that he had entered pleas of guilty to every crime he was accused of committing; that he had a good work history; and, that he had adjusted well to incarceration and would be of benefit to society if sentenced to life imprisonment.

Before a juror can find a nonstatutory mitigating circumstance, he or she must find the circumstance to exist and that the circumstance has mitigating value. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518. We agree with the defendant's contention that the existence of these circumstances was supported by the evidence. However, these circumstances do not have mitigating value as a matter of law. It is the jury's duty to determine whether proffered nonstatutory mitigating circumstances make the defendant less deserving of a sentence of death. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518; *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Thus, despite substantial evidence of the existence of a proffered nonstatutory mitigating circumstance, a jury's failure to find that the circumstances have mitigating value does not require that the defendant's sentence of death be set aside. This assignment of error is overruled.

Preservation Issues

The defendant brings forth seven additional issues for this Court's review. In their brief, defense counsel candidly concedes that these issues have previously been decided by this Court adversely to the position taken by the defendant. Nevertheless, the defendant asks us to reevaluate these prior decisions. Having considered the defendant's arguments, we are not persuaded to abandon our prior holdings. These assignments of error are overruled.

Proportionality Review

Having determined that there was no error in the defendant's sentencing proceeding, we are required by N.C.G.S. § 15A-2000(d) to determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentence of death

was imposed, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in the pool of similar cases, considering both the crime and the defendant.

The jury found three aggravating circumstances in the murder of Jennifer Gray. These were that the murder was committed during the course of a kidnapping, that the murder was especially heinous, atrocious, or cruel, and that the murder was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person.

As already discussed herein, the record clearly supports the jury's finding that this murder was especially heinous, atrocious, or cruel and part of a "course of conduct" involving crimes of violence against another person. Although not addressed herein, the record also supports a finding that this murder was committed in the course of a kidnapping. The existence of this aggravating circumstance was conceded by the defendant during the sentencing proceeding.

Having thoroughly examined the record, transcripts and briefs in this case, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors.

[40] We now turn to our final statutory duty of conducting a proportionality review. In determining whether the sentence of death is disproportionate, we consider both the defendant and the crime, and compare them to a pool of similar cases. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). In *Williams*, we said that the pool of similar cases to which we would compare the case under review, would consist of:

> *[A]ll 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.

Id. at 79, 301 S.E.2d at 355 (emphasis in original). The pool of similar cases includes only those cases which this Court has found to be free from error in both phases of the trial. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Our review is intended to eliminate the possibility that a sentence of death was imposed by the action of an aberrant jury. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986). In furtherance of this purpose, we

> compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

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). However, while we expressly analogize and distinguish many cases, we do not feel bound to cite all cases that we consider. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335.

At the outset, we note as this Court has previously observed, juries consistently return recommendations of death in those cases where the victim was sexually assaulted, *State v. Holden*, 321 N.C. 125, 167, 362 S.E.2d 513, 538. Furthermore, this Court has never found a sentence of death to be disproportionate where the victim was sexually assaulted. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470; *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600. Nevertheless, we must compare this defendant and this crime to similar defendants and similar crimes.

Some of the distinguishing features of the crime in this case were its violent, sexual character, and that it was part of a "course of conduct." Pertinent traits of the defendant were his law abiding history, his mental or emotional disturbance, and his lack of capaci-

ty to conform his conduct to the requirements of the law. Thus, we will endeavor to compare this case to other cases where the crime and the defendant were similar.

In reviewing the cases in the pool, we have found several cases meeting these criteria where the juries returned recommendations of death. In *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732, the victim was beaten, cut, raped, and driven over with a car. The defendant's first degree murder conviction was based on theories of premeditation and deliberation and felony murder. In mitigation, we assumed that the jury found that the defendant was acting under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was impaired. The jury returned a recommendation of death. We found that sentence to be proportionate.

In *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264 (1982), the defendant kidnapped three female college students with the use of a blank pistol. The defendant ordered that he be driven to a remote area in the country. There, the defendant raped, robbed and murdered one of the victims. The jury found as a mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance. On review, we found the defendant's death sentence to be proportionate.

In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), the defendant, after injecting cocaine, gained entry into the victim's home by guile, where he cut and stabbed the victim to death with a butcher knife. There was substantial evidence that the defendant killed the victim while attempting to rape her. Like the instant case, the jury in *McDougall*, found that the murder was part of a "course of conduct." The jury also found that the defendant was acting under the influence of a mental or emotional disturbance, and his capacity to appreciate the criminality of his conduct was impaired. This Court found McDougall's sentence of death to be proportionate.

In *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513, the victim was a passenger in the defendant's car. She was very drunk. The defendant parked his car, tied the victim's legs together, and fondled her breasts. Shortly thereafter, the defendant drove the victim to a secluded area where he attempted to rape her. The defendant killed the victim by shooting her in the neck and slashing her throat. The jury found three aggravating circumstances and no

mitigating circumstances. This court found the recommendation of a sentence of death to be proportionate.

In *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, the defendant stated to a witness that he was going to rape a female acquaintance and that if it was necessary to kill the victim in order to rape the female, he would do so. The defendant thereafter shot the victim in the head as the victim rode in a truck with the female that the defendant intended to rape. After shooting the victim, he transported the female to another location where he threatened her life and raped her. The jury found two aggravating circumstances, including the "course of conduct" aggravator. The jury also found all fifteen submitted mitigating circumstances, including the defendant's age and his impaired capacity to appreciate the criminality of his conduct. The jury returned a recommendation of death. This Court found the defendant's sentence to be proportionate.

We have also reviewed several cases where defendants received sentences of life imprisonment for first degree murders which also involved some sort of sexual offense. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983); *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (1981); *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980). These cases however are distinguishable from the instant case with regard to either the defendant or the crime.

In none of these cases did the jury find the aggravating circumstance that the murder was part of a course of conduct in which the defendant engaged which included acts of violence against another person. The absence of this aggravating circumstance in these cases tends to show that juries are more hesitant to impose the death penalty where the crime was committed in response to a specific set of circumstances rather than as part of a plan or scheme to commit numerous acts of violence against numerous victims.

Additionally, in the cases where the defendants received life sentences, the juries found fewer aggravating circumstances than were found here. In the instant case, the jury found three aggravating circumstances. In two of the cases where life imprisonment was recommended, the jury found two aggravating circumstances. *Clark; Powell.* In the other three cases, life sentences

were imposed where the jury found only one aggravating circumstance. *Fincher; Franklin; Temple.*

Furthermore, in three of these cases, *Fincher*, *Franklin*, and *Powell*, the defendants were convicted of murder based solely on the theory of felony murder. A conviction based on the theory of premeditation and deliberation, like the defendant's conviction in the present case, indicates a more calculated and cold-blooded crime. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470.

Our review has also revealed two cases where juries found the same three aggravating circumstances found in this case. *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991); *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991). The defendants in *Erlewine* and *Thompson*, upon recommendation by the juries, were sentenced to life imprisonment. However, the crimes and the defendants in those cases are readily distinguishable from this case.

In *Erlewine*, the defendant, acting with an accomplice, planned to go to the victims' home for the purpose of robbing them of money and cocaine. After injecting themselves with cocaine, the defendant and his accomplice armed themselves with shotguns. The men then entered the victims' home, under the pretense of paying a debt, and demanded to be given the money and cocaine. The victims were then ordered into a bedroom where they were shot in the head and face. One victim died, the other was seriously maimed. Money and cocaine were stolen from the victims.

In *Thompson*, the seventeen-year-old defendant was convicted of two counts of first degree murder. The defendant and his accomplice were engaged in the fantasy game "Dungeons and Dragons" when they entered the home of the elderly couple that were their victims. Both victims died of multiple stab wounds. The defendant and his accomplice then stole numerous items of the victims' personal property.

The crimes in *Erlewine* and *Thompson* are dissimilar from the crime in the case under review in several respects. In the instant case, the defendant's primary motivation was the perpetration of unnatural and violent sexual acts with the victim. The defendant, acting alone, methodically sought out Appalachian State University female students as they exercised on the streets of Boone. The defendant kidnapped the victim with the intent to sexually assault and murder her. The crimes the defendant committed

against the victim occurred over a period of several hours. During this time, the victim undoubtedly experienced extreme psychological and physical torture.

On the other hand, the defendants' primary motive in *Erlewine* and *Thompson*, was robbery. In addition, the crimes in those cases were committed in a relatively short period of time. Although the victims in those cases suffered physically and psychologically, their suffering was not as protracted as Ms. Gray's. We also find it significant that the defendants in *Erlewine* and *Thompson* acted in concert with another person.

In addition to the different circumstances of the crimes in *Erlewine* and *Thompson*, the defendants in those cases were different from the defendant in this case. In *Erlewine*, the jury found in mitigation that the defendant acted under duress or the domination of another person. In *Thompson*, the defendant was a minor and the jury found his age, seventeen, at the time of the crime, as a mitigating circumstance. Thus, we find *Erlewine* and *Thompson* to be far more dissimilar to the defendant and crime in this case than they are similar.

For the foregoing reasons, we find that the defendant in this case more closely resembles the defendants in the sex-related murders where the defendants were sentenced to death than he does those defendants who were sentenced to life imprisonment. Likewise, the defendant's crime was one of cold calculation wherein he repeatedly sought to abduct, sexually assault, and then murder female Appalachian State University students. Such a repeated pattern of conduct was absent in those cases where the defendants were sentenced to life imprisonment.

Based on our review, comparing this case to similar cases, we are convinced that the defendant's sentence of death is not disproportionate and not the result of the actions of an aberrant jury. We therefore decline to set it aside.

NO ERROR.

Justices Whichard and Parker did not participate in the consideration or decision of this case.

Justice FRYE dissenting.

The majority holds, quite correctly I believe, that it was error for the trial court to refuse to allow the neuropsychologist, Dr. Sciara, to attempt to resolve any of the apparent conflicts between his and Dr. Lindley's testimony. I do not agree, however, with the majority's conclusion that the error was not prejudicial. Assuming that the majority is correct that the test for prejudice for this error is whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at this capital sentencing proceeding, I conclude that defendant has met his burden of showing that such a possibility exists. N.C.G.S. § 15A-1443(a) (1988). Finding the error prejudicial, I vote for a new capital sentencing proceeding.

I note first that defendant pled guilty to murder in the first degree, thus admitting that he unlawfully killed the victim with malice, premeditation and deliberation. The purpose of the sentencing proceeding was to have the jury recommend to the court whether defendant should be sentenced to death or to life imprisonment for this crime. In making this binding recommendation, at least some of the jurors may have found it significant whether the abrupt changes in defendant's behavior were attributable to his recent brain injury and subsequent operation, or whether defendant was simply a "mean young man." The testimony of Dr. Sciara would support the former conclusion while the testimony of Dr. Lindley would suggest the latter. Yet, when Dr. Sciara tried to explain Dr. Lindley's testimony "because I think its important," the trial judge interrupted by telling Dr. Sciara that "the jury has heard his testimony too, its for them to decide what his testimony is, not for you to explain it to them, what somebody else's testimony was, Doctor." I conclude that this was error prejudicial to defendant for the following reasons, among others.

First, the neurosurgeon made it clear that a neuropsychologist would be better qualified than he to determine the extent of personality and behavior changes caused by brain damage. As a neuropsychologist, Dr. Sciara attempted to explain the apparent inconsistencies between his testimony and that of the neurosurgeon. Preventing him from doing so was prejudicial to defendant. Dr. Sciara's testimony in this regard could have been helpful to the jury in weighing the mitigating circumstances against the ag-

gravating circumstances in order to determine if the aggravating circumstances called for imposition of the death penalty.

During the jury argument, the prosecutor took advantage of the apparent inconsistencies in the evidence by arguing that defendant's expert witnesses had contradicted one another. The prosecutor argued at length about the contradictions between the testimony of the two experts—placing emphasis on the qualifications of Dr. Lindley as "Chief Resident of Neurosurgery at Baptist Hospital" while emphasizing that Dr. Sciara "was not a medical doctor, he was a psychologist." Likewise, the prosecutor told the jury that the neurosurgeon had testified that the chance that the brain damage might have caused some personality change "was pure hypothesis" while the psychologist "came in and said I know for a fact that this brain damage has caused this change." The prosecutor continued: "Here is a psychologist, who is totally, totally contradicting what the Chief Resident of Neurosurgery at Baptist Hospital says."

The majority concludes that the prosecutor's argument was supported by the evidence. If so, that is an additional argument for concluding that the error in not permitting the neuropsychologist to attempt to explain the apparent contradictions between his testimony and that of the neurosurgeon was prejudicial to defendant. Apparently the jury was troubled by the differences in the testimony of the two experts. The jury requested a copy of the testimony of the neurosurgeon and the neuropsychologist. The trial judge denied the request, telling the jurors, *inter alia*, that it was their "duty to use [their] own recollection and recall the evidence as [they had] heard it from the witness stand." However, because of the judge's interruption of the witness' response on cross-examination, the jury had been prevented from hearing all of the evidence that should have been given from the witness stand. Thus, the judge's rulings related to this issue permitted the prosecutors' contentions to prevail: 1) that the neurosurgeon's testimony was true, and 2) the conflicting testimony of the neuropsychologist should be ignored.

I conclude that there is a reasonable possibility that had this error not occurred, a different result would have been reached at the sentencing proceeding. N.C.G.S. § 15A-1443(a). Had the neuropsychologist been permitted to fully explain the apparent contradictions between his testimony and that of the neurosurgeon, the

jury may have concluded that the terrible crimes committed by defendant were at least partially attributable to his recent brain damage and brain operation and that his punishment should be life imprisonment rather than death.

Finally, Dr. Sciara's testimony was consistent with that of numerous lay witnesses who testified that defendant's behavior underwent extreme changes following the brain operation. Had the court not interrupted Dr. Sciara's explanation, his testimony would have lent credence to the lay witnesses' testimony that defendant changed from being a polite, nonviolent, considerate, and clean young man, before the operation, to one who was unclean, lethargic, unreliable, perverse and demanding after the operation.

Because I find prejudicial error in the sentencing proceeding entitling defendant to a new capital sentencing proceeding, I find it unnecessary to reach the issue of whether the sentence of death in this case is disproportionate, considering both the crime and defendant, when compared to the pool of similar cases.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHN HARDY ROSE

No. 182A92

(Filed 28 January 1994)

1. Evidence and Witnesses § 217 (NCI4th) — first-degree murder — disposal of body — relevant to premeditation and deliberation — admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence that defendant had burned the victim's body a day after killing her. Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence; defendant's handling of the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation.

Am Jur 2d, Evidence §§ 273 et seq.

2. Evidence and Witnesses § 1694 (NCI4th)— first-degree murder—photographs of victim's body—admissible

The trial court did not err in a first-degree murder prosecution by admitting enlarged color autopsy photographs of the victim's charred body showing indications of stabbing and strangulation. Although some of the photographs were gruesome, they were relevant to illustrate the testimony of the pathologist and were indeed illustrative of testimony regarding the number and nature of the victim's wounds. They were also admissible on the issue of premeditation and deliberation and were not excessive or duplicative. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Homicide §§ 417 et seq.

Admissibility in evidence of enlarged photographs or photostatic copies. 72 ALR2d 308.

3. Homicide § 496 (NCI4th)— first-degree murder—instructions—disposal of body—premeditation and deliberation

The trial court did not err in a first-degree murder prosecution in instructing the jury that defendant's conduct after the killing could be considered on the question of premeditation and deliberation.

Am Jur 2d, Homicide § 500.

4. Evidence and Witnesses § 3127 (NCI4th)— first-degree murder—hearsay—corroborating testimony—not prejudicial

There was no prejudice in a first-degree murder prosecution from the admission of testimony that more than fifty people had been interviewed who knew nothing of a relationship between defendant and the victim where the hearsay statements of the fifty people were inadmissible extrajudicial declarations which should not have been used to corroborate the testimony of the victim's best friend that she had never seen the victim socializing with defendant, but there was no prejudice because the testimony supported defendant's theory and his own testimony that he and the victim were engaged in a secret relationship.

Am Jur 2d, Witnesses §§ 632 et seq.

5. Evidence and Witnesses § 740 (NCI4th)— first-degree murder—Bibles found in victim's apartment—admission not prejudicial

There was no prejudicial error in a first-degree murder prosecution from the admission of two Bibles found in the victim's apartment where the fact that the victim kept two Bibles in her apartment was not probative of any issue, but defendant failed to show that the admission of the Bibles was prejudicial. Evidence of the presence of the Bibles in the victim's apartment was introduced through photographs of the apartment to which defendant did not object and defendant himself points out that after the Bibles were admitted they were only mentioned once again during the trial when the victim's sister testified that she had seen the Bibles in the victim's apartment. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Appeal and Error §§ 797-801, 803.

6. Evidence and Witnesses § 1486 (NCI4th)— first-degree murder—knives—admissible

The trial court did not err in a first-degree murder prosecution by admitting into evidence knives taken from defendant's residence where no murder weapon was discovered in the course of the investigation, the evidence did not produce a clearly identified murder weapon, a pathologist testified to the numerous knife wounds the victim had sustained, and defendant introduced another knife which he presented as the murder weapon. The presence of knives in defendant's apartment was relevant to his possession of the murder weapon before and after the killing and as part of the circumstantial evidence to be considered by the jury in evaluating defendant's statements to law enforcement officers. The probative value of the knives was not outweighed by the danger of confusing or misleading the jury or unfair prejudice. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Homicide § 414.

7. Evidence and Witnesses § 2929 (NCI4th)— murder—confession containing exculpatory statements—introduced by State—not bound by exculpatory statements

The trial court did not err in a murder prosecution by denying defendant's motion for a directed verdict based on exculpatory portions of defendant's statements where the State

introduced defendant's statements, but also introduced evidence tending to contradict and rebut the exculpatory portions of those statements.

Am Jur 2d, Witnesses § 625.

8. **Homicide § 253 (NCI4th)— murder—strangulation—premeditation and deliberation—evidence sufficient**

There was substantial evidence of premeditation and deliberation in a first-degree murder prosecution and thus the trial court did not err by refusing to grant defendant's motion for a directed verdict where defendant contended that evidence of manual strangulation and blows to the victim's body were not sufficient. The evidence showed that, in addition to being strangled, the victim suffered a potentially fatal stab wound to the head which was inflicted with such force as to fracture the skull; there were several other lacerations on the victim's body; and defendant's conduct in handling the body after the murder, including burning and burying it, was also circumstantial evidence from which a jury could infer that this murder was premeditated and deliberate.

Am Jur 2d, Homicide §§ 437 et seq.

9. **Homicide § 571 (NCI4th)— first-degree murder—request for instruction on involuntary manslaughter—denied—no error**

The trial court did not err in a first-degree murder prosecution by failing to instruct on the lesser included offense of involuntary manslaughter where there was no evidence to support a verdict of involuntary manslaughter. The physical evidence is inconsistent with an accidental stabbing and, contrary to defendant's assertions, he did not testify to what he now describes as an "unstable and volatile relationship."

Am Jur 2d, Homicide §§ 525 et seq.

10. **Homicide § 493 (NCI4th)— first-degree murder—instructions—deliberation—inferred from lack of provocation—no error**

There was no plain error in a first-degree murder prosecution from the trial court's instruction that the jury could infer deliberation from lack of provocation where there was evidence from which the jury could reasonably have concluded that

the victim did nothing to provoke defendant and that defendant killed her with premeditation and deliberation.

Am Jur 2d, Homicide § 500.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

11. Homicide § 475 (NCI4th)— first-degree murder—instructions—malice—no error

The trial court did not err in a first-degree murder prosecution by giving the pattern jury instruction on malice where defendant contended that the instruction permitted the jury to find the element of malice based on a theory not supported by the evidence and created the possibility that the jury considered defendant's burning of the victim's body as evidence of depravity of mind. The evidence of numerous stab wounds, including a fatal wound to the head, in conjunction with strangulation supports the instruction, and the trial court specifically instructed the jury to consider defendant's actions before and after the murder with regard to premeditation and deliberation, but gave no such instruction on malice.

Am Jur 2d, Homicide § 500.

12. Homicide § 707 (NCI4th)— first-degree murder—instructions—voluntary manslaughter—no plain error

There was no plain error in a first-degree murder prosecution where the trial court instructed the jury that it could return a verdict of guilty of voluntary manslaughter based on a defense of imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. The Supreme Court declined to reconsider its decision in *State v. McAvoy*, 331 N.C. 583, and there was no plain error in any event because the jury rejected both voluntary manslaughter and second-degree murder in finding defendant guilty of murder in the first degree.

Am Jur 2d, Homicide §§ 529 et seq.

13. Criminal Law § 500 (NCI4th)— first-degree murder—jury—ten minute deliberation—no error

The trial court did not err in a first-degree murder prosecution by denying defendant's motions for new trial, that a new jury be impaneled or that a *voir dire* be conducted

of the jury where the jury returned a guilty verdict in ten minutes. The Supreme Court has previously held that the brevity of a jury's deliberation does not entitle a criminal defendant to a new trial on the grounds of juror misconduct and defendant has demonstrated no conduct on the part of the jury that would warrant questioning the brevity of the deliberations in this case. It is intended under N.C.G.S. § 15A-2000 that the same jury should hear both phases of the trial unless the original jury is unable to reconvene and it would not have been proper to conduct a *voir dire* to determine the jury's ability to ignore autopsy photographs during sentencing because the autopsy photographs were properly admitted into evidence during the guilt-innocence phase of the trial and were competent for the jury's consideration during the sentencing phase.

Am Jur 2d, Trial §§ 1025 et seq.

14. Jury § 217 (NCI4th)— first-degree murder—jury selection—opposition to death penalty—challenges for cause—no error

A defendant's constitutional rights were not violated in a first-degree murder prosecution where jurors opposed to the death penalty were challenged for cause.

Am Jur 2d, Jury § 290.

15. Evidence and Witnesses § 1218 (NCI4th)— first-degree murder—defendant's statements—admissible

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his statements to officers where the evidence shows that the defendant agreed to talk with law enforcement officers, including going to the Sheriff's Department on several occasions and agreeing to go to Asheville for a polygraph examination; defendant was repeatedly told he was not under arrest and was free to leave at any time; defendant was not handcuffed, nor was his freedom restrained; defendant indicated that he wanted to leave on several occasions and was allowed to leave or was taken home by law enforcement officers; defendant testified that the officers had left his apartment on one occasion when he had asked; and defendant also acknowledged that from prior experience he knew what his rights were and that he had knowingly waived them. *Miranda* warnings were not required, the trial court's findings support the conclusion that

there were "no promises of reward or inducements" nor "threat or suggested threat of violence to persuade or induce the defendant to make the statement," and there is also substantial evidence to support the finding that defendant's mother voluntarily came to Graham County and that she was not acting as an agent of the State.

Am Jur 2d, Evidence §§ 543 et seq.

16. Criminal Law § 1068 (NCI4th)— first-degree murder—capital sentencing hearing—prior crime—hearsay testimony of victim—admissible

The trial court did not err in a sentencing hearing for first-degree murder by admitting hearsay statements of the victim of an attempted rape in Mississippi where defendant admitted that he was convicted of attempted rape in Mississippi but denied that he committed the offense; defendant related parts of the testimony of the prosecuting witness at his trial in Mississippi in response to questions by his attorney; and the parts of the testimony that defendant chose to testify about were clearly selected to create the inference that defendant was not the assailant in that crime. Defendant having presented an incomplete statement of the witness' testimony, including only those portions favorable to himself, the prosecution was properly allowed to cross-examine defendant on the omitted portions of the witness' testimony. Furthermore, the questions offered appeared to be asked in good faith.

Am Jur 2d, Criminal Law § 598.

17. Criminal Law §§ 1337, 1068 (NCI4th)— first-degree murder—aggravating circumstances—previous conviction of felony involving violence—evidence sufficient

There was sufficient evidence in a first-degree murder sentencing hearing to submit the aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence where defendant admitted that he had been convicted of attempted rape in Mississippi; admitted that the prosecuting witness in Mississippi had testified that defendant grabbed her around the shoulders; and admitted on cross-examination that the prosecuting witness had testified that defendant threatened to cut her throat at the time of the attempted rape. Moreover, the certified court records

from Mississippi were sufficient because attempted rape in Mississippi is a crime involving the use or threat of violence since a conviction for attempted rape requires a direct act towards forcible ravishment. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598 et seq.

18. Criminal Law § 1337 (NCI4th)— first-degree murder—aggravating circumstances—prior conviction involving violence—attempted rape in Mississippi—peremptory instruction

The trial court did not err in a first-degree murder sentencing hearing by giving a peremptory instruction that a conviction of attempted rape would constitute a conviction involving the use or threat of violence within the meaning of N.C.G.S. § 15A-2000(e)(3) where defendant had been convicted of attempted rape in Mississippi.

Am Jur 2d, Criminal Law §§ 598 et seq.

19. Criminal Law § 1337 (NCI4th)— first-degree murder—aggravating circumstances—prior conviction involving violence—attempted rape during this murder—no plain error

There was no plain error in a first-degree murder sentencing hearing where defendant contended that the trial court's instructions erroneously allowed the jury to consider a possible attempted rape of Patricia Stewart, the murder victim in the instant case, as an aggravating circumstance. Defendant based his arguments on the emphasis the prosecutor placed during closing argument on the State's theory that Stewart and defendant had no prior relationship and that defendant killed Stewart during a rape attempt, but that argument was made at the close of the guilt-innocence phase of the trial, the prosecutor made it very clear in the sentencing phase closing argument that submission of this aggravating circumstance was based on defendant's Mississippi conviction for attempted rape, and the trial court instructed the jury that in order to find this aggravating circumstance it had to find that defendant had been *convicted* of attempted rape and that such conviction had to be "based on conduct which occurred before the events out of which this murder arose." N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598 et seq.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-Gregg cases. 65 ALR4th 838.

20. Criminal Law § 1345 (NCI4th)— first-degree murder—aggravating circumstances—especially heinous, atrocious or cruel—evidence sufficient

The evidence was sufficient in a first-degree murder prosecution to submit the aggravating circumstance that the killing was especially heinous, atrocious, or cruel where the evidence, taken in the light most favorable to the State, tended to show an extremely brutal attack consisting of multiple stab wounds to the body as well as manual strangulation, either of which could have caused death; defendant somehow gained access to the victim's apartment very late at night after the victim's girlfriend had left and the victim was alone; using the knife he had brought with him, defendant inflicted stab wounds on the victim's right eyebrow and her knee and slit her abdomen for five inches; using the knife or some other blunt instrument, defendant inflicted another wound below the left breast causing puckering of the skin and discoloration; defendant stabbed the victim in the head with such force that he fractured the front side of the skull, caused hemorrhaging to the brain beneath the stab wound, and chipping of a bone at the base of the skull; the pathologist's testimony indicated that the victim would have remained conscious while defendant inflicted the lesser knife wounds on her body, and could have remained so after the blow to the head; and, finally, defendant strangled the victim, taking between four and five minutes to choke her to death. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598 et seq.

21. Criminal Law § 1343 (NCI4th)— first-degree murder—aggravating circumstances—especially, heinous, atrocious, or cruel—instruction not unconstitutionally vague

The instruction on the aggravating circumstance that a killing was especially heinous, atrocious, or cruel was not unconstitutionally vague under the Eighth Amendment.

Am Jur 2d, Criminal Law §§ 598 et seq.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

22. Criminal Law § 874 (NCI4th)— first-degree murder—sentencing—reinstruction—no plain error

There was no plain error in a first-degree murder sentencing hearing where the jury requested further instruction by submitting to the court the question, "Could we have in writing the wording of mitigating circumstance and/or value or weight?"; the court repeated its instructions on Issue Two which placed the burden on the defendant to prove by a preponderance of the evidence the existence of mitigating circumstances; and defendant argued that the court should have also repeated the instructions on Issue Three regarding the State's burden to prove aggravating circumstances and the weighing of aggravating and mitigating circumstances. The jury resumed its deliberations and made no further request for reinstruction. It seems clear that they understood the trial court's reinstruction and gave it proper application since they found all nine of the submitted nonstatutory mitigating circumstances, although they declined to find any of the three submitted statutory mitigating circumstances.

Am Jur 2d, Trial § 922.

23. Criminal Law § 1351 (NCI4th)— first-degree murder—mitigating circumstances—burden of proof—pattern jury instructions—constitutional

The pattern jury instruction regarding the burden of proof for finding mitigating circumstances in a capital sentencing proceeding is not unconstitutional.

Am Jur 2d, Criminal Law §§ 598 et seq.

24. Criminal Law § 1327 (NCI4th)— first-degree murder—sentencing—instructions—duty to return death penalty—not unconstitutional

The pattern jury instruction imposing upon the jury a duty to return a recommendation of death if it finds the mitigating circumstances insufficient to outweigh the aggravating circumstances and that the aggravating circumstances

are sufficiently substantial to call for the death penalty is constitutional.

Am Jur 2d, Trial §§ 888 et seq.

25. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—instructions—consideration of evidence from guilt phase

The trial court did not err in a sentencing proceeding for a first-degree murder by instructing the jury that it could consider all of the evidence received during the guilt phase on the sentencing issues, then subsequently instructing the jury that evidence of burning of the body after the murder should not be considered as an especially heinous, atrocious or cruel factor. The instructions are not contradictory when taken as a whole.

Am Jur 2d, Trial §§ 888 et seq.

26. Criminal Law § 1373 (NCI4th)— first-degree murder—death sentence—not disproportionate

A sentence of death for first-degree murder was upheld where the evidence supports the jury's finding of each aggravating circumstance, 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 the sentence was not disproportionate.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Allen (C. Walter), J., at the 4 May 1992 Criminal Session of Superior Court, Haywood County. Heard in the Supreme Court 15 September 1993.

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

Michael W. Patrick for defendant-appellant.

FRYE, Justice.

On 4 February 1991 a Graham County grand jury indicted defendant for the murder of Patricia Stewart. Prior to trial, venue was changed to Haywood County. In a capital trial, the jury re-

turned a verdict of guilty of first-degree murder. After a sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of death. Defendant gave oral notice of appeal on 12 May 1992. An order staying execution was entered by this Court on 15 May 1992.

Defendant brings forward numerous assignments of error. After a careful review of 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. On 6 January 1991, the Graham County Sheriff's Department received a missing person's report regarding the victim, Patricia Stewart. Stewart had last been seen just after 2:00 a.m. on 3 January 1991 by a friend who had been with Stewart at her apartment. A co-worker with whom the victim rode to and from work had dropped the victim off at her apartment after work at approximately 11:30 p.m. on 2 January 1991. The victim failed to appear when she was to be picked up on the afternoon of 3 January 1991.

Deputy Sheriff Jerry Crisp conducted a visual inspection of Stewart's apartment on 6 January 1991 and found everything neat and clean except that the bed linen was missing from the bed. He then conducted interviews with other tenants in the apartment building, including defendant who lived with his sister and her boyfriend in the apartment above the victim. Defendant told Crisp that he knew the victim, but only in passing. Defendant also said that he had been at home all night on 2 January 1991, and had heard no disturbance in the apartment below. Crisp then prepared a missing person's report.

On 10 January 1991, SBI agents searched Stewart's apartment and observed small drops of blood on the venetian blinds behind the bed in the bedroom, on the headboard, on the bed itself, on the carpet and on some of the walls in the bedroom area. Blood was also found on a brass hatrack in the doorway leading from the living room to the dining room and on the door frame. Samples and scrapings were taken of the blood. SBI agents also discovered a broken fingernail on the apartment porch and a small piece of fingernail by the bedroom door.

SBI Agent Kevin West testified that he interviewed defendant on 10 January 1991 and defendant stated that he did not know Patricia Stewart at all, but then changed his statement and said that he had met her at a party. Defendant stated he only knew Stewart in passing and did not know anything about her disappearance, other than rumors he had heard in the community.

On 12 January 1991 defendant agreed to be interviewed at the Sheriff's Department. Defendant told Deputy Crisp he had been seeing Stewart discreetly and having sexual relations with her and had been in her apartment a few times. He stated he first became involved with Stewart about a month earlier and had last seen her on Tuesday, 1 January 1991. At that time they were in Stewart's apartment together for two hours, where they had sex and drank some wine. Defendant stated that he stayed in his apartment on 2 and 3 January, and that his sister and her boyfriend did not know about defendant's involvement with Stewart. Crisp testified that he interviewed over fifty people and no one was aware of any relationship between defendant and Stewart.

SBI Agent Tom Frye testified to several subsequent interviews with defendant. On 13 January, defendant stated that he had moved to the area approximately two months prior to the interview, and had moved in with his sister and her boyfriend. Defendant stated he met Stewart at a party and she later asked him to come by sometime and see her. He had sex with Stewart three or four times. Defendant stated that the last time he saw Stewart was on the 2nd of January and that Stewart's girlfriend had come to visit her. After the girlfriend left, defendant went into the apartment and had sex with Stewart. He then returned home and did not go anywhere else that night.

On 13 January, SBI Agent Charles Moody conducted a consent search of the apartment where defendant lived. Four knives were seized from defendant's apartment. Agent Mark Nelson performed a consent search of an automobile owned by defendant, a blue Pontiac, and one owned by his sister, a yellow Ford, both of which contained items which tested positive for blood. Nelson discovered a pair of numchucks in defendant's car which tested positive for blood. A tire tool, jumper cables and a thermos from the trunk of defendant's sister's car tested positive as well. Bloodstains were also found in the trunk of that car and a black sleeveless jacket in the back seat revealed the presence of blood. Bloodstains from

the thermos and from the Ford trunk were consistent with the victim's blood type and inconsistent with the blood type of defendant.

On 14 January, SBI Agent Frye discussed with defendant the results of the searches of defendant's apartment and the two automobiles. Defendant stated that he did not want to talk about Stewart's disappearance because the situation surrounding it was too bad to talk about, and he was concerned about what his family would think of him. Defendant did tell officers that "the disposition of Patricia Stewart was so bad" that they would not be able to find any of the remains. Defendant also later stated that he went to Stewart's apartment late on 2 January after drinking liquor. He stated he used his sister and her boyfriend's automobile without their knowledge.

On 15 January 1991, officers searched defendant's grandmother's farm and found what appeared to be a grave near the bottom of a hill. After removing a stone, Agent Moody observed what appeared to be human skin underneath the stone. A photograph was taken and the human remains were exhumed. Tests performed on soil samples taken from the grave site revealed that the soil contained residual gasoline. Officers returned to the farm on 16 January to continue their search. A hoe was found beside the residence steps and a pair of women's panties and several items of bed linen were found in a creek on the property. Investigators also located a small pink bag, commonly called a "fanny pack," filled with various items, including a lipstick tube, a pair of black gloves, an address book and a calendar. The fanny pack also contained a savings account book bearing the name of Patricia L. Stewart, a small brown compact, a make-up brush, a small jewel case, some chewing gum, a set of keys, a folding blade knife and a billfold. Agent Moody testified that the officers found a piece of fabric about two feet away from the grave site and two plastic wire ties which were beneath the fanny pack.

On 15 January, agents also spoke again with defendant, this time in the presence of his mother. His mother told defendant that if he was involved with Stewart's disappearance or had any knowledge about it, he needed to tell about it. Defendant informed the agents that Stewart's body was located at his grandmother's farm. Agent Frye radioed this information to officers searching for the victim's body, but was informed that the body had been found.

At this point defendant was arrested and given *Miranda* warnings for the first time. Defendant waived his rights and gave an additional statement in which he said he had a relationship with Stewart which Stewart kept secret. He stated that he was in Stewart's apartment after midnight on Wednesday, 2 January. He was there before Stewart's girlfriend arrived and Stewart asked him to leave and come back later which he did. Defendant stated that he had drunk a quart of whiskey and smoked a lot of pot before going to Stewart's apartment. He stated that he went to the apartment to tell Stewart that he was going back to his girlfriend in Alabama and Stewart told him he could not go. Stewart told him he was her secret lover and that she would have him arrested for rape if he tried to leave. Defendant said he had a knife, that he just went crazy and beat her and choked her. Defendant then wrapped the victim's body in the bed linen and put it in the trunk of his Pontiac, but the car would not start. Defendant stated that after he put Stewart's body in the trunk of his car, he went back inside and tried to clean up. He stated that he took the knife he killed Stewart with back to his apartment, cleaned it and placed it in a box in his bedroom. He left the body in his car through the next day and in the evening borrowed his sister's Ford automobile. He took a gas can and had it filled. He then transferred the body to the trunk of the Ford. He drove the Ford to his grandmother's farm, took the body behind the house, used his grandmother's hoe to dig a shallow grave, poured gasoline on the body, set it afire and walked away. When the fire went out, defendant returned and covered the body with rocks, leaves and tree branches.

Dr. Deborah Radisch, medical examiner, testified that the victim's body showed signs of decomposition and of charring where it had been burned, in some areas down to the muscle. Most of the hair was also burned off. There were several wounds on the victim's body including a half-inch laceration over the right eye. There was a five-inch shallow-incised wound above the waistline and a similar wound on the right knee. Below the left breast there was an area where the skin was puckered and there was a greenish discoloration over the skin of the chest. On the left side of the head, there was an area of defective scalp with a cut through the skull. The skull was fractured and showed areas of bone chipping on the outer surface. The brain below this area showed a small area of bleeding over the surface of the brain and the bone was chipped or fractured at the base of the skull. There was an

area of bleeding in the tissues over the front of the spine in the neck region and in the area behind the esophagus. The lining tissue of the upper airway in the area of the vocal chords showed a purple discoloration consistent with blood having collected there. The medical examiner testified that the cause of death was a combination of sharp and blunt injury to the head and strangulation. The medical examiner testified that in her opinion the injuries to the knee, right side of the body, laceration above the eye, left side of the head and puckered area were all inflicted prior to the victim's death. The burns were clearly inflicted after death and were the result of the body or clothing being set afire with some sort of accelerant.

Defendant testified during the guilt phase of the trial that he was at Stewart's apartment on the night of 2 January and that he told her he was going back to Alabama, to which Stewart responded that she would accuse him of rape if he left. Defendant testified that Stewart then reached over to a nightstand beside her bed and picked up a pocket knife that she always had lying there, open. She shook the knife and said, "You ain't going nowhere." Defendant testified that he jumped up, hit Stewart's arm, causing the knife to hit her in the head real hard, and immediately jumped on top of her. Defendant testified that he heard something pop, backed up and saw blood coming out of Stewart's head. Defendant testified that he did not remember choking Stewart that morning and that he did not intend to harm her and did not think anything like that would happen. Defendant testified that he was scared and it just popped in his mind what to do with Stewart's body. He carried Stewart's body out and put it in the trunk of his car with all of her bedclothing. Defendant testified that he returned to the apartment to try to clean up the blood on the floor. He also took the knife and put it in his pocket. The next night he borrowed his sister's car (because his was not running), bought gasoline, and after his sister went to sleep he transferred Stewart's body to her car. He then drove the body to his grandmother's farm where he used a hoe to scratch out a spot in the ground and placed the victim's body in the ground. He then removed her clothes, doused her with gasoline and threw a match on her. He sat down until the fire went out and then tried to cover the body with rocks and leaves. During cross-examination, defendant testified that he had been convicted of attempted rape in Mississippi.

Defendant also called a private investigator who testified that he was hired by defendant to search for a knife in a field where defendant said he had thrown it. The investigator stated he found the knife which defendant identified as the one he struck the victim with. The knife was introduced into evidence as one of defendant's exhibits.

On rebuttal, the State recalled Robin Anderson, the victim's sister who had lived with the victim for some time, who testified that she had never seen the knife in her life. Anderson testified that the only two knives that the victim owned were the knife she kept in the kitchen and the one used as a screwdriver. The knife defendant identified did not belong to the victim.

The jury returned a verdict of guilty of murder in the first degree. Following return of the guilty verdict a capital sentencing proceeding was held pursuant to N.C.G.S. § 15A-2000.

At sentencing, the State only introduced exhibits related to defendant's conviction in Mississippi for attempted rape. Defendant testified about his childhood and rearing. He described how in his early years he lived with his alcoholic father who was abusive to defendant's mother and siblings. At the age of twelve, defendant and his sister were left with a relative and told that they were going to be given away. Defendant also described his military service in the United States Marine Corps and the Army from which he received honorable discharges. He also testified that he married when he was eighteen years of age, had three children and later divorced. Defendant's mother and sisters also testified concerning defendant's upbringing. Sheriff's Department employees testified that defendant had been a good prisoner and defendant's employer testified that he was a good employee.

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

GUILT PHASE

[1] Defendant's first three assignments of error address his contention that the trial court erred by admitting evidence that he burned Patricia Stewart's body a day after killing her. Defendant first argues that his conduct in burning the body a day after the killing was not relevant to prove premeditation or deliberation. We disagree.

Premeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence. *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991). Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation is "the conduct and statements of the defendant before and after the killing." *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). Further, any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying. *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

Defendant acknowledges that conduct after a killing may be relevant to prove premeditation or deliberation. He argues however that in the present case his conduct after the killing was not relevant since the evidence suggests that he did not plan to burn the victim's body prior to death, as evidenced by the difficulty he encountered in disposing of the body. To the contrary, the evidence tends to show that the defendant knew that he would have to wait until he could borrow his sister's car to transport the victim's body to his grandmother's farm under the cover of darkness. Defendant's testimony was that he rolled his car around to the back of Stewart's apartment, but that the car would not actually start or run. He placed the body, together with the bedclothes and the victim's personal items, in the trunk of his car. Defendant testified that he then went back into the apartment, took a towel from the victim's bathroom and tried to clean up the blood. He locked the victim's apartment, moved the car back around to his side of the building and returned to his own apartment where he washed his bloody clothes. Defendant testified that he borrowed his sister's car the next afternoon, purchased gasoline in preparation for the fire, and waited until his sister and her boyfriend were asleep before he transferred the body from his car to his sister's car. He then went directly to the deserted farm, dug the grave, inserted the body, poured gasoline onto it, and lit the fire. After the fire went out, he covered the body with brush and rocks and left.

As is often the case, there is no direct evidence here that defendant premeditated and deliberated this murder. In particular, there was no evidence of an overt act by the defendant prior to the killing in preparation for burning and disposing of the body.

There was, however, evidence of an elaborate process of removing the body, bloody bedclothes and personal items from the scene of the killing; cleaning the victim's apartment; hiding the body and other items in one car, transferring them to another car, and when opportunity permitted, transporting them to a remote location and burning and burying the body there. Defendant's handling of the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation.

[2] Secondly, defendant argues that the trial court erred in admitting certain enlarged color autopsy photographs of the victim's body. The photographs were of the victim's head, face, and torso showing indications of stabbing, strangulation, and the body's charred condition resulting from its having been burned. Defendant contends that these photographs were gruesome, not relevant on the issue of premeditation and deliberation, and were introduced to inflame the jury. The State argues that the photographs were admissible as illustrative of the pathologist's testimony with regard to the condition of the victim's body and the wounds it had sustained, and were admissible as evidence of defendant's conduct after the murder with regard to the issue of premeditation and deliberation. We agree with the State.

This Court has stated that "[p]hotographs of homicide victims are admissible at trial even if they are 'gory, gruesome, horrible, or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury.' " *State v. Thompson*, 328 N.C. 477, 491, 402 S.E.2d 386, 394 (1991) (quoting *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988)). "Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Admissibile evidence may, however, be excluded under Rule 403 of the North Carolina Rules of Evidence, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,

> or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1992).

> In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988); *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430. Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579.

Hennis, 323 N.C. at 285, 372 S.E.2d at 527.

In this case, seven color autopsy photographs were introduced into evidence. Although some of the photographs were gruesome, they were relevant to illustrate the testimony of the pathologist and were indeed illustrative of testimony regarding the number and nature of the victim's wounds. These photographs were therefore admissible. As we have concluded that defendant's handling of the victim's body after the killing was relevant to premeditation and deliberation, the photographs were also admissible on the issue of premeditation and deliberation. The trial court considered a total of nine photographs and, pursuant to Rule 403, sustained defendant's objection to two of them and admitted the other seven. These seven photographs showed the wounds that were actually inflicted upon the victim by defendant. Although the pathologist also illustrated her testimony with two line drawings showing the location of the wounds, the photographs illustrated the nature of each wound. Under the circumstances, these photographs were not excessive or duplicative. While their gruesome nature may have affected the jury, we do not believe that their effect was more prejudicial than probative. We conclude that the trial court did not abuse its discretion in refusing to exclude these photographs.

[3] Defendant further argues that the court erred in instructing the jury that his conduct after the killing could be considered on the question of premeditation and deliberation. As noted above, a defendant's conduct before and after the killing may be relevant to show premeditation and deliberation and was indeed relevant

in this case. Therefore, the trial court did not err in instructing the jury accordingly.

[4] In defendant's next assignment of error, he contends that the trial court erred in admitting testimony that more than fifty people had been interviewed who knew nothing of his relationship with the victim. Defendant argues that this testimony was inadmissible hearsay. In response to defendant's contention that the killing of Patricia Stewart occurred during the course of a lovers' quarrel, the State questioned Deputy Sheriff Crisp about his investigation into the romantic relationship between Stewart and defendant. Crisp's testimony included the following:

> Q: During the course of your investigation, have you ever, during that investigation, turned up any person who said that they knew of any personal relationship between the defendant and Patricia Stewart?
>
> MR. COWARD: Objection.
>
> THE COURT: Overruled.
>
> Crisp: No sir, we specifically looked for that.
>
> Q: How many people in the Robbinsville area approximately were interviewed and questioned as part of this investigation?
>
> Crisp: I myself, interviewed in excess of 50 people, and nobody ever had any knowledge or any mention of them having any type of relationship. Patricia also had a lot of writings in her apartment.

The State agrees with defendant that this testimony was hearsay but argues that the testimony was corroborative in nature and therefore admissible for that purpose.

Angie Colvin, the victim's best friend, testified that she had never seen defendant before in her life, and that she had never seen the victim socializing with defendant. The State contends that Deputy Crisp's testimony regarding the statements of fifty other people corroborated Colvin's testimony.

Otherwise inadmissible hearsay statements may be admitted for corroborative purposes. *State v. Locklear*, 320 N.C. 754, 761-62, 360 S.E.2d 682, 686 (1987). However, it is not permissible to corroborate a witness' testimony with "extrajudicial declarations of someone other than the witness purportedly being corroborated."

State v. Hunt, 324 N.C. 343, 352, 378 S.E.2d 754, 759 (1989) (citing 1 *Brandis on North Carolina Evidence* § 52, at 243 (3d ed. 1988)). *See also State v. Sherrill*, 99 N.C. App. 540, 543-44, 393 S.E.2d 352, 354, *disc. rev. denied*, 327 N.C. 641, 399 S.E.2d 130 (1990). In this case the hearsay statements of the fifty people were extrajudicial declarations of persons other than Colvin and could not have been used to corroborate her testimony.

Although this testimony was thus not admissible for corroborative purposes, defendant has failed to show how its admission prejudiced him. In fact, Deputy Crisp's testimony that fifty or more people were questioned and none had knowledge of a relationship between defendant and the victim supported defendant's theory and his own testimony that he and the victim were engaged in a secret relationship. Thus, there is no 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). This assignment of error is rejected.

[5] In another assignment of error, defendant contends the trial court erred by admitting into evidence Bibles found in the victim's apartment because this was impermissible character evidence. Defendant argues that the Bibles, which were removed from the victim's apartment by investigators, were not relevant to any issue in the case. According to defendant, the Bibles were introduced to support the implication that "the victim was a God-fearing Christian who would not have engaged in an illicit romantic relationship with [defendant]." Defendant contends that this amounted to inadmissible character evidence of the victim.

Under Rule 401 of the North Carolina Rules of Evidence, " '[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). The fact that the victim kept two Bibles in her apartment was not probative on any issue in this case. Indeed, the only apparent connection of the Bibles to the case was their presence in the apartment along with all of the other furnishings on the night of the murder. Defendant has failed to show, however, that the admission of the Bibles into evidence was prejudicial. In fact, evidence of the presence of the Bibles in the victim's apartment was introduced through photographs of the apartment, including one that clearly depicted

the Bibles on a bookshelf. Defendant did not object to the introduction of these photographs. Furthermore, defendant himself points out that after the Bibles were admitted they were only mentioned once again during the trial when the victim's sister testified that she had seen the Bibles in the victim's apartment. Thus, we conclude that the admission of the Bibles into evidence did not constitute error prejudicial to defendant. N.C.G.S. § 15A-1443(a) (1988).

[6] In another assignment of error, defendant contends the trial court erred in admitting into evidence knives taken from his residence because they were not relevant to any issue in the case. Defendant further contends that to the extent the knives had any relevance, they should have been excluded under Rule 403. During one of his statements to law enforcement officers, defendant stated that the knife he used to kill Stewart was in his pocket when he first went to her apartment and that, after the killing, he took the knife back to his apartment, cleaned it and placed it in a box in his bedroom. During a subsequent consent search of defendant's apartment, SBI agents discovered four knives. These knives, as well as a photograph of the knives, were admitted into evidence. Defendant objected to the admission of the knives, but did not object to the admission of the photograph. SBI Agent Nelson testified that he tested the knives for blood and that no blood was present on the knives. Defendant testified later in the trial that two of the knives belonged to him but that they had not been used to kill Stewart.

During the course of the investigation into this killing, no murder weapon was discovered. At trial, the State presented such evidence as it had gleaned from the investigation. This consisted, in part, of the pathologist's testimony to the numerous knife wounds the victim had sustained. It also consisted of defendant's statements to law enforcement officers, in one of which defendant indicated that he had taken the knife used to kill Stewart back to his apartment, cleaned it, and put it away in a box. The presence of knives in defendant's apartment was relevant to his possession of the murder weapon before and after the killing and as part of the circumstantial evidence to be considered by the jury in evaluating defendant's statements to law enforcement officers. The knives were therefore relevant and admissible under Rules 401 and 402.

Defendant contends that the knives should nevertheless have been excluded under Rule 403 because their probative value was

"outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." We disagree. The knives were one of a number of pieces of evidence introduced regarding the weapon used in this homicide. This evidence included a photograph of these same knives, testimony that some of the victim's wounds "would [have been] caused by a sharp cutting instrument," defendant's conflicting statements regarding how he acquired and disposed of the murder weapon, and a fifth knife introduced by defendant which he presented as the murder weapon. This evidence did not produce a clearly identified murder weapon. However, the danger of confusion or unfair prejudice from the admission of these particular knives was minimal considering the admission of a picture of these same knives and another knife produced by defendant. We conclude that the probative value of the knives was not outweighed by the danger of confusing or misleading the jury or unfair prejudice and therefore the trial court did not abuse its discretion under Rule 403 by not excluding the four knives from the evidence. *See State v. Thompson*, 332 N.C. 204, 222, 420 S.E.2d 395, 405 (1992).

[7] In another assignment of error, defendant contends that the trial court erred in denying his motion for a directed verdict because the evidence was insufficient to support a conviction of first degree murder. Defendant first argues that by introducing his confession, the State was bound by the exculpatory portions of the confession, establishing that the murder was committed without premeditation and deliberation. Through his confession, defendant stated that on the night of the killing he went to Stewart's apartment to tell her he was breaking off their relationship and returning to Alabama. He stated that Stewart responded by telling him that if he left she would accuse him of rape. Defendant further stated that, upon hearing this, he "went crazy" and "I just killed her; I beat her; I choked her." Defendant now argues that this confession established that he acted in a fit of passion, rather than with premeditation and deliberation.

This Court has stated that:

> [w]hen the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements. The introduction by the State of a confession of the defendant which includes such exculpatory statements,

> however, does not prevent the State from showing facts which contradict the exculpatory statements. The State is not bound by the exculpatory portions of a confession which it introduces if it introduces other evidence tending to contradict or rebut the exculpatory statements of the defendant contained in the confession.

State v. Williams, 308 N.C. 47, 66, 301 S.E.2d 335, 347, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983) (citations omitted). Defendant argues that the State introduced no evidence to dispute that part of his confession which indicated that he killed Stewart in a fit of passion after being provoked by her, and without premeditation and deliberation.

In the present case there is evidence tending to contradict the exculpatory portions of defendant's confession. First, the pathologist testified that the stab wound to the head and the strangulation were both fatal and that the stab wound was inflicted before the strangulation. The pathologist also testified that the strangulation would have required four to five minutes of constant pressure. Thus, not only did defendant have time and opportunity to stop between the stabbing and the strangulation, but he also had four to five minutes during the strangulation in which to stop. Contrary to defendant's contention, the evidence of these time frames supports the inference of a killing done with premeditation and deliberation.

There was also evidence to contradict defendant's confession statement that he killed the victim after she provoked him by threatening him with a knife and threatening to accuse him of rape. The victim's half-sister, Robin Anderson, testified that the victim kept her pocket knife on a table in the dryer room, not in the bedroom as defendant stated. Anderson also testified that she had never seen the knife defendant identified at trial as having come from the victim's bedroom, and that it did not belong to the victim. Although defendant stated that the basis of the victim's threat to him was their secret relationship, there was evidence that no such relationship existed. Finally, defendant asserts that the State presented no evidence of a struggle in the apartment. Apart from the fact that defendant stated that he returned to the apartment and cleaned it, the State presented several SBI agents who testified to the presence of blood on the window blinds, the headboard of the bed, the carpet, the wall, a hatrack, and

a doorframe. This evidence supports the inference that the victim did not die without a struggle.

Since the State introduced evidence tending to contradict and rebut the exculpatory portions of defendant's statements, it was not bound by those exculpatory portions. The trial court did not err in denying defendant's motion for a directed verdict based on exculpatory portions of his statements.

[8] Defendant also argues that his motion for a directed verdict should have been granted because evidence of manual strangulation and blows to the victim's body did not provide sufficient evidence of premeditation and deliberation. Defendant argues that in all of this Court's previous first-degree murder cases involving manual strangulation, additional facts were present to show premeditation and deliberation, such as prior threats to the victim or that the strangulation occurred after the victim was bound, abducted, and/or raped. Defendant cites two cases from the state of Washington for the holding that manual strangulation alone is insufficient to establish premeditation and deliberation. *State v. Bingham*, 719 P.2d 109 (Wash. Sup. Ct. 1986); *State v. Bushey*, 731 P.2d 553 (Wash. Ct. App. 1987). We find no error.

A motion for a directed verdict has the same legal effect as a motion for judgment of nonsuit and challenges the sufficiency of the evidence to go to the jury. *State v. Williams*, 307 N.C. 452, 454, 298 S.E.2d 372, 374 (1983). If there is substantial evidence of each essential element of the crime charged, the motion for a directed verdict should be denied. In ruling on this motion, the trial judge must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* at 455, 298 S.E.2d at 374.

In considering whether there was susbstantial evidence of premeditation and deliberation in the instant case to withstand defendant's motion for a directed verdict, we do not have to answer the question whether strangulation alone is insufficient to establish premeditation and deliberation. There was much more evidence here of premeditation and deliberation than the strangulation alone. Premeditation and deliberation may be proved by any relevant evidence including the circumstances and manner in which the victim was killed. *State v. Richardson*, 328 N.C. 505, 513-14, 402 S.E.2d 401, 406 (1991). The evidence shows that, in addition to being strangled, the victim suffered a potentially fatal stab wound to

the head which was inflicted with such force as to fracture the skull. There were several other lacerations on the victim's body. As we have already concluded, defendant's conduct in handling the body after the murder, including burning and burying it, was also circumstantial evidence from which a jury could infer that this murder was premeditated and deliberate. We conclude that there was substantial evidence of premeditation and deliberation and thus the trial court did not err by refusing to grant defendant's motion for a directed verdict.

[9] In his next assignment of error, defendant contends the trial court erred in denying his request for a jury instruction on the lesser included offense of involuntary manslaughter. The jury was instructed that it could return a verdict of first degree murder, second degree murder, voluntary manslaughter, or not guilty.

Involuntary manslaughter is "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Wingard*, 317 N.C. 590, 600, 346 S.E.2d 638, 645 (1986) (quoting *State v. Hill*, 311 N.C. 465, 471, 319 S.E.2d 163, 167 (1984)). Defendant argues that his evidence showed that he and his victim had "an unstable and volatile relationship," that he was intoxicated from drinking and smoking pot on the night in question, and that these conditions triggered a conflict that led to his killing Stewart. Defendant also relies on his testimony that the initial stabbing was accidental and that he did not recall strangling the victim. This evidence, he asserts, supported an instruction on involuntary manslaughter. We disagree.

Contrary to defendant's assertions, he did not testify to what he now describes as an "unstable and volatile relationship." Defendant's testimony was that he visited Stewart at her apartment eight or nine times over the course of a month and that they engaged in "conversation, sex [and had supper] a few times." Further, the physical evidence is inconsistent with an accidental stabbing. The uncontroverted evidence was that there were four wounds to the victim's body and one wound to the head which was inflicted with enough force to pierce the skull and was potentially fatal. Defendant's testimony that he could not recall strangling the victim is not substantial evidence in light of the physical evidence and pathologist's testimony that the victim was in fact strangled. "It

is well settled that a jury should only be instructed with regard to a possible verdict if there is evidence to support it." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989). Here there was no evidence to support a verdict of involuntary manslaughter and the trial court did not err in failing to instruct on this lesser included offense.

[10] In another assignment of error, defendant contends that the trial court erred in instructing the jury on premeditation and deliberation by telling the jury that it could infer deliberation from "lack of provocation." Defendant argues that this instruction was erroneous because (1) it was not supported by the evidence, (2) it allowed the jury to convict based on a lack of evidence regarding whether or not the victim provoked the killing, and (3) it relieved the State of its constitutional burden of proving every element of the crime beyond a reasonable doubt. The trial court instructed the jury as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proven by circumstances from which they may be inferred, such as the lack of provocation by the victim; the conduct of the defendant before, during and after the killing; the circumstances of the killing; the manner in which and the means by which the killing was done.

Because defendant did not object to the instruction at trial, we review this assignment of error under the plain error rule. Under the plain error rule, defendant must convince this Court not only that there was error, but that the error was so substantial that absent the error, the jury probably would have reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991).

We have stated that:

> [t]he examples listed in the above instruction, which is taken directly from the North Carolina Pattern Jury Instructions, N.C.P.I.—Crim. 206.13 (1989), "are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). However, when the trial judge focuses his instruction upon one or more of such elements as circumstantial proof of premeditation and

> deliberation, those focused upon must be supported by competent evidence. *State v. McDowell*, 329 N.C. 363, 388, 407 S.E.2d 200, 214 (1991).

State v. Thomas, 332 N.C. 544, 563, 423 S.E.2d 75, 86 (1992).

In the present case, defendant testified that he and the victim had an intimate relationship. He testified that on the night of the murder he told the victim that he was leaving to go back to Alabama and that, in response, the victim picked up a pocket knife that she always had on her nightstand, shook it at him and said, "you ain't going nowhere." Defendant also testified that the victim threatened to accuse him of rape if he left her. This version of the events that took place was contradicted by evidence that the victim did not keep a knife in her bedroom on the nightstand and that the knife defendant identified as having been in the bedroom did not belong to the victim. There was also evidence that there was no relationship between the victim and defendant which according to defendant formed the basis of the provocation. Notwithstanding the defendant's statements to the contrary, there was evidence from which the jury could reasonably have concluded that Stewart did nothing to provoke defendant and that defendant killed Stewart with premeditation and deliberation. We therefore reject defendant's argument that there was no evidence to support the instruction that premeditation and deliberation could be inferred from "lack of provocation by the victim." We further conclude that there was competent evidence from which the jury could infer a lack of provocation by the victim and therefore, the State was not relieved of its burden of proving every element of the crime beyond a reasonable doubt. We find no error in the trial court's instruction and, consequently, no plain error.

[11] In another assignment of error, defendant contends that the trial court erred in instructing the jury on the definition of malice. The trial court instructed the jury in accord with the North Carolina Pattern Jury Instruction, N.C.P.I.—Crim. 206.11, as follows:

> Malice means not only hatred, ill-will or spite, as it is ordinarily understood to be sure; that is malice, but it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious injury upon another, which proximately results in her death without just cause, excuse, or justification; or *to act wantonly in such a manner as to manifest depravity of mind or a heart devoid*

of a sense of social duty and a callous disregard for life. (Emphasis added.)

The trial court rejected defendant's request to charge in accord with N.C.P.I.—Crim. 206.10 which does not include the emphasized portion of the instruction.

Defendant argues that the emphasized portion of the instruction should not have been given since it permitted the jury to find the element of malice based on a theory not supported by the evidence and created the possibility that the jury considered defendant's burning of the victim's body as evidence of depravity of mind. We reject this argument for two reasons: First, evidence of the numerous stab wounds, including a fatal wound to the head, in conjunction with strangulation support the definition of malice in this instruction. Secondly, the trial court specifically instructed the jury to consider defendant's actions before and after the murder with regard to premeditation and deliberation. No such instruction was given as to the element of malice.

Defendant also argues that this Court's decision in *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982), should be reconsidered based on a new standard for the analysis of the constitutionality of jury instructions articulated by the United States Supreme Court in *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344 (1985). In *Bush* an erroneous malice instruction was found harmless because the jury arrived at its verdict in reliance upon the correct premeditation and deliberation instruction untainted by the malice instruction. Since we find no error in the instruction given in the instant case, we do not reach defendant's argument for reconsideration of our decision in *Bush*.

[12] In another assignment of error, defendant contends that the trial court committed plain error by instructing the jury that it could return a verdict of guilty of voluntary manslaughter based on a defense of imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense. Defendant acknowledges that this issue was recently decided contrary to his position in *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992). *See also State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992) (trial court did not err in failing to instruct the jury that it should find that the defendant acted in the exercise of imperfect self-defense if it found that he killed due to an honest but unreasonable belief that it was necessary to save himself from imminent or

great bodily harm). Although defendant voiced no objection to this instruction at trial, he now asks this Court to reconsider its decision in *McAvoy* and to grant a new trial on this basis. We decline to do so. In any event, any error in the instruction on voluntary manslaughter would not afford relief to defendant under the plain error rule since the jury rejected both voluntary manslaughter and second-degree murder in finding defendant guilty of murder in the first degree. *See State v. Hardison*, 326 N.C. 646, 392 S.E.2d 364 (1990) (no prejudicial error in failing to instruct on voluntary manslaughter where jury was instructed on second-degree murder but found defendant guilty of first-degree murder).

[13] In another assignment of error, defendant contends that the trial court erred in failing to grant a new trial, order a sentencing hearing before a new jury, or at least conduct a *voir dire* of the jury after it returned a verdict of guilty of first degree murder in only ten minutes. When the jury returned with its verdict of guilty, defendant moved to set aside the verdict and this motion was denied. Defendant also made a motion that a different jury be impaneled for the sentencing phase and this motion was also denied. Finally, defendant moved that the court conduct a new *voir dire* of the jury to determine if the jurors could exclude from consideration the photographic evidence of burning in reaching their verdict as to punishment. This motion was denied.

Defendant acknowledges that this Court has previously held that the brevity of a jury's deliberation does not entitle a criminal defendant to a new trial on the grounds of juror misconduct. *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985). In *Spangler* we said

> that shortness of time in deliberating a verdict in a criminal case, in and of itself, simply does not constitute grounds for setting aside a verdict. The brevity of deliberation should only be questioned if there is evidence of some misconduct on the part of the jury or the trial judge believes that the jury acted with a contemptuous or flagrant disregard of its duties in considering the matters submitted to it for decision.

Id. at 388, 333 S.E.2d at 731. Defendant contends that there are additional factors present here that were not present in *Spangler*. He points to the admission of "gruesome autopsy photographs," and the failure of the judge to empanel a new jury or to determine the jurors' ability to consider the remaining issues free of taint from their exposure to the autopsy photographs.

First, we have already determined that the autopsy photographs were properly admitted into evidence during the guilt-innocence phase of the trial. Since this evidence was competent for the jury's consideration during the sentencing phase, N.C.G.S. § 15A-2000(a)(3) (1988), it would not have been proper to conduct a *voir dire* to determine the jury's ability to ignore this evidence during sentencing. Further, "[u]nder N.C.G.S. § 15A-2000, it is intended that the same jury should hear both phases of the trial unless the original jury is unable to reconvene." *State v. Holden*, 321 N.C. 125, 132, 362 S.E.2d 513, 520 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Defendant does not contend that this jury was unable to reconvene for the sentencing phase.

Defendant has demonstrated no conduct on the part of the jury that would warrant questioning the brevity of the deliberations in this case. The trial court did not err in denying defendant's motions that a new jury be impaneled or that a *voir dire* be conducted of the jury. Accordingly, this assignment of error is rejected.

[14] In another assignment of error, defendant contends that his constitutional rights were violated when the trial court granted the State's challenges for cause of jurors because of their belief in opposing the death penalty. Defendant acknowledges that this issue has previously been decided against him. *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990); *Holden*, 321 N.C. at 133, 362 S.E.2d at 520. Defendant has presented no compelling reason why we should re-examine this issue. Thus, this assignment of error is rejected.

[15] Defendant's final assignment of error from the guilt-innocence phase is that the trial court erred in denying his motion to suppress evidence of statements made by him to law enforcement officers because these statements were made in violation of his rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendant contends that: (1) these statements were made after he was illegally seized by law enforcement officers without probable cause, (2) he was not advised of his *Miranda* rights, (3) he was coerced into accompanying officers and submitting to a custodial interrogation, and (4) his mother was acting as an agent of the State to elicit his confession and her coercive effect was improper. The State contends that defendant was not in custody until the time of his arrest and that subsequent to that arrest

he was fully advised of his *Miranda* rights and elected to waive them. The State further contends that defendant's mother voluntarily came to Graham County out of concern for her son and that she was not acting as an agent of the State. We find no error.

"Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). In assessing whether someone has been seized for purposes of the Fourth Amendment, the salient question is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138 (1980); *State v. Johnson*, 317 N.C. 343, 360, 346 S.E.2d 596, 606 (1986). Defendant argues that, under the circumstances of the instant case, a reasonable person would not have believed he was free to leave. "What the circumstances are is a question of fact to be decided by the trial court. How these circumstances would be viewed by a reasonable person is a question of law fully reviewable by an appellate court." *State v. Bromfield*, 332 N.C. 24, 33, 418 S.E.2d 491, 496 (1992).

The trial judge conducted a lengthy hearing on defendant's motion to suppress and made detailed findings of fact concerning the several interviews defendant had with various law enforcement and investigative officers. Based on these findings, the trial court concluded that "none of the constitutional rights of the defendant, either federal or state, were violated by his arrest, detention, interrogation or any statement that he made." The court further concluded that "there were no promises of reward" nor "threat or suggested threat of violence to persuade or induce the defendant to make the statement." The court also concluded that defendant's statement of 15 January 1991 "was made freely, voluntarily, and understandingly" and that "he was in full understanding of his constitutional rights" which he "agreed freely and voluntarily to waive."

We agree with the State that there was ample evidence in the record to support the trial court's findings of fact and that the findings support the conclusions of law. A trial court's findings of fact are binding on appeal when supported by competent evidence. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 166 (1991).

In the instant case, the evidence shows that the defendant agreed to talk with law enforcement officers, including agreeing to come to the Sheriff's Department on several occasions, and on 13 January agreeing to go to Asheville for the polygraph examination. Defendant was repeatedly told he was not under arrest and was free to leave at any time. At no time was the defendant handcuffed, nor was his freedom restrained. On several occasions defendant indicated that he wanted to leave and he was allowed to leave or was in fact taken home by law enforcement officers. Defendant testified that when he had asked the officers to leave his apartment on one occasion, they had done so. Defendant also acknowledged that from prior experience he knew what his rights were and that he had knowingly waived them. Given these circumstances, we cannot say that a reasonable person would have believed he was not free to leave and therefore we conclude that defendant was not seized for Fourth Amendment purposes. *See Bromfield*, 332 N.C. at 37, 418 S.E.2d at 498 (no seizure where defendant agreed to accompany officers to the police station, was not handcuffed, was told there were no charges against him and he was free to go, went unescorted to the snack bar and restrooms, and acknowledged that based upon prior experiences, he could not be coerced into talking with officers); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (no seizure where defendant agreed to accompany officers to the police station, was not frisked, was given cigarettes and coffee, was allowed to go unescorted to the bathroom and to make telephone calls).

Miranda warnings are required prior to questioning only if one is in custody or has been deprived of one's freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); *State v. Perry*, 298 N.C. 502, 506, 259 S.E.2d 496, 499 (1979). The test for whether a person is in custody for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992). In determining that the defendant was not seized for Fourth Amendment purposes, we have already concluded that under the circumstances of this case a reasonable person in defendant's position would have believed he was free to leave up until the time he was arrested. Likewise, we hold that the trial court's findings of fact support the conclusion that defendant was not in custody at the time of his prearrest statements to law enforcement officers. Thus, *Miranda*

warnings were not required and there was no error in denying defendant's motion to suppress on this basis. *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992) (defendant not in custody when he went to police station on his own, was permitted to return home and later agreed to take a polygraph test); *State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978) (defendant not in custody when he voluntarily went to the police station and made a statement and police officers returned him to his home afterwards).

Finally, as to the voluntariness of defendant's statements, we conclude that the trial court's findings support the conclusion that there were "no promises of reward or inducements" nor "threat or suggested threat of violence to persuade or induce the defendant to make the statement." There is also substantial evidence to support the finding that defendant's mother voluntarily came to Graham County and that she was not acting as an agent of the State. We thus find no error and no violation of defendant's constitutional rights in the denial of defendant's motion to suppress the statements made by him to the law enforcement officers.

SENTENCING PHASE

[16] In his first assignment of error from the sentencing phase of the trial, defendant contends that the trial court erred in admitting hearsay statements of the victim of an attempted rape at a trial held in Mississippi. Defendant testified during the guilt-innocence phase that he was convicted of attempted rape in Mississippi and on direct examination by his attorney described some of the testimony of the rape victim as follows:

Q: You heard her testify, didn't you?

A: Yes sir.

Q: Where did she testify that this assault took place?

A: Supposedly took place at her house.

Q: Had you ever been in her house?

A: Never.

Q: Did you hear her testify at the hearing with respect to how you appeared at that time, the length of your hair and so forth and beard?

A: She described a long greasy haired guy with a full beard, which was not me.

. . . .

Q: State whether or not you were represented by an attorney?

A: Yes, I was.

Defendant further testified that he did not actually commit that offense and on cross-examination testified further as follows:

Q: Mr. Rose, you heard your attorney ask if you were convicted of an assault of Hilda Jones, did you not hear that?

A: Yes, I did.

Q: And you were actually convicted of the attempted rape of Hilda Jones?

A: That was the charge, yes sir.

Q: And you were present at the trial?

A: Yes sir.

Q: You had an attorney?

A: Yes sir.

Q: And you heard Hilda Jones testify against you?

A: Yes I did.

Q: She testified that you grabbed her around her shoulders, isn't that correct?

A: That's correct.

Q: That you were holding a knife to her throat?

Mr. Buchanan: Objection.

The Court: Overruled.

A: That's what she said, yes.

Q: And that you threatened to cut her throat during this attempted rape?

Mr. Buchanan: Objection.

The Court: Overruled.

A: I don't recall those exact words, but they were very similar to that.

Q: Very close to it?

A: Yes.

Defendant argues that the statements made by Hilda Jones were inadmissible hearsay. The State does not dispute that this testimony was hearsay, but argues, *inter alia*, that defendant opened the door to cross-examination questions on the testimony of Hilda Jones.

The phrase "opening the door" refers to the principle that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Garner*, 330 N.C. 273, 290, 410 S.E.2d 861, 870 (1991) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). Thus, where the defendant misstates or otherwise uses his criminal record to create inferences favorable to himself, the prosecutor may properly cross-examine on the details of these prior crimes. *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993).

In the instant case, defendant admitted that he was convicted of attempted rape in Mississippi, but denied that he committed the offense. In response to questions by his attorney, defendant related parts of the testimony of the prosecuting witness at his trial in Mississippi. The parts of the prosecuting witness' testimony that defendant chose to testify about were clearly selected to create the inference that defendant was not the assailant in that crime. Defendant having presented an incomplete statement of the witness' testimony, including only those portions favorable to himself, the prosecution was properly allowed to cross-examine defendant on the omitted portions of the witness' testimony. *Cf. id.* at 413, 432 S.E.2d at 354 (where defendant's summary of his criminal record was accurate and complete and he did not use it to create inferences favorable to himself, he did not open the door to questions about the details of his prior crimes).

We further note that this result is consistent with well-established principles regarding the scope of cross-examination in general. As we stated in *State v. Warren*:

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981).

Warren, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990). Here, the questions offered appeared to be asked in good faith and the trial court did not abuse its discretion in permitting defendant to answer them on cross-examination.

[17] By another assignment of error defendant contends that the trial court erred in submitting to the jury aggravating circumstance N.C.G.S. § 15A-2000(e)(3), that "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person." Defendant contends that the evidence was insufficient to support submitting this circumstance. We disagree. We note first that defendant admitted that he had been convicted of attempted rape in Mississippi. Defendant also admitted, without objection, that the prosecuting witness testified that defendant grabbed her around the shoulders. We have also held that it was not error to admit defendant's admission, on cross-examination, that the prosecuting witness testified that defendant threatened to cut her throat at the time of the attempted rape. Nevertheless, we consider defendant's argument that the certified records from the Mississippi court were insufficient to support submitting the (e)(3) aggravating circumstance to the jury.

In a capital case, the State must present evidence sufficient to prove an aggravating circumstance beyond a reasonable doubt. *State v. Johnson*, 298 N.C. 47, 75, 257 S.E.2d 597, 617 (1979); N.C.G.S. § 15A-2000(c)(1) (1988). N.C.G.S. § 15A-2000(e)(3) "requires that there be evidence that (1) defendant had been convicted of a felony, that (2) the felony for which defendant was convicted involved the 'use or threat of violence to the person,' and that (3) the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose." *State v. Goodman*, 298 N.C. 1, 22, 257 S.E.2d 569, 583 (1979). A prior felony under this section "can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery or a felony which does

not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission." *State v. McDougall*, 308 N.C. 1, 18, 301 S.E.2d 308, 318, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). When the prior felony is one which "on its face, . . . involves the threat or use of violence to the person," the State is not required to show that the threat or use of violence was actually involved in commission of the felony. *State v. Hamlette*, 302 N.C. 490, 503-04, 276 S.E.2d 338, 347 (1981). *See also Goodman*, 298 N.C. at 23, 257 S.E.2d at 584 (defendant's stipulation to armed robbery conviction sufficient because "armed robbery, by definition, involves the use or threat of violence to the person of the victim").

In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must use the same standard applied in considering a motion to dismiss. *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992), *cert. denied*, --- U.S. ---, 123 L. Ed. 2d 486 (1993). That is, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984).

In the present case, the State offered, as evidence of the (e)(3) aggravating circumstance, certified court records showing that defendant was convicted of attempted rape in Mississippi in 1978, and copies of the pertinent General Laws of Mississippi. These records provide sufficient evidence that the defendant had been convicted of a felony and that the conduct upon which this conviction was based was conduct which occurred prior to the events out of which the capital felony charge arose. For reasons stated herein, we also conclude that these documents provide sufficient evidence that the felony for which defendant was convicted involved the use or threat of violence to the person. In order to reach this conclusion based on the certified court records alone, we must determine that the felony of attempted rape under Mississippi law "has as an element the involvement of the use or threat of violence to the person." *McDougall*, 308 N.C. at 18, 301 S.E.2d at 319.

Under Mississippi law, "[e]very person who shall forcibly ravish any person of the age of fourteen (14) years or upward" is guilty of rape. Miss. Code Ann. § 97-3-65(2) (1992). "The crime of attempt consists of three elements: 1) an intent to commit a particular crime, 2) a direct ineffectual act done toward its commission, and

3) failure to consummate its commission." *Pruitt v. State*, 528 So. 2d 828 (Miss. Sup. Ct. 1988).

Under the Mississippi statute, rape, by definition, involves the use or threat of violence to the person since an element of the offense is forcible ravishment. This Court has likewise held that rape is a crime of violence as a matter of law. *State v. Artis*, 325 N.C. 278, 321, 384 S.E.2d 470, 494 (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). We find no Mississippi case law which has addressed the issue of whether attempted rape is also a crime involving the use or threat of violence. After careful review of Mississippi law regarding rape and attempt we conclude that attempted rape is a crime involving the use or threat of violence since a conviction for attempted rape requires a direct act towards forcible ravishment. Such a direct act towards commission of a crime involving use or threat of violence necessarily involves at least a threat of violence. Thus, a conviction for attempted rape under Mississippi law is a conviction of a felony involving the "use or threat of violence to the person" within the meaning of N.C.G.S. § 15A-2000(e)(3).

Since we conclude that the State presented sufficient evidence of the (e)(3) aggravating circumstance through certified records of defendant's conviction for attempted rape, it is not necessary to address whether the State presented sufficient evidence that this particular attempted rape involved the use or threat of violence. *See State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981).

[18] In another assignment of error, defendant contends that the trial court erred by peremptorily instructing the jury that if it found defendant had committed attempted rape this would constitute a crime within the meaning of N.C.G.S. § 15A-2000(e)(3). The trial court instructed on the (e)(3) aggravating circumstance in pertinent part as follows:

> Has the defendant been previously convicted of a felony involving the use or threatened use of violence to the person?
>
> Attempted rape is by definition a felony involving the use or threatened use of violence to the person.

Defendant objected at trial to the characterization of attempted rape as a per se crime of violence. Relying on his earlier argument that attempted rape under the law of Mississippi does not necessari-

ly involve the use or threat of violence, defendant contends that this instruction eliminated the State's burden of proving that the crime of which defendant was convicted involved the use or threat of violence. As we have determined that attempted rape under Mississippi law is a crime involving the use or threat of violence, we conclude that the trial court did not err in instructing the jury accordingly.

[19] In another assignment of error, defendant contends the trial court's instructions erroneously allowed the jury to consider a possible attempted rape of Patricia Stewart, the murder victim in the instant case, as an aggravating circumstance. The trial court instructed on the (e)(3) aggravating circumstance in pertinent part as follows:

> If you find from the evidence and beyond a reasonable doubt that on or about the alleged date, the defendant had been convicted of attempted rape and that the defendant used or threatened to use violence to the person in order to accomplish his criminal act and that the defendant killed Patricia Stewart after he committed attempted rape, you would find this aggravating circumstance . . . .

Defendant did not object to this instruction at trial and therefore asserts plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Defendant contends that the instruction might have been misunderstood by the jury as meaning that if defendant had attempted to rape Patricia Stewart prior to killing her, that attempted rape could be considered a prior felony involving the threat or use of violence. Defendant bases his argument on the emphasis the prosecutor placed, during closing argument, on the State's theory that Stewart and defendant had no prior relationship and that defendant killed Stewart during a rape attempt.

The prosecutor's argument defendant refers to was made at the close of the guilt-innocence phase of the trial. In the sentencing phase closing argument, the prosecutor made it very clear that submission of the (e)(3) aggravating circumstance was based on defendant's Mississippi conviction for the attempted rape of Hilda Jones. The trial court instructed the jury that in order to find this aggravating circumstance it had to find that defendant had been *convicted* of attempted rape and that such conviction had to be "based on conduct which occurred before the events out of which this murder arose." We are convinced that the jury did

not misunderstand the court's instructions. Defendant has failed to demonstrate any error in this instruction, let alone any that rises to the level of plain error.

[20] In another assignment of error, defendant contends that the trial court erred in submitting the § 15A-2000(e)(9) aggravating circumstance because the evidence was insufficient to support a jury verdict that the killing was especially heinous, atrocious or cruel. We disagree.

In determining the sufficiency of the evidence to support this circumstance, the trial court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993). The propriety of submitting this aggravating circumstance turns on the particular facts surrounding the capital offense being considered. *Stanley*, 310 N.C. at 335, 312 S.E.2d at 395.

> [T]o submit this [aggravating circumstance] to a jury, the capital offense must not be *merely* heinous, atrocious, or cruel; it must be *especially* heinous, atrocious, or cruel. The defendant's acts must be characterized by '*excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present*' in a first degree murder case.

Id. at 336, 312 S.E.2d at 396, quoting *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983); *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988). It is not "inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased or surviving victim." *Blackwelder*, 309 N.C. at 415, 306 S.E.2d at 787. We have also interpreted this aggravating circumstance as directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Goodman*, 298 N.C. at 25, 257 S.E.2d at 585.

In the present case, the evidence, taken in the light most favorable to the State, tended to show an extremely brutal attack consisting of multiple stab wounds to the body as well as manual strangulation, either of which could have caused death. Defendant somehow gained access to the victim's apartment very late at night after the victim's girlfriend had left and the victim was alone.

Using the knife he had brought with him, defendant inflicted stab wounds on the victim's right eyebrow and her knee and slit her abdomen for five inches. Using the knife or some other blunt instrument, defendant inflicted another wound below the left breast causing puckering of the skin and discoloration. Defendant stabbed the victim in the head with such force that he fractured the front side of the skull, caused hemorrhaging to the brain beneath the stab wound, and chipping of a bone at the base of the skull. The pathologist's testimony indicated that the victim would have remained conscious while defendant inflicted the lesser knife wounds on her body, and could have remained so after the blow to the head. Finally, defendant strangled the victim, taking between four and five minutes to choke her to death. We conclude that there was sufficient evidence to warrant submission of this aggravating circumstance to the jury.

[21] Defendant next contends the trial court erred in instructing the jury on the especially heinous, atrocious, or cruel circumstance because the instruction was unconstitutionally vague under the Eighth Amendment. The court instructed the jury as follows:

> 2. Was this murder especially heinous, atrocious or cruel?
>
> Every murder is, at least arguably, heinous, atrocious and cruel. In addition, this aggravating circumstance is limited to acts done during the commission of the murder and any act after the murder, regardless of how heinous or shocking, may not be considered.
>
> You shall not consider the burning of the deceased as an especially heinous, atrocious or cruel factor, because it occurred after the death of the victim. It could not indicate that the defendant enjoyed or was indifferent to the suffering of the deceased.
>
> In this context heinous means wicked, extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious and cruel as those terms have been defined. This murder must have been especially heinous, atrocious and cruel, and not every murder is especially so. For this murder to

> have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily tortuous [sic] to the victim.

Defendant acknowledges that this Court recently rejected a similar challenge to our pattern jury instruction on this aggravating circumstance. *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993). Defendant nevertheless contends that the instruction given in the present case vested "standardless discretion" in the jury and violated the Eighth and Fourteenth Amendments.

Defendant relies on *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991), *aff'd*, 996 F.2d 667 (4th Cir. 1993), *rev'd*, No. 91-4011 (4th Cir. January 21, 1994) (*en banc*). In *Smith*, the Fourth Circuit Court of Appeals affirmed the district court's holding that the heinous, atrocious or cruel instruction was unconstitutionally vague and that this Court did not cure the vagueness error by reweighing the evidence or conducting a constitutional harmless-error analysis.[1] However, the Fourth Circuit, sitting *en banc*, has since reversed this decision and, applying a harmless-error analysis, concluded that the vagueness error in *Smith* was harmless. *Smith v. Dixon*, No. 91-4011, slip op. at 41. Further, *Smith* is not helpful here since a different jury instruction was given in the present case than was given in *Smith*. The instruction given in the present case incorporated the constitutionally narrowing definition specifically referred to by the Fourth Circuit as having not been given or applied in *Smith*, *Id.* at 40; *State v. Martin*, 303 N.C. 246, 254-55, 278 S.E.2d 214, 220, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L. Ed. 2d 655 (1981) ("brutality in excess of that which is normally present in any killing" and "conscienceless or pitiless crime which is unnecessarily torturous to the victim"), and includes the identical language found to be constitutionally sufficient in *Syriani*. *Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 140-41. This assignment of error is therefore rejected.

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1. The defendant in *Smith* raised this issue for the first time in a federal habeas corpus petition. The vagueness error was not raised and therefore not specifically reviewed by this Court in Smith's direct appeal. 305 N.C. 691, 292 S.E.2d 264 (1982).

[22] In his next assignment of error defendant contends that the trial court erred by not fully responding to a request by the jury for reinstruction regarding mitigating circumstances. During the sentencing phase charge, the trial court instructed the jury on Issue Two in accordance with the North Carolina Pattern Jury Instructions. During deliberations, the jury requested further instruction by submitting to the court the question, "Could we have in writing the wording of mitigating circumstance and/or value or weight?" In response the court repeated its instructions on Issue Two which places the burden on the defendant to prove by a preponderance of the evidence the existence of mitigating circumstances. Defendant argues that the court should have also repeated the instructions on Issue Three regarding the State's burden to prove aggravating circumstances and the weighing of aggravating and mitigating circumstances. Defendant further argues that the instruction on Issue Two, in accord with the pattern jury instruction, is constitutionally deficient.

We first note that since defendant did not object to the reinstruction or the manner in which the trial court handled the jury's question, this assignment of error must be assessed under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). In response to the written inquiry by the jury, the trial court repeated a portion of the instruction it had previously given for Issue Two. The court further informed the jury that if this was not sufficient, the jury should submit another request in writing which the court would take up at the appropriate time. Defendant made no objection to the court's handling of the request. The jury resumed its deliberations and made no further request for reinstruction. It seems clear that, contrary to defendant's assertions, the jury understood the trial court's reinstruction and gave it proper application, since although it declined to find any of the three submitted statutory mitigating circumstances, it did find all nine of the submitted nonstatutory mitigating circumstances.

[23] With regards to the constitutionality of the pattern jury instruction on Issue Two, defendant acknowledges that this Court has repeatedly decided this issue contrary to his position. *State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684 (1993); *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), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991); *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988),

vacated on other grounds, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). Defendant has presented no new arguments that warrant our reconsideration of this issue. Therefore, this assignment of error is rejected.

[24] Defendant next contends that the North Carolina Pattern Jury Instruction imposing a "duty" upon the jury to return a recommendation of death if it finds the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty is unconstitutional. Defendant acknowledges that this Court has previously decided this issue contrary to his position. *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled in part*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Defendant raises no new arguments which warrant reconsideration of our prior holdings. This assignment of error is therefore rejected.

[25] In another assignment of error defendant contends that the trial court erred by instructing the jury that it could consider all of the evidence received during the guilt phase on the sentencing issues. At the beginning of the sentencing phase charge, the trial court instructed the jury as follows:

> All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit, during the sentencing proceeding, any evidence which was submitted during the guilt phase of this case.
>
> All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.
>
> It is now your duty to decide from all of the evidence presented in both phases what the facts are.

Defendant made a written request for an instruction emphasizing that evidence of defendant's conduct after the murder not be considered by the jury "in the sentencing hearing for any purpose." Instead the court instructed the jury as follows:

> You shall not consider the burning of the deceased as an especially heinous, atrocious or cruel factor, because it occurred after

the death of the victim. It could not indicate that the defendant enjoyed or was indifferent to the suffering of the deceased.

Defendant contends that these instructions were erroneous because: (1) they are contradictory in that they first tell the jury that it can consider all of the guilt phase evidence during the sentencing phase and then that it is not to consider some of the evidence from the guilt phase; (2) they limit the instruction to not consider the burning evidence to the jury's consideration of the "especially heinous, atrocious or cruel" aggravating circumstance; and (3) taken together, the instructions tell the jury that it can consider the evidence of burning of the body in deciding Issues Two, Three, and Four. We find no reversible error.

When taken as a whole, the instructions are not contradictory. The trial court began its sentencing phase charge with general instructions regarding, *inter alia*, the evidence the jury would be allowed to consider on sentencing. After providing other general instructions, the court gave specific instructions for each of the two aggravating circumstances, including the instruction that evidence of burning of the body after the murder should not be considered as an especially heinous, atrocious or cruel factor.

Evidence of defendant's conduct after the murder, including burning and burying the body, was properly admitted into evidence during the guilt-innocence phase. At sentencing, the jury is properly permitted to consider the evidence presented at the guilt-innocence phase. N.C.G.S. § 15A-2000(a)(3) (1988); *Syriani*, 333 N.C. at 396, 428 S.E.2d at 143. It was therefore not error for the trial court to instruct the jury that it could consider all of the evidence presented at both phases of the trial except with regards to the "especially heinous, atrocious or cruel" aggravating circumstance. This assignment of error is therefore rejected.

PROPORTIONALITY

[26] Having found no prejudicial error in the trial and sentencing phases of this case, we are required by statute to review the judgment and sentence to determine whether: (1) the record supports the jury's finding the aggravating circumstances on which the court based its sentence of death, (2) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime

and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993).

In this case, the jury found the two aggravating circumstances which were submitted: "[h]ad the defendant been previously convicted of a felony involving the (use) (threat) of violence to the person?" and "was this murder especially heinous, atrocious or cruel?" We have held that the evidence supports the jury's finding of each of these aggravating circumstances. We also conclude that 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 (1985). 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, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993) (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 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 . . . ." *Syriani*, 333 N.C. at 401, 428 S.E.2d at 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 attacked his neighbor who was at home alone late at night. Defendant inflicted numerous stab wounds including one potentially fatal wound to the head, and followed this with manual strangulation. He then removed the victim's body and stored it in the trunk of his car until the next evening when he transferred it to another car, took it to his grandmother's farm, burned and buried it.

The jury found the two aggravating circumstances, that defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the murder was especially heinous, atrocious or cruel. The jury found none of the three statutory mitigating circumstances submitted, but did find all nine of the non-statutory mitigating circumstances. Those circumstances were: (1) defendant is the product of a broken home; (2) defendant was reared until at least his twelfth birthday in the home of his father and mother, the father being a chronic alcoholic who was abusive both physically and mentally to defendant's mother in the presence of defendant; (3) defendant received an honorable discharge from the United States Army; (4) defendant received an honorable discharge from the United States Marine Corps; (5) defendant was a good and obedient prisoner in the Graham County Jail for fifteen months, and at no time caused any problem with the jailor or other personnel of the Sheriff's Department or with any other inmates confined there; (6) defendant was a good and obedient prisoner in Haywood County Jail for twelve days, and at no time caused any problem with the jailor or other personnel of the Sheriff's Department or with any other inmates; (7) defendant cooperated with the agents of the SBI and members of the Graham County Sheriff's Department when he, at their request, agreed to take and did take a polygraph test at a time when he was not in custody and was free to go and come as he pleased; (8) defendant has been a good and reliable and valuable employee of Tuckaseegee Mills for a substantial period of time prior to 1 January 1991; and (9) defendant has a good character and reputation for truth and veracity in the work community of his place of employment prior to 1 January 1991, namely the Tuckaseegee Mills work community.

Of the cases in which this Court has found the death penalty disproportionate, only two involved the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1,

352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 653 (1987). Neither is similar to this case.

In *Stokes*, defendant and three other young men planned to rob the victim's place of business. During the robbery one of the assailants severely beat the victim about the head, killing him. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. *Stokes* is distinguishable from the present case. First, the defendant in *Stokes* was seventeen years old; defendant in this case is thirty-two years old. Second, the defendant in *Stokes* was convicted on a felony murder theory with virtually no evidence of premeditation and deliberation, whereas in the present case, defendant was convicted on a theory of premeditation and deliberation. There was also no evidence in *Stokes* showing who was the ringleader in the robbery, or that the defendant deserved a death sentence any more than did an older confederate who received a life sentence. There was evidence that the defendant in *Stokes* suffered from impaired capacity to appreciate the criminality of his conduct and that he was under the influence of a mental or emotional disturbance at the time of the murder, neither of which is present in the instant case.

In *Bondurant*, the defendant shot the victim while they were riding together in a car. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. The Court "deem[ed] it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. He then went inside to secure medical treatment for the victim. The defendant also spoke with the police at the hospital, confessing that he shot the victim. In the present case, by contrast, the defendant followed the infliction of one potentially fatal wound with another until the victim was dead. He then proceeded to dispose of the body by burying and burning it and for almost two weeks denied knowing anything about the victim's whereabouts.

There are also cases in the pool, similar to the present one, in which the jury recommended a sentence of death after finding as an aggravating circumstance that the murder was especially heinous, atrocious or cruel. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984).

In *Huffstetler*, defendant beat his mother-in-law to death with a cast iron skillet after an argument. The victim had multiple wounds

on her head, neck and shoulders. Her jaw, neck, spine and collarbone were fractured. After beating the victim, the defendant went home to change his bloody clothes, returned to the scene to remove the skillet, and went to visit a woman friend. *Huffstetler*, 312 N.C. at 98-100, 322 S.E.2d at 115-16. The jury in *Huffstetler* found as the single aggravating circumstance that the murder was especially heinous, atrocious or cruel. *Id.* at 100, 322 S.E.2d at 116. The jury also found three mitigating circumstances: that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; that the killing occurred contemporaneously with an argument and by means of an instrument acquired at the scene and not taken there; and that the defendant did not have a history of violent conduct. *Id.* Notwithstanding the fact that defendant suffered from an emotional or mental disorder, this Court concluded that the sentence of death was not disproportionate, based on evidence similar to that in the present case, including the brutal nature of the killing, the lack of remorse shown by the defendant, and the defendant's cool actions after the murder.

Of the cases in which this Court has found the death penalty disproportionate, none have involved the aggravating circumstance of a prior conviction of a felony involving the threat or use of violence against the person. There are two cases in which both aggravating circumstances, "especially heinous, atrocious, or cruel" and "prior conviction of a felony involving the threat or use of violence" were involved and we found the sentence of death not disproportionate. *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).

In *Boyd*, the defendant stabbed his estranged girlfriend thirty-seven times in front of her mother and her daughter at a shopping mall. After the killing, the defendant walked "slowly and inconspicuously" from the scene, removed his bloodstained shirt and attempted to conceal himself in the parking lot when police arrived. We found the death sentence not disproportionate based on "overwhelming evidence of defendant's guilt, scanty evidence of emotional or mental disorder, . . . defendant's significant history of criminal convictions and the heinous nature of the crime, including suffering of the victim." *Boyd*, 311 N.C. at 436, 319 S.E.2d at 207. Although the defendant in the present case had a less significant history of criminal convictions than did the defendant in *Boyd*, he was indeed convicted of a prior felony involving the threat

or use of violence. The other factors which formed the basis of the death penalty in *Boyd* are equally present in the instant case.

In *Brown*, the defendant robbed a convenience store and kidnapped the clerk whom he then drove to an isolated location and shot six times. Finding the death sentence not disproportionate, we noted that the defendant robbed the store during the early morning hours when the lone employee was most vulnerable and that the victim did not die immediately, but may have remained conscious for up to a quarter hour before her death. Similarly in the present case, defendant approached the victim late at night when she was alone in her own apartment. There was also evidence in this case that the victim would have remained conscious during the initial stab wounds and might have remained so after the fatal blow to the head.

> Although the presence of two of the aggravating circumstances which are most prevalent in death-affirmed cases is not in itself conclusive, it is one indication that the sentence was neither excessive nor arbitrarily imposed. The heinous, atrocious or cruel circumstance reflects upon the brutality of the crime and the suffering of the victim, while the prior violent felony circumstance reflects upon the defendant's character as a recidivist, two important factors in our consideration of the nature of the defendant and the crime.

Artis, 325 N.C. at 342, 384 S.E.2d at 506-07.

We further note that in this case, defendant's character, background, and mental and physical condition do not mitigate this brutal killing. Although he came from a poor, dysfunctional background, he was nevertheless able to successfully complete two tours of duty in military service, to hold down a job in the civil sector and to support a wife and children for a while. There is no evidence that defendant had any mental or physical difficulties either prior to or at the time of the murder.

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 the victim. We further conclude that the sentence of death was 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 to similar cases in the pool, we cannot hold as a matter of law that the sentence of death is disproportionate or excessive.

NO ERROR.

STATE OF NORTH CAROLINA v. YSUT MLO

No. 177A93

(Filed 28 January 1994)

1. **Evidence and Witnesses § 1278 (NCI4th)— murder—defendant's statement—knowing waiver of rights**

The trial court did not err in a noncapital first-degree murder prosecution by determining that defendant waived his rights knowingly, intelligently and voluntarily where the evidence showed that defendant had only a third-grade education in Vietnam; there was no evidence that he had had any formal training in English or that he was required to speak it at his job; although an interpreter was provided who was fluent in both Vietnamese and English, the defendant's native language was Dega, the language of the Montagnard region of Vietnam; defendant had not been placed under arrest, nor had he been handcuffed, shackled, or restrained in any way when the statement was given; when the waiver of rights form was read to defendant both in English and in Vietnamese, he was asked if he understood his rights and he answered "yes" in English; defendant did not indicate at any time that he did not understand the questions; and a review of the written transcript of the statement itself indicates that defendant was able to respond logically and appropriately to the questions presented to him in English.

Am Jur 2d, Criminal Law § 797; Evidence §§ 555-557, 614.

2. **Evidence and Witnesses § 1113 (NCI4th)— murder—Montagnard defendant—statements made through interpreter—officer's testimony**

The trial court did not err in a noncapital murder prosecution by admitting a detective's testimony concerning statements

made on defendant's behalf by his interpreter where this was not a situation in which the defendant and the questioning officer found each other to be unintelligible; the transcript shows that, for the most part, both defendant and Detective Roseman communicated in English; the only portion of Roseman's testimony that concerned statements elicited with the assistance of the interpreter was the portion concerning the circumstances surrounding the theft of defendant's automobile and the victim's attitude toward defendant's girlfriend; in both cases defendant and Detective Roseman were able to continue the interview in English after the interpreter briefly clarified the subject matter of the questions for defendant; this case did not involve the agency issues discussed in *State v. Felton*, 330 N.C. 619; and, assuming that it did, defendant has not made a sufficient showing to rebut the presumption of agency that arises when an accused accepts the benefit of the proffered translation to make a voluntary statement.

Am Jur 2d, Evidence §§ 597 et seq.; Homicide §§ 337 et seq.

3. Evidence and Witnesses § 2850 (NCI4th) — murder — statements made by defendant — officer's use of transcript of recording to refresh recollection — no error

The trial court did not err in a murder prosecution by allowing a detective to use the written transcription of defendant's tape recorded statements to refresh his recollection of statements made by defendant. There was no indication that the detective was not able to rely primarily on his own memory of events in giving his testimony.

Am Jur 2d, Witnesses § 456.

4. Evidence and Witnesses § 2859 (NCI4th) — murder — defendant's statements — officer's use of transcript of recording to refresh recollection — recording not introduced — no error

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's request to review the tape recording of his statement or by allowing a detective to testify as to statements contained therein without first introducing the recording into evidence. The detective used the transcript of the recorded statement to refresh his personal recollection of defendant's responses to the questions asked;

the best evidence rule does not apply to a document that serves only to refresh a witness' memory and is not offered into evidence. N.C.G.S. § 8C-1, Rule 1002.

Am Jur 2d, Witnesses § 462.

5. **Homicide § 256 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss where the evidence presented in the present case clearly supports the inference that the crime was committed in a premeditated and deliberated manner in that the mattress in the victim's bedroom had bullet holes in it; slugs and shell casings matching those found in the vicinity of the corpse were found in the bedroom; there were bloodstains on the screen door of the apartment; this evidence indicates that the killing was done in the apartment and that quite likely the victim was in his bed, perhaps asleep when the first shots were fired; the victim sustained thirty-three bullet wounds all over his body; some of the entry wounds were in the victim's back, suggesting that he was trying to escape as he was being shot; the victim's body was found near Raleigh, more than one hundred miles away from the likely scene of the killing; near the body were garbage bags that contained expended shell casings fired from the same weapon that was used in the Charlotte apartment; personal effects and clothing of the victim were found in the vicinity; and it thus appears that the perpetrator, upon completion of his crime, attempted to conceal his activities by collecting and disposing of the evidence in a remote spot far from the scene of the killing.

Am Jur 2d, Homicide §§ 437 et seq.

6. **Homicide § 226 (NCI4th)— first-degree murder—evidence of defendant's identity—sufficient**

There was substantial evidence to support the inference that defendant was the perpetrator of a first-degree murder where the evidence showed that the victim and defendant were roommates; when defendant's girlfriend visited their apartment shortly after the time of the victim's death, defendant offered inconsistent accounts of the victim's whereabouts; the killing was shown to have taken place about the time that

defendant was normally at work, but was not; the victim's body was found far from defendant's home, but in a location with which defendant would have been familiar, having worked nearby in prior years; defendant drove the victim's car and was in possession of the victim's watch after the crime; there was evidence that the victim had never previously allowed even his closest friend to drive his car; defendant stated that he had been in exclusive possession of the vehicle during the time period of the killing and blood samples matching the victim's own were found in the trunk of the car; defendant was shown to have owned a weapon of a make and caliber consistent with the weapon that inflicted the victim's wounds; and there was evidence of some hostility between defendant and the victim concerning defendant's relationship with Mary Ann Mirelez.

Am Jur 2d, Homicide § 435.

7. **Searches and Seizures § 150 (NCI4th)— first-degree murder—victim's car—released from custody—no denial of due process**

There was no violation of a first-degree murder defendant's due process rights where a detective had the victim's automobile towed to the law enforcement center after noticing what appeared to be bloodstains on the bumper and within the trunk of the automobile; defendant's counsel requested the results of a comparison of the car's tire treads to casts made at the location where the victim's body was found; no such comparison had been made; the vehicle had been released from custody; and the tires had been changed. The rules concerning the safekeeping of potential evidence were violated; however, the investigating officers at the site where the body was found did not make plaster casts of all the tracks found at that location, so that the absence of a match would have been only marginally exculpatory. Defendant did not allege or demonstrate bad faith by the police in the release of the automobile and the exculpatory value of any tests defendant wished to perform was speculative at best.

Am Jur 2d, Searches and Seizures § 212.

8. **Evidence and Witnesses § 1700 (NCI4th)— first-degree murder—autopsy photographs of victim—admissible**

The trial court did not err in a first-degree murder prosecution by admitting two autopsy photographs of the victim

where the photographs were used to show the nature and extent of the wounds sustained by the victim; they were relevant to show not only the cause of death, but also as a means of proving the premeditation and deliberation elements of first-degree murder; there is no indication that the jury was subjected to unnecessary or excessive descriptions of the victim's injuries; and the context in which the photographs were introduced does not suggest that the purpose was to inflame the passions of the jury.

Am Jur 2d, Evidence § 791.

9. Evidence and Witnesses § 216 (NCI4th)— murder—prior possession of rifle—murder weapon not identified—relevant

There was no error in a murder prosecution in the admission of testimony that defendant had been seen in possession of a black rifle with a clip on the bottom and "a long handle that pulled back" where no murder weapon was produced at trial, but a federal firearms form was introduced which showed that an individual who identified himself as defendant purchased a .22-caliber semiautomatic rifle with a fifteen-round clip and retracting stock, and the pathologist indicated that the victim's wounds had been caused by a .22-caliber weapon. When no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes especially relevant.

Am Jur 2d, Evidence § 272.

10. Evidence and Witnesses § 216 (NCI4th)— murder—testimony that defendant possessed rifle—relevant

There was no error in a murder prosecution where a witness testified that he had attempted to fire a gun owned by defendant which used small bullets during the time he had been defendant's roommate. The murder weapon was not produced at trial but the pathologist testified that the victim's wounds had been caused by a .22-caliber weapon.

Am Jur 2d, Evidence § 272.

11. Evidence and Witnesses § 221 (NCI4th)— murder—subsequent possession of victim's property—relevant

There was no error in a first-degree murder prosecution in the introduction of testimony that the witness had never

seen defendant drive the victim's car prior to the day he was arrested, had not known the victim to loan his car to anyone, and had never known defendant to own a watch where the defendant was driving the victim's car and had the victim's watch in his pocket when he was questioned. Testimony concerning defendant's sudden and unprecedented possession of the victim's personal property immediately after the victim's murder is relevant to the issue of whether defendant was involved in the killing; however, assuming error under the balancing test of N.C.G.S. § 8C-1, Rule 403, defendant did not show a reasonable possibility that a different result would have been reached at trial had the error not occurred.

Am Jur 2d, Evidence §§ 278 et seq.

12. Searches and Seizures § 4 (NCI4th)— murder—search of victim's automobile in defendant's possession—no expectation of privacy

There was no error in a first-degree murder prosecution from the introduction of evidence seized from the victim's automobile where defendant was in possession of the automobile when it was seized. A person's right to be free from unreasonable searches and seizures is a personal right; the record tends to show that defendant did not have any authority to use the car and defendant's self-serving comments wherein he claimed permission to use the car are not sufficient to meet his burden of showing a legitimate possessory interest in the automobile. Furthermore, it cannot fairly be said that defendant conferred upon himself any reasonable expectation of privacy by driving the car.

Am Jur 2d, Searches and Seizures § 32.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Fulton, J., at the 24 August 1992 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 October 1993.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellant.

MEYER, Justice.

On 23 March 1992, a Mecklenburg County grand jury indicted defendant for the murder of Yhue Kbuor. Defendant was tried noncapitally in the Superior Court, Mecklenburg County, in August 1992 and was found guilty. Judge Shirley L. Fulton thereafter imposed the mandatory life sentence.

The evidence presented by the State at trial tended to show the following: On Thursday, 14 November 1991, a body later identified as that of Yhue Kbuor was found by a state wildlife officer in a pond located in a wooded area off Reedy Creek Road in Wake County. There were no dwellings in the area, and the pond was approximately five to six miles from where defendant once worked as a laborer. The body had been wrapped in a blanket that had become snagged on a tree root and was only partially submerged. Drag marks led down a steep embankment to the body.

The victim had sustained gunshot wounds all over his body. During the autopsy, a total of thirty-three wounds were discovered, although some may have been multiple wounds from a single bullet passing through the body. One wound to the upper abdomen passed upward into the heart and lung. A second wound extended from underneath the chin into the face and brain. The pathologist testified that these two wounds were the only wounds that caused significant internal injury. Eleven projectiles, which appeared to be .22-caliber bullets, were recovered from the body.

A search of the area in which the body was found disclosed several garbage bags roughly one hundred feet from the body. These bags contained various items, including documents that included what was later discovered to be the victim's name and his Charlotte, North Carolina, address. The bags also contained bloody clothing and nineteen expended .22-caliber shell casings. There were several sets of tire tracks in the area. Tire casts were made of some tracks but not all of them.

Members of the Wake County Sheriff's Department contacted and met with members of the Charlotte Police Department on Friday, 15 November 1991. Together they went to the address listed on a bank deposit slip found near the body. They took with them a Polaroid photograph of the deceased victim. The address listed, 2900 #3 Seymour Drive, was a duplex located in North Charlotte. After knocking on the door and getting no answer, the

officers knocked on the door of a neighbor. A woman answered and identified the photograph as that of Yhue Kbuor and indicated that he lived in apartment #3. When the officers attempted once again to get an answer at apartment #3, Detective Roseman of the Charlotte Police Department noticed what appeared to be a bloodstain on the lower part of the screen door. At that point, he requested that a uniformed officer secure the premises while he returned to the law enforcement center to obtain a warrant to enter the apartment. Prior to their return, an Oriental man drove a beige-colored Oldsmobile into the driveway and attempted to gain access to the apartment. The officer stationed there told the individual that he could not go inside the apartment, and the individual got back into the car and drove away.

Upon returning with a warrant, law enforcement officers conducted a search of the apartment. A mattress in the left rear bedroom of the apartment had bullet holes in it, and two spent .22-caliber projectiles were found: one inside the mattress and one in the bottom drawer of a dresser in the bedroom. One live round was found under the bed, and spent shell casings were found under the bed and near the bathroom doorway. Later analysis revealed that the shell casings found in Wake County and the shell casings found in the apartment were from the same manufacturer and had been fired by the same weapon.

At approximately 2:00 a.m. on Saturday, 16 November 1991, Detective Roseman received a call from the Charlotte Police Department duty officer informing him that defendant, who at this time was a "possible suspect," was at his place of employment and was driving the victim's car, a beige Oldsmobile. Upon arrival at defendant's place of employment, Lida Manufacturing Company, Detective Roseman located the victim's car. An exterior inspection revealed red spots, which appeared to be blood, on the bumper. Roseman knocked on the door of the business and asked to speak to defendant. When defendant appeared, Detective Roseman conducted a "pat search" of defendant and removed from defendant's pocket what was later learned to be the victim's watch. Upon questioning, defendant stated that he was driving the victim's car because the victim was sick. At the car, Roseman asked defendant if he knew anything about the stain on the bumper, and defendant initially denied knowing anything about it. Later, defendant stated that it came from some meat that the victim had purchased and placed in the trunk of the car.

Detective Roseman then looked in the trunk of the car and noticed what appeared to be blood on a plastic oil container. Roseman then closed the trunk, and the car was towed to the law enforcement center where a more thorough search was conducted. The search produced several samples of human blood collected from the trunk of the car. Some samples were too small or had deteriorated too badly for detailed examination, but stains from the spare tire cover panel and the trunk carpet were consistent with the victim's blood type. There were no inconsistent samples.

After inspecting the trunk of the car, Roseman asked defendant to accompany him to the law enforcement center to answer questions. Because Roseman anticipated potential language difficulties, an interpreter was summoned. At this time, Roseman believed that defendant spoke Vietnamese, but it was later learned that defendant, a native of the Montagnard region of Vietnam, spoke Dega as well as some English and Vietnamese.

During the interview, defendant appeared to understand what was being asked of him and for the most part responded in English without assistance from the interpreter.

During this interview, defendant completed a waiver of rights form. He stated that he was living with the victim at 2900 #3 Seymour Drive and that the victim had loaned him his automobile because he (the victim) was sick. Defendant stated that he had been in exclusive possession of the automobile since the time the victim loaned it to him. He indicated that the victim did not like defendant's girlfriend and that the victim had told him that if he continued to bring her to the apartment, defendant would have to move.

Defendant admitted once owning a rifle that he had purchased from a gun shop but stated that the rifle had been lost when his car was stolen the previous September. No police report concerning the theft of the rifle had been filed.

Records from the Hyatt Gun Shop in Charlotte indicated that defendant had purchased a .22-caliber automatic rifle from there in May 1991.

The victim's best friend in America, Yjuen Eban, testified that he had helped the victim purchase the automobile in question, a 1984 Oldsmobile. The victim had provided the purchase money, but Eban had registered the car and insured it in his own name

because the victim did not have a driver's license. This witness lived with the victim for some six months after the car was purchased and testified that he had never known the victim to loan the car to anyone. This witness also testified that although he had known defendant for many years, he had never known him to wear a watch. He further testified that a watch found in defendant's possession on 16 November 1991 had belonged to the victim.

During testimony given by the controller for Lida Manufacturing, defendant's time card was introduced into evidence. This time card showed that during the week of the killing, defendant reported to work only one time—late Friday evening just a few hours before he was first contacted by Detective Roseman.

Defendant's girlfriend, Mary Ann Mirelez, testified that defendant had come to see her in her motel room the evening of Thursday, 14 November 1991, the same day the body was discovered in Wake County. Defendant was driving the victim's car. He asked her to accompany him to another motel and she did. Defendant then left Mirelez at this motel, stating that he needed to go pick up his paycheck. Defendant returned after midnight. Defendant and Mirelez then went to defendant's home. Mirelez testified that the door to the victim's bedroom was closed and that defendant gave her varying accounts of the victim's whereabouts, saying first that he was sick and later that he had gone out of town. After staying at this location for a short time, defendant dropped Mirelez off back at her motel room and departed. He returned later that day around noon, again driving the victim's car. He and Mirelez drove to a laundromat to wash clothes; defendant cashed his check at a bank and again dropped Mirelez off at her motel.

Defendant returned again at around 3:00 p.m., still driving the victim's car. He then told Mirelez that the police were at his apartment.

Mirelez also testified that defendant had once shown her a gun. The description of the gun by Mirelez matched the general description given by the salesperson from the Hyatt Gun Shop.

Another witness, Kpoh Cilbiet, testified that he had lived with defendant after defendant moved to Charlotte from Raleigh. Cilbiet stated that defendant had owned a rifle and had hidden it when Cilbiet tried to fire it.

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

[1] In his first assignment of error, defendant contends that the trial court improperly denied his motion to suppress the statement given by him on 16 November 1991. Defendant asserts as grounds for this error that the statement was given without his knowingly, understandingly, and intelligently waiving his constitutional rights.

> When a person is in the custody of a law enforcement officer,
>
> the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706-07 (1966). Defendant was given his *Miranda* warnings, and he initialed a waiver of rights form which indicated that he understood his rights and was willing to answer questions without a lawyer present. However,

> the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly given. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution is not, standing alone, controlling on the question of whether a confession was voluntarily and understandingly made. The answer to this question can be found only from a consideration of all circumstances surrounding the statement.

State v. Rook, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). Defendant argues that he did not voluntarily and understandingly give his statement because he did not fully understand English.

The evidence showed that defendant had only a third-grade education in Vietnam, and there was no evidence that he had had any formal training in English or that he was required to speak it at his job. Additionally, although an interpreter was provided who was fluent in both Vietnamese and English, the defendant's native language was Dega, the language of the Montagnard region

of Vietnam. Defendant asserted these grounds as the basis for his allegation that he did not understand English well enough to waive his rights effectively.

When a defendant makes a motion to suppress, N.C.G.S. § 15A-977(f) requires the trial court to make findings of fact and conclusions of law. The trial court must determine whether the State has borne its burden by showing by a preponderance of the evidence that the defendant's statement was voluntary, but, on appeal, the findings of the trial court are conclusive and binding if supported by competent evidence. *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988).

The trial judge made the following findings of fact:

> 14. The defendant is a Daga [sic] (Montaguard) [sic] of the central Highlands of Vietnam, whose native language is Daga, not Vietnamese; he was 28 years old at the time, came to the United States in 1986, and completed the third grade in his native country with there being no evidence of any further formal education.
>
> 15. The interpreter, not being fluent in the Daga language, conversed with the defendant in English and in Vietnamese. Officer Roseman then, in English, advised the defendant of his constitutional rights, reading them from the form which was admitted as State's Voir Dire Exhibit #2. After each right was read, Officer Roseman asked the defendant if he understood that right, whereupon the interpreter would repeat in Vietnamese what Officer Roseman said in English to the defendant. After each right the defendant replied "yes" in Vietnamese and again "yes" in English. Additionally, at Officer Roseman's request, the defendant placed his initials by each right in the spaces provided on Exhibit 2 and signed the rights form upon the form's completion after Officer Roseman asked if he were willing to waive these rights and answer questions without first consulting with a lawyer.
>
> 16. In addition to the foregoing, with regard to questions (2) and (6) on Exhibit #2, and after being asked if he understood and what they meant, the defendant replied in English that he did and read them out loud in English.
>
> 17. At no time did the defendant indicate a desire to stop answering questions, request to speak with a lawyer,

make any indication to Officer Roseman or the interpreter that he was having difficulty understanding his constitutional rights, or that he had difficulty understanding or speaking English.

18. In the opinion of both Officer Roseman and the interpreter, both while being advised of his constitutional rights and during the entire interview that followed, the defendant appeared to understand the conversation and made logical, coherent and responsive answers to the questions propounded.

19. During his testimony at this hearing, the defendant answered a number of questions in English without first having them interpreted into Daga.

20. The defendant waived his constitutional rights as set out in Exhibit 2 at approximately 6:25 a.m. on November 16, 1991 and immediately thereafter participated in the tape recorded interview that is a subject of this hearing, which interview was concluded at approximately 7:27 a.m.

A review of the pretrial motion hearing transcript reveals the following: When the statement was given, defendant had not been placed under arrest, nor had he been handcuffed, shackled, or restrained in any way. When the waiver of rights form was read to defendant both in English and in Vietnamese, he was asked if he understood his rights. Defendant answered "yes" in English. At no time did defendant indicate that he did not understand the questions. A review of the written transcript of the statement itself indicates that defendant was able to respond logically and appropriately to the questions presented to him in English. Accordingly, we hold that the findings of fact made by the trial judge are supported by competent evidence and, as such, are conclusive. *State v. Barfield*, 298 N.C. 306, 339, 259 S.E.2d 510, 535 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).

Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court and "are fully reviewable on appeal." *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992); *see also Rook*, 304 N.C. at 216, 283 S.E.2d at 742. The focus of our inquiry is whether the conclusion, that defendant's waiver of rights and subsequent statement were given knowingly and voluntarily, is supported by the findings. Again, such an inquiry

requires the Court to examine "all circumstances surrounding the statement." *Rook*, 304 N.C. at 216, 283 S.E.2d at 742.

The record gives no indication that defendant was threatened, coerced, or harassed. Defendant had been in the United States for six years and was able to participate in the interview using English. On those occasions when the interpreter assisted defendant, he was able to continue the interview in English, giving logical responses to the questions asked. When Detective Roseman asked defendant if he understood instructions (2) and (6) on the waiver of rights form, defendant replied that he did and read them aloud in English. There is nothing in the record to indicate anything more than occasional communication difficulties between defendant and Detective Roseman. We hold that the trial court's determination that defendant waived his rights knowingly, intelligently, and voluntarily was correct in light of the findings; thus, this assignment of error is overruled.

[2] Defendant next contends that it was error for the trial court to admit Detective Roseman's testimony concerning statements made on defendant's behalf by his interpreter. Defendant bases his argument on our recent decision in *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992), in which we held that a law enforcement officer's

> testimony regarding defendant's responses during interrogation, as translated to him by the duly qualified interpreter, was proper because it fell within the exception to the hearsay rule for admissions of a party opponent made through defendant's agent, the interpreter.

Id. at 637, 412 S.E.2d at 355. Defendant argues that the interpreter in this case was not qualified to serve as his agent, as she spoke Vietnamese and defendant's principal language was Dega. Thus, defendant argues, no agency relationship existed, and it was therefore error for Detective Roseman to testify concerning the interpreter's statements. We disagree.

An examination of the transcript of the interview leads us to the conclusion that it is not necessary to determine the existence of an agency relationship between defendant and his interpreter. This is not a situation where the defendant and the questioning officer found each other to be unintelligible. Rather, the transcript shows that, for the most part, both defendant and Detective Roseman

communicated in English. Detective Roseman testified that "[a]ll the questions that I asked he responded [to] in English."

The only portion of Roseman's testimony that concerned statements elicited with the assistance of the interpreter was that concerning the circumstances surrounding the theft of the victim's automobile and the victim's attitude toward defendant's girlfriend. In both cases, after the interpreter briefly clarified the subject matter of the questions for defendant, defendant and Detective Roseman were able to continue the interview in English.

We thus hold that this case does not involve the agency issues discussed in *Felton*. Even assuming *arguendo* that it does, defendant has not made a sufficient showing to rebut "the presumption of agency that arises when an accused accepts the benefit of the proffered translation to make a voluntary statement." *Felton*, 330 N.C. at 636, 412 S.E.2d at 355. Defendant's contention on this issue is without merit.

[3] Defendant next contends that it was error for the trial court to allow Detective Roseman to use the written transcription of defendant's tape-recorded statements to refresh his recollection of the statements made by defendant. This assignment of error is likewise without merit.

"It is generally accepted that two types of aid are available for a witness: *past recollection recorded* and *present recollection refreshed.*" *State v. Smith*, 291 N.C. 505, 516, 231 S.E.2d 663, 670 (1977). " 'Under present recollection refreshed[,] the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch,' and he testifies from his memory so refreshed." *State v. Gibson*, 333 N.C. 29, 50, 424 S.E.2d 95, 107 (1992) (quoting *State v. Corn*, 307 N.C. 79, 83, 296 S.E.2d 261, 264 (1982)), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). The evidence presented at trial comes from the witness' memory, not from the aid upon which the witness relies; thus, there is no need to engage in the foundational inquiry required under the doctrine of past recollection recorded. *See id.* at 50, 424 S.E.2d at 107. It is only " '[w]here the testimony of the witness purports to be from refreshed memory but is *clearly* a mere recitation of the refreshing memorandum[ ] [that] such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge.' " *Id.* (quoting *State v. Smith*, 291 N.C. at 516, 231 S.E.2d at 670-71). There being no indication in the record that

Detective Roseman was not able to rely primarily upon his own memory of events in the giving of his testimony, we hold that the use of the transcript to refresh his recollection was not error.

[4] In his next assignment of error, defendant contends that the trial judge erred in denying defendant's request to review the tape recording of his statement and erred in allowing Detective Roseman to testify as to defendant's statements contained therein without first introducing the tape recording into evidence.

With regard to his request that the trial judge review the tape recording, defendant argues that had the trial judge done so, she would have concluded that the tape recording was the "best evidence" of defendant's statements. We disagree.

Under the "best evidence" rule as codified in the North Carolina Rules of Evidence, when the contents of a writing are to be proved, the original writing is required. N.C.G.S. § 8C-1, Rule 1002 (1992).

Here, Detective Roseman was not attempting to prove the contents of the tape recording or the transcript of the recorded statement given by defendant. Rather, Detective Roseman used the transcript of the recorded statement to refresh his personal recollection of defendant's responses to the questions asked. The "best evidence" rule does not apply to a document that serves only to refresh a witness' memory and is not offered into evidence. *See State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970); *State v. Cobbins*, 66 N.C. App. 616, 311 S.E.2d 653 (1984). Defendant's assignment of error on this issue is overruled.

[5] In defendant's next assignment of error, he contends that the trial court erred in denying his motion to dismiss the charge of murder on the grounds that the evidence presented by the State was insufficient to demonstrate the elements of the crime charged. Once again, defendant's argument has no merit.

When the trial judge rules on a motion to dismiss:

> "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable

> to the State is to be considered by the court in ruling on the motion."

State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982).

N.C.G.S. § 14-7 "[separates] first degree murder into four distinct classes as determined by the proof." *State v. Strickland*, 307 N.C. 274, 282, 298 S.E.2d 645, 651 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). One such class is "[m]urder perpetrated by any . . . kind of willful, deliberate and premeditated killing." *Id.* Defendant was charged with first-degree murder based on premeditation and deliberation. "Premeditation means the perpetrator thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citing *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984)). "Deliberation means the perpetrator carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation." *Id.*

> Premeditation and deliberation are mental processes which are ordinarily not susceptible to proof by direct evidence. In a majority of cases, they must be proved by circumstantial evidence. Some of the circumstances from which premeditation and deliberation may be implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. at 565, 411 S.E.2d at 596 (citing *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986)).

The evidence presented in the present case clearly supports the inference that the crime was committed in a premeditated and deliberated manner. The mattress in the victim's bedroom had bullet holes in it. Slugs and shell casings matching those found in the vicinity of the corpse were found in the bedroom. There were bloodstains on the screen door of the apartment. This evidence indicates that the killing was done in the apartment and that quite likely the victim was in his bed, perhaps asleep when the first shots were fired. The victim sustained thirty-three bullet wounds all over his body. Some of the entry wounds were in the victim's back, suggesting that he was trying to escape as he was being shot. These circumstances clearly support an inference that this was not a killing that occurred in a moment of uncontrollable passion.

The victim's body was found near Raleigh, more than one hundred miles away from the likely scene of the killing. Near the body were garbage bags that contained expended shell casings fired from the same weapon that was used in the Charlotte apartment. Personal effects and clothing of the victim were found in the vicinity. It thus appears that the perpetrator, upon completion of his crime, attempted to conceal his activities by collecting and disposing of the evidence in a remote spot far from the scene of the killing. We hold that there was substantial evidence to support the inference that the killing was done in a premeditated and deliberated manner.

[6] Defendant in the present case argues that while the evidence raises a suspicion of his guilt, the State failed to present evidence that he was the perpetrator of the crime. Again, defendant's argument is without merit. The evidence showed that the victim and defendant were roommates. When defendant's girlfriend visited their apartment shortly after the time of the victim's death, defendant offered inconsistent accounts of the victim's whereabouts. The killing was shown to have taken place about the time that defendant was normally at work, but was not. The victim's body was found far from defendant's home, but in a location with which defendant would have been familiar, having worked nearby in prior years. Defendant drove the victim's car and was in possession of the victim's watch after the crime. There was evidence that the victim had never previously allowed even his closest friend to drive his car. Defendant stated that he had been in exclusive possession of the vehicle during the time period of the killing, and blood samples matching the victim's own were found in the trunk of

the car. Defendant was shown to have owned a weapon of a make and caliber consistent with the weapon that inflicted the victim's wounds. There was evidence of some hostility between defendant and the victim concerning defendant's relationship with Mary Ann Mirelez.

We conclude that there was substantial evidence to support the inference that defendant was the perpetrator of this premeditated and deliberated killing and that defendant's assignment of error on this issue is without merit.

[7] Defendant next contends that because the Charlotte Police Department improperly relinquished its custody of the victim's automobile, the case against him must be dismissed.

The vehicle first became the subject of investigation during the early morning hours of 16 November 1991. It was at this time that Detective Roseman first encountered defendant at his place of employment. Upon noticing what appeared to be bloodstains on the bumper and within the trunk of the automobile, Detective Roseman had the car towed to the law enforcement center.

When defendant's counsel stated that she needed the results of a comparison of the car's tire treads to plaster casts of vehicle tracks made at the location in Wake County where the victim's body was found, she was informed that no such comparison had been made. She was also informed that the vehicle had been released from custody, and it was later learned that the tires on the car had been changed.

The State concedes that the rules concerning the safekeeping of potential evidence were violated in this case. N.C.G.S. § 15-11.1(a) provides as follows:

> (a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner . . ., or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney

> refuses to release such property, the lawful owner . . . may make application to the court for return of the property.

N.C.G.S. § 15-11.1(a) (1983). In the present case, the car was released to the executor of the victim's estate without the authority of the district attorney or the court.

A violation of this section does not, however, mandate dismissal of the charges against defendant. In considering the effect, if any, of the release of this evidence, such inquiry must focus on the question of whether defendant was thereby deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

The United States Supreme Court has faced similar questions with regard to situations where a defendant was unable to obtain access to evidence. In *Brady v. Maryland*, the 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.

373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). In that case, the defendant had asked to examine statements made by his co-conspirator. One such statement, in which the co-conspirator admitted the actual homicide, was withheld from the defendant. *Id.* at 84, 10 L. Ed. 2d at 217. Based on these circumstances, the Supreme Court ruled that the withholding of that evidence violated the defendant's right to due process. *Id.* at 87, 10 L. Ed. 2d at 218.

The present case, however, is readily distinguishable from *Brady*. Here, counsel for defendant stated that had she been allowed access to the car, she would have compared the tire treads on the vehicle to the plaster casts made of tire tracks at the location where the body was discovered "and see what, if anything, we could determine." The State did not make any such comparisons; furthermore, the investigating officers at the Wake County site did not make plaster casts of all of the vehicle tracks found at that location. Thus, all that defense counsel would have been able to show if a match was not found was that, for whatever reason, no plaster casts matched the tires presently on the vehicle. Put another way,

whereas a match would have been highly incriminating, the absence of a match would have been only marginally exculpatory.

We think this case resembles *Arizona v. Youngblood*, where the defendant in a rape trial claimed that his due process rights were violated when the police failed to test or properly preserve for testing certain articles of the victim's clothing. The Supreme Court rejected this argument, stating:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.

488 U.S. 51, 57, 102 L. Ed. 2d 281, 289 (1988), *reh'g denied*, 488 U.S. 1051, 102 L. Ed. 2d 1007 (1989). The Supreme Court went on to hold "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58, 102 L. Ed. 2d at 289.

Defendant in this case has not alleged or demonstrated any bad faith on the part of the police in the release of the automobile, nor does the record reveal any such conduct. The exculpatory value of any tests defendant wished to perform on the automobile was speculative at best. Accordingly, defendant's assignment of error on this issue is without merit.

[8] In his next assignment of error, defendant contends that the trial judge erred in admitting two photographs of the victim taken during the victim's autopsy.

The photographs at issue are State's exhibits #18 and #28. Exhibit #18 depicts the head of the victim's corpse with a pathologist's probe inserted through the cheek and out of the temple, indicating the path of one of the gunshot wounds sustained by the victim. Exhibit #28 is a photograph of the victim's ankle showing the entrance and exit of another gunshot wound.

Defendant did not object to the admission of these photographs into evidence but contends on appeal that "the photographs at issue here lacked any probative value whatsoever and were inflammatory, their erroneous admission was a fundamental error, so prejudicial, so lacking in its elements that it denied defendant a fair trial."

In order for photographic evidence to be admitted, it must first meet the relevancy requirements of Rule 401 of the North Carolina Rules of Evidence, that is, the photograph must have a "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).

In this case, the photographs were used to show the nature and extent of the wounds sustained by the victim. The photographs were relevant to show not only the cause of death, *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), but also, because they showed numerous gunshot wounds, were relevant as a means of proving the premeditation and deliberation elements of first-degree murder, *State v. Olson*, 330 N.C. 557, 585, 411 S.E.2d 592, 596; *see State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673.

After the photographs have been shown to be relevant, they are still subject to exclusion under Rule 403 if their "probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). In ruling on the admissibility of photographic evidence, the trial judge must engage in what is known as a balancing test pursuant to Rule 403. "In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). It is only "where 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" that the trial judge's ruling will be overturned on appeal. *Id.*

Although no definitive test for the admissibility of photographs alleged to be inflammatory and unduly prejudicial has been developed, factors that courts have looked to in the past include: (1) the number of the photographs, *State v. Sledge*, 297 N.C. 227,

231-32, 254 S.E.2d 579, 582 (1979); (2) whether the photographs were unnecessarily duplicative of other testimony, *State v. Mercer*, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969), *overruled on other grounds by State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975); (3) whether the purpose of the photographs was aimed solely at arousing the passions of the jury, *State v. Murphy*, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988); and (4) the circumstances surrounding the presentation of the photographs, *State v. Hennis*, 323 N.C. 279, 286, 372 S.E.2d 523, 528.

The two photographs in the present case were admitted to show the wounds sustained by the victim. There is no indication in the record that the jury was subjected to unnecessary or excessive descriptions of the injuries to the victim. The photographs were taken in a clinical setting and are not particularly gruesome given the circumstances of the crime. The context in which they were introduced does not suggest that their purpose was to inflame the passions of the jury. The forensic pathologist, Dr. John D. Butts, merely gave a brief description of what the photographs contained as foundation for their admission into evidence. The photographs were subsequently distributed to the jury by hand. We find no error in the admission of the photographs.[1]

Defendant's next three assignments of error concern the admission of testimony given by three different witnesses. Defendant questions the relevance of the testimony of each and contends that even if the testimony has some relevance, it should have been excluded pursuant to Rule 403 because, "[a]lthough 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. Such a determination is within the discretion of the trial judge, and his ruling will not be overturned unless the "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Shoemaker*, 334 N.C. 252, 261, 432 S.E.2d 314, 318 (1993).

[9] In the first of these assignments of error, defendant contends that the trial court erred in allowing Mary Ann Mirelez to testify that she had seen defendant in possession of a black rifle with

1. In an apparent typographical error, the question presented in defendant's brief lists State's exhibit #26 as one of the offending photographs. We have examined exhibit #26 and, in accordance with the reasoning stated for exhibits #18 and #28, find no error in its admission.

a clip on the bottom and, as she described it, "a long handle that pulled back." Defendant argues that because no murder weapon was produced at trial and because there was no evidence showing a link between the rifle seen by Mirelez and the weapon used to kill Mr. Kbuor, such evidence was irrelevant and highly prejudicial.

When no weapon is found in a defendant's possession at the time of his arrest or thereafter, testimony that defendant had once owned or possessed a weapon becomes especially relevant. By its nature, such evidence is circumstantial, but circumstantial evidence is proper and sufficient to prove facts at issue in a trial. *State v. Arsad*, 269 N.C. 184, 152 S.E.2d 99 (1967); *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 506 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966); *State v. Alston*, 233 N.C. 341, 64 S.E.2d 3 (1951).

Defendant contends that because there was no link between the rifle described by Mirelez and the weapon that killed Mr. Kbuor, the testimony was highly prejudicial and should have been excluded. Defendant overlooks the testimony of William S. Wasserman, a salesman for the Hyatt Gun Shop in Charlotte. During Mr. Wasserman's testimony, a federal form entitled a "Firearms Transaction Record" was introduced into evidence. This form indicated that an individual who identified himself as Ysut Mlo purchased a .22-caliber semiautomatic rifle with a fifteen-round clip and retracting stock. The pathologist clearly indicated that the victim's wounds had been caused by a .22-caliber weapon.

The testimony of Mary Ann Mirelez was used to prove that defendant had owned a weapon that could have been used to kill the victim. We hold that such testimony is relevant and that the trial court did not commit error in the admission of the testimony. Defendant's assignment of error is without merit.

[10] Defendant raises a similar assignment of error with regard to the testimony of witness Kpoh Cilbiet. Cilbiet testified that during the time that he and defendant were roommates, he attempted to fire a gun owned by defendant, and that the gun had small bullets. Again, defendant contends that this testimony was irrelevant and unfairly prejudicial. We hold, in accordance with the reasoning stated above, that such testimony is relevant and admissible, and defendant's assignment of error on this point is likewise without merit.

[11] Defendant's next assignment of error concerns the testimony of witness Yjuen Eban. Eban testified that he had never seen defendant drive the victim's car prior to the day he was arrested nor had he known the victim to loan his car to anyone including himself, even though he and Kbuor had lived together for six months. Again, defendant contends that this testimony was irrelevant or that whatever probative value the statements had was substantially outweighed by the danger of unfair prejudice. Defendant says the same with regard to Eban's testimony that he had never known defendant to own a watch, and the watch found in defendant's pocket at the time he was initially questioned belonged to the victim.

Testimony concerning defendant's sudden and unprecedented possession of the victim's personal property immediately after the victim's murder is relevant to the issue of whether defendant was involved in the killing. Assuming *arguendo*, however, that it was error to allow the testimony under the balancing test of Rule 403, defendant bears the burden of showing that had the error not occurred, there is a reasonable possibility that a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Defendant has presented nothing to persuade this Court that this is the case nor does a reading of the transcript indicate that this might be so. As defendant has not borne this burden, he is not entitled to a new trial based on this assignment of error.

[12] In his final assignment of error, defendant contends that the trial court erred in denying his motion to suppress the evidence seized from the victim's automobile, including the results of the tests performed on the evidence. Defendant argues that the search and seizure of the vehicle and the evidence it contained violated his Fourth Amendment right to be free from unreasonable searches and seizures.

Before defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's. A person's right to be free from unreasonable searches and seizures is a personal right, and only those persons whose rights have been infringed may assert the protection of the Fourth Amendment. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *State v. Gordon*, 287 N.C. 118, 213 S.E.2d 708 (1975), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976); *State v. Craddock*, 272 N.C. 160, 158 S.E.2d 25 (1967).

"It is a general rule of law in this jurisdiction that one may not object to a search or seizure of the premises or property of another." *State v. Greenwood*, 301 N.C. 705, 707, 273 S.E.2d 438, 440 (1981) (citing *State v. Eppley*, 282 N.C. 249, 192 S.E.2d 441 (1972); *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968); *State v. Craddock*, 272 N.C. 160, 158 S.E.2d 25). The basis for this rule is the requirement that the individual relying on immunity from unreasonable searches and seizures have a " 'reasonable expectation of freedom from governmental intrusion' " in the place or property searched. *State v. Alford*, 298 N.C. 465, 471, 259 S.E.2d 242, 246 (1979) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 20 L. Ed. 2d 1154 (1968)); *see also Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576 (1967).

> [T]he lack of property rights in an invaded area is not necessarily determinative of whether an individual's Fourth Amendment rights have been infringed. Nonetheless, there are many instances in which the presence or absence of property rights in an invaded area are the best determinants of an individual's reasonable expectations of privacy.

Alford, 298 N.C. at 471, 259 S.E.2d at 246 (citations omitted). The burden of showing this ownership or possessory interest is on the person who claims that his rights have been infringed. *Greenwood*, 301 N.C. at 708, 273 S.E.2d at 441; *see also State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979).

In the present case, the vehicle that was searched belonged to the victim. The only indication of any right to possession by the defendant was his unsubstantiated assertion in his initial statement that the victim had loaned the car to him because the victim was "sick." The record tends to show that defendant did not have any authority to use the car. Defendant did not present any evidence at trial that showed he had permission to use the car. Although defendant was not charged with the theft of the automobile, the evidence indicates that he was using the automobile without the deceased owner's permission. Defendant's self-serving comments wherein he claimed permission to use the car are not sufficient to meet his burden of showing a legitimate possessory interest in the automobile. Furthermore, it cannot fairly be said that by driving the car, defendant conferred upon himself any reasonable expectation of privacy with regard to the vehicle. *See Greenwood*, 301 N.C. at 709, 273 S.E.2d at 441 ("No thief has any reasonable

expectations of privacy in his use of the property he has stolen."). Defendant does not, therefore, have standing to assert a privilege against the search and seizure of the vehicle. Defendant's assignment of error on this point is therefore without merit.

We conclude that defendant received a fair trial free from prejudicial error and that the judgment appealed from must be upheld.

NO ERROR.

HAYWOOD HARRIS, ADMINISTRATOR OF THE ESTATE OF ETTA HARRIS v. GEORGE J. MILLER, M.D.

No. 345A91

(Filed 28 January 1994)

1. **Labor and Employment § 231 (NCI4th)— borrowed servant rule—temporary employer's liability for servant's negligence**

Under the "borrowed servant" rule, one who borrows another's employee may be considered a temporary master liable in *respondeat superior* for the borrowed employee's negligent acts if acquiring the same right of control over the employee as originally possessed by the lending employer.

Am Jur 2d, Master and Servant § 415.

2. **Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— personnel assisting surgeon—presumption of control by hospital**

A surgeon should no longer be presumed to enjoy the authoritative control of a master over all who assist in an operation merely because he is "in charge" of the operation. Rather, under traditional borrowed servant principles, the hospital must be presumed to retain the right of control over operating room employees. To the extent that *Jackson v. Joyner*, 235 N.C. 259 (1952) sanctions such a presumption, it is overruled.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 288.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

3. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence of skilled assistant—liability of surgeon under respondeat superior

A surgeon may be held liable under the doctrine of *respondeat superior* for the negligence of even a skilled assistant if the surgeon in fact possessed the right to control that assistant at the time of the assistant's negligent act regardless of whether the surgeon should reasonably have been aware of the negligent conduct sought to be imputed to him. To the extent that *Starnes v. Hospital Authority*, 28 N.C. App. 418 (1976) conflicts with this proposition, it is overruled.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 288.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

4. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence of assistant—vicarious liability of surgeon

Whether a surgeon may be held vicariously liable for the negligence of one assisting in an operation depends on whether, in the particular case, the surgeon had the right to control the manner in which the assistant performed.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 288.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

5. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— negligence of nurse anesthetist—control by surgeon—liability of surgeon

Plaintiff's evidence of a temporary master-servant relationship between defendant surgeon and a nurse anesthetist was sufficient to present a question for the jury as to the surgeon's vicarious liability for the nurse anesthetist's negligence under the "borrowed servant" doctrine where plaintiff's evidence tended to show that the surgeon agreed with the hospital to control the performance of the nurse anesthetists assigned to his cases in that he agreed to comply with the hospital's anesthesia manual as a condition of his staff privileges, and the manual gives the surgeon direct responsibility not only for the selection of anesthetic agents but also for the tech-

niques used to administer them; a medical emergency occurred in this case, and the surgeon had the right to control the anesthetist's every act in a medical emergency; and the surgeon was capable of exercising authoritative control over the anesthetist in that he knew the principles of anesthesia administration and exercised such control when he ordered the anesthetist to stop all anesthesia and give the patient one hundred percent oxygen.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 288.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

6. **Torts § 7.6 (NCI3d); Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— release of servant—vicariously liable master not released**

Under the Uniform Contribution Among Tort-Feasors Act, the release of a servant no longer operates to release a vicariously liable master unless the terms of the release so provide. Therefore, the trial court erred in directing a verdict for defendant surgeon on the issue of his vicarious liability for the negligence of a nurse anesthetist on the ground that plaintiff had executed a covenant not to sue the anesthetist. N.C.G.S. § 1B-4.

Am Jur 2d, Master and Servant § 409; Physicians, Surgeons, and Other Healers § 288.

Liability of operating surgeon for negligence of nurse assisting him. 12 ALR3d 1017.

7. **Evidence and Witnesses § 2254 (NCI4th)— expert in nurse anesthesia—competency to testify as to need for supervision—exclusion of testimony prejudicial**

In a wrongful death action based upon defendant orthopedic surgeon's alleged negligent supervision of a nurse anesthetist during surgery, an expert in nurse anesthesia was competent to testify that (1) the nurse anesthetist needed supervision in ascertaining that there was a medical crisis and in deciding what remedial measures should be taken, and (2) the surgeon had a duty to provide such supervision where the witness testified that, in her fifteen years of practice as a nurse anesthetist, she had participated in thousands of operations

since the witness was as knowledgeable as surgeons about what a nurse anesthetist can competently do without supervision. Furthermore, the exclusion of this testimony was prejudicial error where the jury returned a verdict in favor of defendant surgeon, this witness was the only one who offered to testify that the anesthetist needed defendant's supervision in a medical emergency and was incapable of making the proper decisions without help, and the admission of this testimony could have altered the jury's verdict.

Am Jur 2d, Master and Servant § 409; Physicians, Surgeons, and Other Healers § 223.

Justice MEYER dissenting.

Appeal of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) and on discretionary review of an additional issue pursuant to N.C.G.S. § 7A-31(a), from a decision of the Court of Appeals, 103 N.C. App. 312, 407 S.E.2d 556 (1991), affirming a judgment entered by Griffin, J., in the Superior Court, Martin County, on 5 January 1989. Heard in the Supreme Court 13 March 1992.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Adam Stein, for plaintiff-appellant.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale and Kurt E. Lindquist, II, for defendant-appellee.

EXUM, Chief Justice.

Of primary importance in this case is the following question: under what circumstances should a surgeon in charge of an operation be held vicariously liable for the negligence of medical personnel who assist in performing the operation?

I

On 1 June 1981, Mrs. Etta Harris underwent back surgery under general anesthesia at Beaufort County Hospital. Defendant George Miller, M.D., an orthopedic surgeon, performed the surgery assisted by William Hawkes, a nurse anesthetist. As a result of inadequate oxygenation during the surgery, Mrs. Harris suffered brain damage and paralysis. Some six years later, she died from complications secondary to the brain damage.

In 1983, Mrs. Harris and her husband filed suit for personal injury and loss of consortium against the hospital, Dr. Miller and Nurse Hawkes. They later settled their claims against the hospital and Nurse Hawkes, executing a covenant not to sue, but specifically reserved the right to pursue any claims against Dr. Miller. When Mrs. Harris died, the complaint was amended to allege wrongful death and the case proceeded against Dr. Miller on theories of direct and vicarious liability. Plaintiff claimed that Dr. Miller was negligent in causing a severe bleeding problem during the surgery, in failing to properly treat the bleeding problem and in failing to adequately supervise Nurse Hawkes. Plaintiff also claimed that Dr. Miller should be held liable for the negligence of Nurse Hawkes under the doctrine of *respondeat superior*. At the close of plaintiff's evidence, the trial court granted Dr. Miller's motion for a directed verdict on the vicarious liability claim, finding the evidence insufficient to establish a master-servant relationship between Dr. Miller and Nurse Hawkes. As an alternative basis for the directed verdict, the trial court held that the prior release of Nurse Hawkes served to exonerate Dr. Miller. The case was submitted to the jury on the sole issue of Dr. Miller's negligence.

The jury found for Dr. Miller and plaintiff appealed. The Court of Appeals, Judge Phillips dissenting, affirmed the judgment below. 103 N.C. App. 312, 407 S.E.2d 556 (1991). Plaintiff appealed to this Court on the basis of the dissent, presenting the following issues: 1) whether the trial court erred in directing a verdict on the issue of Dr. Miller's vicarious liability, and 2) whether the trial court erred in excluding certain testimony of plaintiff's expert on nurse anesthesia care. We granted plaintiff's petition for discretionary review of an additional issue, not addressed by the Court of Appeals: whether the trial court erred in ruling that the release of the servant, Nurse Hawkes, extinguished the vicarious liability of the master, Dr. Miller. Having concluded that the Court of Appeals erred in affirming the trial court's rulings on the first two issues, and that the trial court erred in its ruling on the release issue, we now reverse the Court of Appeals and grant plaintiff a new trial.

II

Plaintiff's evidence tended to show the following.

In early 1981, Mrs. Harris began experiencing severe back pain. She consulted Dr. Miller, an orthopedic surgeon, who diag-

nosed a ruptured disc requiring surgery. Dr. Miller performed the surgery on June 1, 1981, at Beaufort County Hospital, where he had staff privileges. Anesthesia was administered by Nurse Hawkes, a certified registered nurse anesthetist employed by the hospital and assigned to the case by the hospital's Chief Anesthetist. Because the hospital did not employ a staff anesthesiologist, Nurse Hawkes worked for the duration of the case, as stated in the hospital's Anesthesia Manual, under the "responsibility and supervision" of Dr. Miller. No anesthesiologist was available for consultation within thirty miles.

The operation appears to have been doomed from the start by Nurse Hawkes' negligent performance of the pre-operative anesthesia evaluation. Among other errors, Nurse Hawkes interpreted Mrs. Harris' chest X-rays as "negative" when in fact she had an enlarged heart—evidence of past heart disease—and failed to perform an electrocardiogram despite her mild obesity and history of high blood pressure. As a result, Nurse Hawkes was unaware of Mrs. Harris' heart problems, an unfortunate circumstance given that he would be using anesthetic agents—Demerol, Innovar and Ethrane—that can significantly lower blood pressure in patients with depressed cardiac function.

Come the day of the operation, Nurse Hawkes put Mrs. Harris to sleep at 7:45 a.m. After inserting an endotracheal tube, he turned the patient and started the maintenance anesthesia: sixty-six percent nitrous oxide, thirty-three percent oxygen and one percent ethrane. As expected, Mrs. Harris' blood pressure dropped slightly. In most patients, the drop in blood pressure at induction is a normal reaction to the anesthetic agents and is no cause for concern; the blood pressure soon rights itself in response to the stimulation of surgery. However, when surgery began at 8:05 a.m., Mrs. Harris' blood pressure did not return to normal. Instead, it continued to drop, while her pulse rate rose dramatically.

Thinking that his patient was feeling pain, too lightly anesthetized, Nurse Hawkes administered high dosages of Demerol and Innovar, and continued to give high levels of Ethrane. Her pulse rate did not decrease, however, and her blood pressure remained dangerously low. In actuality, Mrs. Harris was suffering from a lack of oxygen and too much anesthesia. Post-surgery X-rays revealed that the endotracheal tube had slipped into her right lung, leaving the left lung unventilated. Her heart was beating faster

to compensate for the lack of oxygen, her blood pressure unresponsive because of the anesthetics. Nurse Hawkes did not realize that the endotracheal tube had slipped because, contrary to standard procedure, he had not checked for bilateral breath sounds when he turned the patient after intubation.

Nurse Hawkes continued to give high levels of anesthesia from 8 to 9 a.m. During this time, Mrs. Harris' blood pressure remained at 100 systolic, 70 diastolic, some thirty to fifty points lower than normal, and her pulse rate at 130. Nurse Hawkes did not inform Dr. Miller of the problem.

For Dr. Miller, the operation proceeded smoothly until 8:40 a.m., when he noticed an unusual amount of bleeding. Having just finished removing the extruded disk, Dr. Miller applied small packs to the bleeding and proceeded to clean the disk space. This done, he removed the packing only to find that the bleeding had continued unabated. By 9 a.m., Mrs. Harris had lost roughly 400 cc's of blood, 300 cc's more than a patient would normally lose over the entire operation. At this point, Dr. Miller instructed Nurse Hawkes to start giving the patient blood.

In derogation of this direct order, Nurse Hawkes did not start giving blood until roughly 9:40 a.m. In the meantime, Mrs. Harris suffered a precipitous drop in blood pressure due to the loss of blood volume. By 9:15 a.m., her blood pressure had dropped to 90 systolic, 60 diastolic; by 9:25 a.m., to 80 systolic, her diastolic now inaudible; by 9:40 a.m., to 70 systolic. Here her blood pressure would remain, a level incompatible with normal brain function, until 10:20 a.m., while her pulse rate rose to 140. Yet still, Nurse Hawkes did not inform Dr. Miller. Nor did he take appropriate remedial measures. The proper course of action would have been to cut off all anesthesia and give one hundred percent oxygen as of 9:15, at the very latest. Instead, Nurse Hawkes administered a final dose of Demerol at 9:15 a.m., continued Ethrane until 9:45 a.m. and left the oxygen at thirty-three percent until 11 a.m., long after Mrs. Harris had suffered permanent brain damage.

All the while, Mrs. Harris continued to bleed. By 10 a.m., Dr. Miller had succeeded only in identifying the source of the bleeding, a small hole in one of the vertebra on which he had operated. Realizing, then, that there was a "major bleeding problem," Dr. Miller requested more blood and applied Surgicel to the wound. He also called in another surgeon to assist him. The Surgicel

stopped the bleeding. Unfortunately, Dr. Miller removed the Surgicel after only twenty minutes, fearing that it would swell and damage Mrs. Harris' spinal cord. Though the bleeding resumed at a vigorous rate, Dr. Miller did not replace the Surgicel. Instead, he tried again to control the bleeding with direct pressure. According to one of plaintiff's experts, in failing to keep the Surgicel in place, Dr. Miller turned "a very bad situation into a[n] irretrievable one."

By 10:20 a.m., Mrs. Harris' systolic blood pressure had dropped to 40, her diastolic blood pressure still inaudible. At this point, Nurse Hawkes administered neo-synephrine, a vasoconstrictor. Mrs. Harris' blood pressure rose briefly but soon plunged again. Now her pulse rate began to drop as well, rapidly. When Nurse Hawkes checked her vital signs at 11:10 a.m., she had no discernible blood pressure or pulse. He then, for the first time, informed Dr. Miller that Mrs. Harris was *in extremis*. This intelligence came as a surprise to Dr. Miller. Though his patient had been losing blood at an alarming rate for two and a half hours, Dr. Miller had not once inquired about her vital signs.

Dr. Miller immediately made a partial closure of Mrs. Harris' back, turned her and devoted himself to the resuscitation effort. With the help of a number of surgical specialists he had called in to assist him, Dr. Miller ultimately succeeded in restoring Mrs. Harris' blood pressure and pulse. His efforts, however, came far too late to prevent her injuries, the damage to her brain having occurred sometime between 9 and 10:45 a.m.

Mrs. Harris remained in a coma for some time after the operation. When she regained consciousness, she could no longer move any of her limbs effectively. She could only breathe with the aid of a tube inserted in her neck, and paralysis of the vocal cords prevented her from speaking. She would spend eight months in rehabilitative hospitals before returning home. The home remodeled to meet her many needs, she was cared for almost exclusively by her husband for the next five years. Despite daily, agonizing, rehabilitation exercises, her health slowly deteriorated and she died on November 8, 1987.

III

The first issue raised is whether the trial court properly directed a verdict for Dr. Miller on plaintiff's vicarious liability claim. We

hold that plaintiff presented sufficient evidence of a master-servant relationship between Dr. Miller and Nurse Hawkes to get this claim to the jury.

[1] Because Nurse Hawkes was employed by Beaufort County Hospital, Dr. Miller's vicarious liability, if any, depends upon the "borrowed servant" doctrine: One who borrows another's employee may be considered a temporary master liable in *respondeat superior* for the borrowed employee's negligent acts if acquiring the same right of control over the employee as originally possessed by the lending employer. *Weaver v. Bennett*, 259 N.C. 16, 129 S.E.2d 610 (1963); *Restatement (Second) of Agency* § 227 comment a (1957). Though the rule is clear, our courts have not always consistently applied it in determining the liability of surgeons for the negligence of operating room personnel. Our first task, then, must be to clarify the proper application of the borrowed servant rule in this context.

A

The traditional test of liability under the borrowed servant rule is as follows:

> Whether a servant furnished by one person to another becomes the employe (sic) of the person to whom he is loaned [depends on] whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it*. . . . A servant is the employe (sic) of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually *exercises* that control or not.

(Emphasis in original). *Weaver*, 259 N.C. at 28, 129 S.E.2d at 618 (quoting *Mature v. Angelo*, 373 Pa. 593, 97 A.2d 59 (1953)); *see also Hodge v. McGuire and Fingleton v. McGuire*, 235 N.C. 132, 69 S.E.2d 227 (1952); *and Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E.2d 729 (1940).

Employment, of course, is a matter of contract. Thus, where the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive. *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963). Absent such an agreement, inferences must be drawn from the circumstances surrounding the employment. *Id.* Facts considered relevant include whether the lent servant is a specialist, which employer supplies

the instrumentalities used to perform the work, the nature of those instrumentalities, the length of the employment, the course of dealing between the parties, whether the temporary employer has the skill or knowledge to control the manner in which the work is performed and whether the temporary employer in fact exercises such control. Of these, the actual exercise of control is the most weighty. *See Lewis v. Barnhill*, 267 N.C. 457, 148 S.E.2d 536 (1966); *Leggette v. McCotter*, 265 N.C. 617, 144 S.E.2d 849 (1965); *Weaver*, 259 N.C. 16, 129 S.E.2d 610; *Hodge*, 235 N.C. 132, 69 S.E.2d 227; *Beatty v. H.B. Owsley & Sons, Inc.*, 53 N.C. App. 178, 280 S.E.2d 484, *disc. rev. denied*, 304 N.C. 192, 285 S.E.2d 95 (1981); *see also Restatement (Second) of Agency* § 227 comment c. Absent evidence to the contrary, the original employer is presumed to retain the right of control. *Restatement (Second) of Agency* § 227 comment b; 53 Am. Jur. 2d *Master and Servant* § 415, at 428 (1970).

North Carolina appellate courts have only twice had the opportunity to test the liability of a surgeon for the negligence of operating room personnel under the borrowed servant rule: in *Jackson v. Joyner*, 236 N.C. 259, 72 S.E.2d 589 (1952), and later in *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E.2d 733 (1976). In *Jackson*, plaintiff's intestate, an eight-year-old girl, died after a tonsillectomy performed by the defendant Dr. Joyner as a result of anesthesia complications. The girl had a cold at the time of the operation and developed pneumonia during the surgery, the anesthetic—ether—apparently having caused the infection to spread to the lungs. Anesthesia was administered by a Nurse Hanson, who was employed by the hospital. *Jackson v. Sanitarium*, 234 N.C. 222, 223-24, 67 S.E.2d 57, 59-60 (1951), *reh'g denied*, 235 N.C. 758, 69 S.E.2d 29 (1952). The trial court instructed the jury that the defendant could not be held liable for the negligence of Nurse Hanson. This Court granted plaintiff a new trial on the vicarious liability claim, reasoning as follows:

> The record discloses that the child's mother in arranging for the operation contacted and engaged only Dr. Joyner. He in turn, after demurring to the mother's suggestion that her family physician be engaged to give the anesthetic, arranged for the assistance of the nurses, including nurse Hanson, who administered the anaesthetic.
>
> On this record the evidence is sufficient to justify the inference that during the time the child was being prepared

> for the operation and while the operation was in progress, Dr. Joyner, *as surgeon in charge*, had full power of control over the nurses, including nurse Hanson, so as to make him responsible for the way and manner in which the anaesthetic was administered by Hanson.

Jackson v. Joyner, 236 N.C. at 260, 72 S.E.2d at 591 (emphasis added).

There is no discussion in *Jackson* of the facts underlying the Court's conclusion that Dr. Joyner had the right to control Nurse Hanson other than the facts that Dr. Joyner, as opposed to the hospital, was engaged to perform the operation, and that he himself "arranged" for the assistance of the nurses. These facts do not sufficiently elucidate the right of control issue. The Court appears to have presumed that Dr. Joyner enjoyed the right of control from the mere fact that he was the "surgeon in charge." Such a presumption runs contrary to the borrowed servant doctrine, part of which is that the lender rather than the borrower is presumed to have the right of control.

Though the presumption that the surgeon in charge controls all operating room personnel may have been appropriate in an era in which hospitals undertook only to "furnish room, food, facilities for operation, and attendance," *not* to treat patients, *Smith v. Duke University*, 219 N.C. 628, 634, 14 S.E.2d 643, 647 (1941), and in which only physicians had the expertise to make treatment decisions, *Byrd v. Hospital*, 202 N.C. 337, 341-42, 162 S.E. 738, 740 (1932), it is no longer appropriate in this era. First of all, hospitals are now in the business of treatment. As stated in *Rabon v. Hospital*:

> "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."

269 N.C. 1, 11, 152 S.E.2d 485, 492 (1967) (quoting *Bing v. Thunig*, 2 N.Y.2d 656, 666, 143 N.E.2d 3, 8, 163 N.Y.S.2d 3, 11 (1957)).

Accordingly, hospitals now exercise significant control over the manner in which their employees, including staff physicians, provide treatment. This is done through hiring criteria, training, formal practice guidelines,[1] hierarchical supervision structures, peer review groups and disciplinary measures. Stewart R. Reuter, *Toward a More Realistic and Consistent Use of Respondeat Superior in the Hospital*, 29 St. Louis U. L.J. 601, 632-34 (1985) [hereinafter *Reuter*]. As stated in *Truhitte v. French Hospital*, 128 Cal. App. 3d 332, 348-49, 180 Cal. Rptr. 152, 160 (1982): "Today's hospitals hire, fire, train, and provide day-to-day supervision of their nurse-employees. . . . [H]ospitals can and do implement standards and regulations governing good surgery practices and techniques and are in the best position to enforce compliance."

The degree to which hospitals may exercise control over the performance of operating room personnel is well illustrated in *Sparger v. Worley Hospital, Inc.*, 547 S.W.2d 582 (Tex. 1977). At issue in that case was whether a surgeon should be liable for the negligent failure of operating room nurses to remove a surgical sponge from the plaintiff's abdomen. In analyzing the right of control issue, the court noted that the hospital's policy manual made accounting for sponges the responsibility of the nurses and mandated the following procedure. Nurses were required to count all sponges before the case began, recording the count in writing in the operative record, and again before closure of the operative incision. If the counts matched, a written note was to be made in the operative record and signed by the circulating nurse. If not, the surgeon was to be notified immediately and a search made. If the missing sponge was not found after a thorough search, an X-ray was to be taken. The X-ray could not be refused by the surgeon. *Id.* at 585, n.1. Thus, hospitals may retain absolute, authoritative control over the manner in which surgical procedures are performed.

While hospitals now exercise significant control over operating room personnel, surgeons are no longer the only experts in the operating room. The operating team now includes nurses, techni-

1. Such guidelines are a prerequisite to accreditation by the Joint Commission on Accreditation of Hospitals.

cians, interns, residents, anesthetists, anesthesiologists and other specialized physicians. All of these are experts in their own fields, having received extensive training both in school and at the hospital. When directed to perform their duties, they do so without further instruction from the surgeon, relying instead on their own expertise regarding the manner in which those duties are performed. William H. Payne and K. Mike Mayes, *Vicarious Liability and the Operating Room Surgeon*, 17 S. Tex. L.J. 367, 387-90 (1976) [hereinafter *Payne & Mayes*]. Some of them, like anesthesiologists and technicians, may have expertise not possessed by the surgeon. *Reuter*, 29 St. Louis U. L.J. at 635-36. Thus, the surgeon will in some cases be ill-equipped, if not incapable, of controlling the manner in which assisting personnel perform their duties.

Even where the surgeon does have the knowledge or skill to control assisting personnel, it may be impractical for him to do so given the necessity of focusing on the surgical procedure. Generally, he has "no time to watch the anesthesiologist (-tist), nurses, or other assistants, much less direct them in the performance of their duties." *Payne & Mayes*, 17 S. Tex. L.J. at 389-90; *accord, e.g., Parker v. St. Paul Fire & Marine Ins. Co.*, 335 So. 2d 725, 734 (La. Ct. App.), *writ refused*, 338 So. 2d 700 (La. 1976) (evidence shows surgeon could not divert attention from surgical procedure to supervise transfusion of blood). As stated in *Grant v. Touro Infirmary*, 254 La. 204, 220, 223 So. 2d 148, 154 (1969): "[O]perations performed under modern techniques require team performance, and the nurses and other personnel assisting in the operating room are not at all times under the immediate supervision and control of the operating surgeon . . . ."

Thus, today, the surgeon in charge may well have authority to direct only the tasks to be performed, not the manner of their performance.

[2] In light of the foregoing, we hold that surgeons should no longer be presumed to enjoy the authoritative control of a master over all who assist merely because they are "in charge" of the operation. *Accord, e.g., Truhitte*, 128 Cal. App. 3d 348, 180 Cal. Rptr. 152; *Franklin v. Gupta*, 81 Md. App. 345, 567 A.2d 524, *cert. denied*, 319 Md. 303, 572 A.2d 182 (1990); *Thomas v. Hutchinson*, 442 Pa. 118, 275 A.2d 23 (1971); *Sparger*, 547 S.W.2d 582; *see also Payne & Mayes*, 17 S. Tex. L.J. at 390. To the extent that *Jackson* sanctions such a presumption, we now overrule it.

The second North Carolina case to consider the liability of a surgeon for the negligence of operating room personnel was *Starnes*. In that case, a newborn was burned during a surgical procedure by an excessively hot water bottle which had been placed under him to keep him warm during the surgery. Warming the infant during surgery was the responsibility of the nurse anesthetist. Plaintiff alleged that the surgeon should be liable in *respondeat superior* for the negligence of the anesthetist. 28 N.C. App. at 419, 424, 221 S.E.2d at 735, 738. Affirming a directed verdict entered by the trial court in favor of the surgeon, the Court of Appeals explained that:

> The department [of] anesthesiology assigned the anesthetist for the operation. Dr. Hamilton had no responsibility for her training or assignment. Absent some conduct or situation that should reasonably place the surgeon on notice of negligent procedure, we think the surgeon is entitled to rely on the expertise of the anesthetist. We find nothing to support general *respondeat superior* liability on the part of the surgeon.

Id. at 425, 221 S.E.2d at 738.

Given the facts presented, the court's affirmance of the directed verdict is certainly reconcilable with traditional borrowed servant principles. That the hospital's anesthesiology department trained its anesthetists indicates a retention by the hospital of the right to control those anesthetists. Nothing else appearing, it can only be inferred that the anesthetists remained the servants of the hospital while performing their surgical duties.

We do not approve, however, of the court's rationale that a surgeon is entitled to rely on the expertise of the anesthetist absent reasonable notice of the anesthetist's negligent conduct. If, by this language, the court meant that a surgeon, charged with the negligence of an assisting specialist, should only be held liable if he knew or should have known of the assistant's negligent conduct, then the rationale is clearly inconsistent with the basic precept that *respondeat superior* imposes liability without fault. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 69 (5th ed. 1984). We assume, however, that the court understood this precept and intended instead to suggest a rule of limited liability for surgeons: At least where the negligence sought to be imputed is that of a specialist like an anesthetist, surgeons should be exempted altogether from *respondeat superior* liability and held respon-

sible only if they were negligent in supervising the specialist, on the assumption that surgeons never enjoy the right of control over assisting specialists.[2] Though such a rule has been adopted in some jurisdictions with regard to the surgeon's liability for the negligence of anesthesiologists and anesthetists,[3] we believe it unjustifiable.

While it may be true that surgeons generally rely on assisting specialists to perform their duties without supervision, and that assisting specialists may have the greater expertise in their particular fields, it is clearly not the case that surgeons *never* enjoy authoritative control over such assistants. As in the case at bar, the surgeon may have agreed with the hospital to control the performance of the specialist in question. Or a surgeon may know more about a particular procedure than an assisting specialist and actively supervise the latter's performance, as where the surgeon is assisted by a relatively inexperienced resident physician. *Payne & Mayes*, 17 S. Tex. L.J. at 389. Also, in emergency situations, the surgeon *may* have the right to control the performance of all life-saving acts: "Time is essential, and any loss of time could mean the life of the patient. The surgeon is implicitly given from the hospital, therefore, the right to control the nurses in regard to the 'how's' of performing all acts in saving the patient." *Id.* at 388, n.153.[4] The testimony in the case at bar indicates that this right may also extend to the life-saving efforts of anesthetists and other specialists. And, finally, it is well-recognized that nurse anesthetists, when not supervised by an anesthesiologist, generally work under the direction and supervision of a physician. Margaret

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2. This is the view taken of *Starnes* by other jurisdictions. *See, e.g., Franklin*, 81 Md. App. 345, 371-72, 567 A.2d 524, 537-38 (citing *Starnes* along with cases rejecting *respondeat superior* liability for surgeons assisted by anesthetists); *Parker v. Vanderbilt University*, 767 S.W.2d 412, 419 (Tenn. App. 1988) (citing *Starnes*: "North Carolina courts have rejected the imposition of respondeat superior liability on a surgeon for the negligent acts of a nurse anesthetist").

3. *See Franklin*, 81 Md. App. at 371-72, 567 A.2d at 537-38 (citing, *e.g., Vargas v. Dulzaides*, 520 So. 2d 306, 307 (Fla. Dist. Ct. App.), *review dismissed*, 528 So. 2d 1184 (Fla. 1988) (holding that surgeon may be liable for acts of assisting personnel but not for "the negligence of a fellow specialist such as an anesthetist or an intern")); *Thompson v. Lillehei*, 164 F. Supp. 716 (D. Minn. 1958), *aff'd*, 273 F.2d 376 (8th Cir. 1959) ("ordinarily a surgeon cannot be held liable for the negligent acts of an anesthetist").

4. The authors note that the surgeon may not have this right if the hospital has specifically instructed its nurses on emergency procedure.

H. Meeker and Jane C. Rothrock, *Alexander's Care of the Patient in Surgery* 147 (9th ed. 1991).

Nor is the fact that a borrowed employee has expertise considered a bar to *respondeat superior* liability in any other setting. *See, e.g., Ward v. Gordon*, 999 F.2d 1399 (9th Cir. 1993) (military physician held borrowed servant of private hospital where performed duties under supervision of hospital staff); *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980) (skilled welder held borrowed servant where lending employer equivalent of temporary employment agency and had no concern with details of welder's work); *United States v. N.A. Degerstrom, Inc.*, 408 F.2d 1130 (9th Cir. 1969) (experienced operator of heavy loading machine held borrowed servant where taught how to perform act causing damage by borrowing employer's supervisor); *Six Flags Over Georgia, Inc. v. Hill*, 247 Ga. 375, 276 S.E.2d 572 (1981) (skilled ironworker held borrowed servant where, at least for particular work which caused injury, borrowing employer shown to be in complete control of how work was done); *New York Central Railroad v. Northern Ind. Pub. Serv. Co.*, 140 Ind. App. 79, 221 N.E.2d 442 (1966) (crane operator held borrowed servant where foreman directing him an experienced crane operator himself); *F.M. Pulliam v. Home Building Contractors, Inc.*, 363 S.W.2d 48 (Mo. Ct. App. 1962) (skilled carpenter held borrowed servant where borrowing employer paid his wages and had power to control how work should be done); *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 585 N.E.2d 355, 578 N.Y.S.2d 106 (1991) (experienced sheet metal mechanic held borrowed servant where recruited by lending employer specifically to work for borrower, where employee worked exclusively for borrower, and where lending employer had no knowledge or expertise regarding work performed by employee); *Rorie v. Galveston*, 471 S.W.2d 789 (Tex. 1971), *cert. denied*, 405 U.S. 988, 31 L. Ed. 2d 454 (1972) (experienced operator of complicated hoist held borrowed servant where borrower and lender expressly agreed employee would work under borrower's control); *and McKinney v. Air Venture Corp.*, 578 S.W.2d 849 (Tex. Civ. App. 1979) (experienced airplane pilot held borrowed servant where borrowing employer was owner of airplane and pilot's first responsibility was safety of airplane). As is clear from the above-cited cases, the right of control may pass to a temporary employer, as a matter of fact, even where the borrowed employee has the skill of a specialist. When it does, *respondeat superior* liability must follow.

[3] Therefore, consistent with traditional agency principles, we hold that a surgeon may be held liable under the doctrine of *respondeat superior* for the negligence of even a skilled assistant if the surgeon in fact possessed the right to control that assistant at the time of the assistant's negligent act regardless of whether the surgeon should reasonably have been aware of the negligent conduct sought to be imputed to him. *Restatement (Second) of Agency* § 227 comment a. To the extent that *Starnes* conflicts with this proposition, we now overrule it.

[4] In summary, we hold that a surgeon should not, as suggested by *Jackson*, be presumed to enjoy the authoritative control of a master merely because he is "in charge" of the operation. To the contrary, under traditional borrowed servant principles, the hospital must be presumed to retain the right of control over its operating room employees. Nor, however, should the surgeon be exempted from *respondeat superior* liability, as suggested by *Starnes*, merely because the negligence sought to be imputed is that of a skilled specialist. Whether a surgeon may be held vicariously liable for the negligence of one assisting in the operation depends on whether, in the particular case, the surgeon had the right to control the manner in which the assistant performed.

B

[5] Having outlined the proper reach of the borrowed servant doctrine in the context of the operating room, we turn now to the question of whether the trial court erred in granting Dr. Miller a directed verdict on plaintiff's vicarious liability claim. To answer this question, we must decide whether plaintiff's evidence of a temporary master-servant relationship between Dr. Miller and Nurse Hawkes was legally sufficient for his claim to be considered by the jury. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). Unlike the Court of Appeals, we believe it was.

Most persuasive is plaintiff's evidence that Dr. Miller agreed with Beaufort County Hospital to control the performance of the nurse anesthetists, including Nurse Hawkes, assigned to his cases. *See Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 226 (Tex. 1963) ("When a contract, written or oral, between two employers expressly provides that one or the other shall have right of control, solution of the [borrowed servant] question is relatively simple"). Such an agreement is indicated by the following language of the

hospital's Anesthesia Manual, whose provisions Dr. Miller agreed to comply with as a condition of his staff privileges:

> Anesthesia care shall be provided by nurse anesthetists working under the responsibility and supervision of the Surgeon doing the case.
>
> . . . .
>
> Administration of anesthesia shall be the sole responsibility of the Surgeon and anesthetist involved, and it shall be their responsibility to select and administer a proper agent with proper techniques.
>
> . . . .
>
> Since the director [of the Anesthesia Department] is not an anesthesiologist, it is understood that the performance of anesthetists, while providing direct services to patients, shall be under the overall direction and supervision of the physician responsible for the patient's care.

The Court of Appeals interpreted this language as vesting the surgeon with the right of supervision, not control: the power merely to point out the work to be done but not to direct the manner in which the work is to be performed. 103 N.C. App. at 324, 407 S.E.2d at 562-63. On the contrary, we believe this language, read as it must be in the light most favorable to plaintiff, *Kuykendall*, 322 N.C. at 661, 370 S.E.2d at 387, evinces a clear intent to transfer to the surgeon doing the case control over the manner in which the anesthetists performed their work. Indeed, the surgeon, under whose supervision the anesthetists are said to work, is given direct responsibility not only for the selection of anesthetic agents but also for the "techniques" used to administer them. Making decisions about agents and administration techniques—whether to preoxygenate the patient, whether to anesthetize using Demerol or a narcotic with fewer side effects, whether to maintain the patient strictly on inhalation anesthetics or on a combination of inhalation and intravenous anesthetics, whether to give the patient thirty-three or fifty percent oxygen—is the very essence of anesthesia practice. *See* 21 NCAC 36 .0226(c)(2)(B) (July 1993) (defining nurse anesthesia practice to include "selecting, implementing, and managing general anesthesia"). Clearly, then, the surgeon's authority was over the manner of performance and not merely the tasks to be done. *Compare Franklin*, 81 Md. App. 345, 366, 567 A.2d 524, 534-35

(describing authoritative control as "right to supervise or control the method of anesthesia, the agents used to achieve the anesthesia, the dosages of those agents," etc.). This conclusion is further supported by the fact that the hospital did not employ an anesthesiologist and, thus, presumably did not itself have the means of controlling anesthesia decisions.

Also supporting the inference that Dr. Miller had the right to control Nurse Hawkes was plaintiff's evidence that, in an emergency situation, the surgeon has the right to control the anesthetist's every act. Dr. John B. Neeld, an anesthesiologist, testified that, given the patient's severe blood loss and precarious life signs, it would have been appropriate for Dr. Miller to have "actively taken over the direction of the anesthesia." Dr. Robert W. Gaines, an orthopedic surgeon, testified that if he were faced with the sort of emergency encountered by Dr. Miller, he would "enumerate every one of the activities that the CRNA (Certified Registered Nurse Anesthetist) currently should be doing." Even Dr. Miller admitted that in an emergency situation it is the surgeon who directs the remedial measures taken by the anesthetist. Unlike the Court of Appeals, we do not consider this testimony an incompetent legal conclusion about the scope of a surgeon's vicarious liability. *See* 103 N.C. App. at 325-26, 407 S.E.2d at 563. It is testimony regarding the nature of the relationship between surgeon and anesthetist, as defined by the standards of practice prevailing in communities like Beaufort, and, as such, is perfectly competent on the *respondeat superior* question. *See Restatement (Second) of Agency* § 220(2)(c).

And, finally, plaintiff supported his claim by showing that Dr. Miller was capable of exercising authoritative control over Nurse Hawkes, in that he knew the principles of anesthesia administration, and that he in fact exercised such control on at least one occasion. At 11:10 a.m., he ordered Nurse Hawkes to stop all anesthesia and give the patient one hundred percent oxygen. Implementing corrective measures in the event of an adverse reaction to anesthesia is one of the functions of the anesthetist. *See* 21 NCAC 36 .0226 (c)(2)(D). At 11:10 a.m., it was Dr. Miller who decided what corrective action should be taken.

We believe the above evidence reasonably supports the inference that Dr. Miller enjoyed authoritative control over Nurse Hawkes and was, during the surgery, his temporary master. We

hold, therefore, that the trial court erred in refusing to submit plaintiff's vicarious liability claim to the jury.

IV

[6] As noted above, the trial court refused to submit the vicarious liability claim to the jury on two grounds. We have established that the first of these—insufficient evidence of a master-servant relationship—was erroneous. We must now evaluate the second: that plaintiff's release of the servant Hawkes operated, as a matter of law, to release the master Miller.

The trial court's ruling was based on the common law rule, established in *Smith v. R. R.*, 151 N.C. 479, 66 S.E. 435 (1909), that a release of or covenant not to sue the servant operates to release the master as well. Plaintiff argues correctly that this rule has been abrogated by the Uniform Contribution Among Tort-feasors Act, N.C.G.S. §§ 1B-1 to -6 (1983). The Act provides as follows:

> When a release or a covenant not to sue . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> 1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide . . . .

N.C.G.S. § 1B-4. In the recent case of *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 412 S.E.2d 666, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992), decided after plaintiff filed his appeal, we interpreted the term "tort-feasors" in the Act to include vicariously liable masters. Thus, the release of a servant no longer operates to release a vicariously liable master, unless the terms of the release so provide. The trial court's holding was therefore error.

Having rejected both grounds on which the trial court refused to submit plaintiff's vicarious liability claim to the jury, we now reverse the Court of Appeals and grant plaintiff a new trial on this claim.

V

[7] The last issue on appeal relates to plaintiff's claim that Dr. Miller was negligent in supervising Nurse Hawkes. This claim was submitted to the jury, which answered it in Dr. Miller's favor. The question is whether the trial court erred in excluding certain

testimony of plaintiff's expert, Nurse Sandra F. Privatte. Nurse Privatte, qualified as an expert in nurse anesthesia care, would have testified that: 1) Nurse Hawkes needed supervision in ascertaining that there was a medical crisis and in deciding what remedial measures should be taken, and 2) Dr. Miller had a duty to provide such supervision. Plaintiff claims Nurse Privatte was fully qualified to give such testimony and that its exclusion prevented him from proving his negligent supervision claim against Dr. Miller. We agree.

Echoing the trial court, the Court of Appeals held this testimony properly excluded on the ground that Nurse Privatte had not been shown to be familiar with the standard of care for orthopedic surgeons. Under our case law, "the applicable standard of care must be established by other practitioners in the particular field . . . *or by other expert witnesses equally familiar and competent to testify to that limited field of practice.*" *Lowery v. Newton*, 52 N.C. App. 234, 239, 278 S.E. 566, 571, *disc. review denied*, 303 N.C. 711, *reconsideration denied*, 304 N.C. 195, 291 S.E.2d 148 (1981) (emphasis added). Nurse Privatte testified that, in her fifteen years of practice as a nurse anesthetist, she had participated in thousands of operations. Given this experience, she was clearly as knowledgeable as anyone about what a nurse anesthetist can competently do without supervision and what he needs help with. This knowledge, of course, was germane to her own field of practice. However, having worked so frequently with surgeons, she was as knowledgeable as they about the way surgeons ordinarily supervise nurse anesthetists. And, as pointed out by Judge Phillips in his dissent, "what members of a trade or profession ordinarily do in certain situations is evidence of what should be done in those situations." 103 N.C. App. at 331, 407 S.E.2d at 566. We hold that Nurse Privatte was competent to testify on the matters described and should have been permitted to do so.

The question of whether plaintiff was prejudiced by the improper exclusion of Nurse Privatte's testimony is a more difficult one. Other of plaintiff's experts testified that the surgeon is responsible for supervising the remedial measures taken by the anesthetist in a medical crisis. Dr. Robert L. Gibson, an anesthesiologist, testified that, given the bleeding problem, Dr. Miller should have kept himself "constantly aware of all the vital signs of this patient," and that he was personally responsible for ensuring the patient's adequate oxygenation. Dr. Neeld also testified that Dr. Miller should have kept himself apprised of the patient's vital signs and said that

it was Dr. Miller's responsibility to decide what remedial measures should be taken: giving more blood, cutting off all anesthetics and giving one hundred percent oxygen, etc. Dr. Gaines testified to the same effect. Thus, it was well established that Dr. Miller had the duty of supervising Nurse Hawkes in the medical crisis. However, only Nurse Privatte offered to testify that Nurse Hawkes in fact *needed* such supervision and was incapable of making the proper decisions without help. Of all the testimony offered on the issue, this would have been the most persuasive in fixing the high level of supervision required in a medical crisis. Because we believe the admission of this testimony could have altered the jury's verdict, we now overrule the Court of Appeals and grant plaintiff a new trial on his negligent supervision claim.

VI

Having held that the Court of Appeals erred in affirming the trial court's directed verdict for Dr. Miller on plaintiff's vicarious liability claim, we now reverse and remand for a new trial on this claim. Having held that the Court of Appeals erred in affirming the trial court's exclusion of the testimony of Nurse Privatte, we now reverse and remand for a new trial on plaintiff's negligent supervision claim. Plaintiff is not entitled to retry his claim that Dr. Miller was negligent in causing, and inadequately treating, the bleeding problem.

REVERSED and REMANDED.

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

Justice MEYER dissenting.

Believing that the release of the nurse-anesthetist released Dr. Miller as well, I respectfully dissent. I dissented in the case relied upon by the majority, *Yates v. New South Pizza Ltd.*, 330 N.C. 790, 796, 412 S.E.2d 666, 670, *reh'g denied*, 331 N.C. 292, 417 S.E.2d 73 (1992), and was joined in my dissent by Chief Justice Exum, the writer of the majority opinion here, and Justice Whichard. I shall not here repeat the contents of that exhaustive dissent but will simply refer the reader thereto. I continue to believe that *Yates* was wrongly decided, and I do not consider it too late for this Court to reexamine its holding in that case, which was decided by the narrow margin of one vote.

STATE OF NORTH CAROLINA v. THOMAS MARK ADAMS

No. 3A89

(Filed 28 January 1994)

1. Constitutional Law § 344 (NCI4th)— ex parte bench conferences—excusal of prospective jurors—harmless error

It was error violating a capital defendant's unwaivable state constitutional right to be present at every stage of his trial for the trial judge to conduct *ex parte* bench conferences with three prospective jurors after which those prospective jurors were excused. However, the transcript reveals that the substance of the unrecorded communications with the three prospective jurors was adequately reconstructed by the trial judge for the record and that defendant's absence from the conferences was harmless beyond a reasonable doubt where it appears from the record that two prospective jurors were ineligible to serve due to their recent service as prospective jurors, and that the third juror was deferred for the manifestly unobjectionable reason that he was to be a pallbearer at a funeral the next day.

Am Jur 2d, Criminal Law §§ 695, 696.

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

2. Constitutional Law § 344 (NCI4th)— ex parte communications with prospective jurors—burden of showing error—showing of harmless error by State

The State was not precluded from showing that the trial court's *ex parte* communications with prospective jurors was harmless error because the record does not reveal whether prospective jurors other than the three named in the transcript may have been questioned off the record since the appellant has the burden in the first instance of demonstrating error from the record on appeal; this means that it is not enough for defendant to assert that there may have been other impermissible *ex parte* communications but that defendant must show from the record that the trial judge examined off the record prospective jurors other than those named; and the record in this case, including the transcript of the trial, does

not reveal that any other prospective jurors were examined *ex parte* by the trial judge.

Am Jur 2d, Criminal Law §§ 695, 696.

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. Jury § 251 (NCI4th)— peremptory challenges—racial discrimination—failure to object

The white defendant's failure to object to the prosecutor's peremptory challenges of black jurors on the ground they were based on race precluded him from raising this issue on appeal. Defendant cannot avail himself of the exception to the objection requirement enunciated in *State v. Robbins*, 319 N.C. 465, and *State v. Davis*, 325 N.C. 607, where his trial was held some two years after the decision in *Batson v. Kentucky*, 476 U.S. 79, prohibited the prosecutor's use of peremptory challenges in a racially discriminatory manner.

Am Jur 2d, Jury § 235.

4. Criminal Law §§ 542, 543 (NCI4th)— prosecutorial misconduct during cross-examination—not reversible error

It was improper for the prosecutor in a capital trial to ask a psychologist who testified for defendant questions on cross-examination designed merely to belittle and insult the witness and to make declaratory responses to the witness's answers which were designed merely to produce laughter in the courtroom. Furthermore, the prosecutor's tactic of tapping or pounding a stick near this witness in a manner which caused the witness to believe he might be struck and for the purpose of irritating or provoking the witness amounted to prosecutorial misconduct violating our Rules of Professional Conduct and generally applicable professional standards. However, the prosecutor's misconduct during the cross-examination of the psychologist did not constitute reversible error entitling defendant to a new trial on the issue of his guilt where the record shows that the trial judge was actively overseeing the cross-examination of the psychologist in an effort to "rein-in" the prosecutor's overzealousness and that he frequently sustained defendant's objections to unseemly prosecutorial remarks to the psychologist; despite the prosecutor's barrage of ques-

tions and comments directed at impugning his credibility and entertaining the jury, the psychologist maintained his composure and in some instances succeeded in bolstering his testimony; the substance of the psychologist's testimony appears largely unharmed by the prosecutor's conduct and no inherently prejudicial information came before the jury; and a psychiatrist whose cross-examination by the prosecutor is not the subject of complaint gave testimony which was essentially the same as that of the psychologist.

Am Jur 2d, Trial § 252.

5. **Evidence and Witnesses § 2302 (NCI4th); Homicide § 490 (NCI4th)— first-degree murder—intent to kill, premeditation and deliberation—effect of mental disabilities—failure to instruct not plain error**

The trial court should have instructed the jury in a first-degree murder trial with regard to defendant's personality disorder as it related to his capacity to premeditate and deliberate and to form a specific intent to kill where a psychologist stated his opinion that, although defendant was capable of forming the specific intent to kill prior to the murder, under the stress of the confrontation with the victim defendant "was no longer able to form that intent." However, the trial court's failure to give this instruction did not constitute plain error entitling defendant to a new trial where defendant failed to object to the instructions as given or to request an instruction on his mental disabilities; the weight of the psychologist's opinion was diminished by his further testimony that defendant's history demonstrated that, under stress or pressure, defendant's disorganization and impulsivity manifested itself in flight and withdrawal; defendant's clear and unequivocal out-of-court confessions of a deliberate killing of the victim on the morning of the murder make it improbable that the jury would have found that he was incapable of forming the specific intent to kill; and defendant thus has not shown that such an instruction would have probably resulted in the jury reaching a different verdict.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363; Homicide § 501.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

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

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

Am Jur 2d, Trial § 1375.

7. Criminal Law § 1352 (NCI4th)— capital sentencing—McKoy error—new sentencing hearing

The trial court's instructions in a capital sentencing proceeding requiring the jury to unanimously find mitigating circumstances before considering any of those circumstances in their deliberations on punishment constituted prejudicial error for which defendant is entitled to a new sentencing hearing.

Am Jur 2d, Criminal Law §§ 598 et seq.

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

Justice MITCHELL concurring in the result.

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

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to death imposed by Lewis (John B.), J., presiding at the 31 October 1988 Criminal Session of Superior Court, Iredell County. Heard in the Supreme Court on 16 April 1992.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

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

EXUM, Chief Justice.

On 14 March 1988, defendant was indicted for first degree burglary, robbery with a dangerous weapon and the murder of Mildred Hendrix Foster. Defendant pled guilty to the two burglary charges against him. At trial, a jury found defendant guilty of first degree murder. After a capital sentencing hearing, the jury

recommended the death penalty for defendant. The trial court sentenced defendant to death. Defendant appeals from that judgment.

Defendant brings forward five assignments of error relating to the guilt phase of his trial on the first degree murder indictment and eight assignments relating to the sentencing phase. The State concedes that in the sentencing proceeding the trial court erred under the United States Supreme Court's holding in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990) and recommends that this Court remand the case for re-sentencing in accordance with *McKoy*. We find no reversible error in the guilt phase of defendant's trial. Concluding there is *McKoy* error in the trial court's jury instructions in the sentencing phase, we remand the case for a new sentencing proceeding.

I.

The State offered evidence during the guilt phase, including defendant's two pretrial statements made to investigators by which he essentially admitted committing the acts forming the basis of the charges against him, which tended to show as follows:

At approximately 1:30 a.m. on 13 December 1987, the seventeen year old defendant broke into and entered the home of seventy year old Mildred Hendrix Foster with the intention of stealing money from Ms. Foster to buy marijuana. At the time defendant entered Ms. Foster's home, he was carrying a large kitchen knife that he had taken from the home of his parents for the purpose of scaring the victim. After unsuccessfully searching the other rooms of the Foster home for money, defendant moved into Ms. Foster's bedroom. Ms. Foster awoke as defendant was searching for her pocketbook.

Ms. Foster screamed and attempted to struggle with defendant. Defendant asked Ms. Foster to remain quiet and told her that he would not harm her. Ms. Foster continued to scream and managed to obtain the knife which defendant had laid down during his search of her room. Ms. Foster bit defendant when he put his hand over her mouth to quiet her, and she attempted to stab him with the knife. Defendant eventually regained control of the knife and stabbed Ms. Foster in the chest. Defendant told police that he stabbed her several more times in the chest to keep her from further suffering. As the victim struggled to live, defendant slashed her throat with the knife, killing her. After killing the

victim, defendant took thirty-eight dollars from her purse and fled the house.

Defendant returned to his house and soon decided to turn himself in. At approximately 3:00 a.m., defendant appeared at the Davie County Sheriff's Department where he had driven in his car. He had blood on his clothes and was crying hysterically. He made several references to "that poor old lady." After calming down, defendant stated that he had broken into a house, which the authorities were able to identify as the home of Ms. Foster. At first, defendant made several short statements indicating he had stabbed Ms. Foster. Defendant was immediately advised of his juvenile rights. Within three to four hours of arriving at the sheriff's department, defendant made two detailed voluntary statements to a detective and an agent of the State Bureau of Investigation. The statements were reduced to writing and signed by defendant.

The parties stipulated that the victim was stabbed six times in the chest and that her throat had been cut. The parties further stipulated that all wounds were inflicted within a very close period of time and that Ms. Foster died from loss of blood within a few minutes of receiving her wounds.

Defendant's evidence at the guilt phase consisted of the testimony of two mental health experts, a psychologist and a psychiatrist, and dealt with his state of mind at the time of the murder:

Dr. John Warren, a psychologist, testified that he had examined defendant at the Davie County Jail on three occasions in 1988: 13 August, 9 September and 28 September. He also reviewed defendant's statements to the authorities on the morning of the murder, his school records, mental health treatment records and a report from Dorothea Dix Hospital. Dr. Warren diagnosed defendant as suffering from (1) borderline personality disorder with dependent and histrionic traits and (2) dependence on marijuana. Dr. Warren testified that defendant had been involved in several earlier break-ins in order to obtain money for his marijuana use. Defendant had been caught in the spring of 1987, pled guilty and had been sentenced to five years probation and fifteen weekends in jail.

In response to defense counsel's questions regarding defendant's ability to form the specific intent to kill, Dr. Warren testified as follows:

> My opinion is that—that prior to going to the house, Tommy was capable of forming specific intent. At some point, he became disorganized and fell apart and was no longer able to form that intent. He was not calm, he was not together, he was in pieces and very disorganized.

Dr. Selwyn Rose, a psychiatrist who was qualified as an expert in forensic psychiatry, also testified as to defendant's state of mind. Dr. Rose diagnosed defendant as suffering from (1) marijuana dependency and (2) borderline personality disorder with particular traits of immaturity and impulsivity. He further testified that he believed defendant fell apart under stress that night and, at the time of the murder, could not conform his conduct to the requirements of the law. During cross-examination by the prosecution, Dr. Rose also stated that, under the stress of the confrontation with the victim, defendant did not have the ability to tell right from wrong.

The State presented no evidence during the penalty phase of defendant's trial. Defendant presented evidence which tended to show as follows:

Defendant's father, mother, half-brother, uncle, sister, one of his teachers, and a family friend each testified that defendant had never been known to be violent. Defendant was described as being shy, liking animals, and usually befriending younger children. He had not been a discipline problem at school. Although he did well in elementary school, he was not a good student in junior and senior high school. Defendant had a drug problem which became known to his parents during the spring of 1987. Defendant was small for his age. He was generally a "follower" and was known to get along well with others. The witnesses testified they had never seen defendant act aggressively or violently.

II.

Guilt Phase Issues

A.

[1] Defendant first contends that the trial court violated his right to be present at every stage of a capital proceeding[1] by conducting *ex parte* bench conferences with prospective jurors after which some prospective jurors were excused. Though the trial court's action was error, we hold that the error was harmless beyond a reasonable doubt.

After the case was called for trial and prospective jurors were called into the courtroom to begin the jury selection process, Judge Lewis in open court and on the record instructed the prospective jurors on qualifications for jury service. He then stated that there might be "other reasons" why a juror should not serve, mentioning specifically doctor certified physical illness; and he invited any juror who had "any reasons" to come to the bench "to tell me why you should not serve on jury this week." The trial transcript at that point states:

> (EXCUSES HEARD BY THE COURT)
>
> THE COURT: Mr. Sloan indicates that he is a pallbearer in a funeral tomorrow, we have a group of jurors coming in on Wednesday and so Mr. Sloan you will come in on Wednesday.
>
> Ms. Gillian and Mrs. Holler indicate that they have served within the last two years, and therefore, would be ineligible.
>
> Stand by and we'll put something in the file about that.

After these comments, the trial judge resumed giving instructions to the rest of the prospective jurors.

It was error violating a capital defendant's unwaivable state constitutional right to be present at every stage of his trial for Judge Lewis to speak privately with prospective jurors. *State v.*

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1. A defendant's right to presence at every stage of a criminal trial is guaranteed by the Confrontation Clause of the North Carolina Constitution, Art. I, § 23. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 650-51 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). Though alluding to the federal constitution as a basis of the right to presence, defendant's argument relies exclusively on the definition of the right contained in North Carolina law. We limit our discussion accordingly.

Boyd, 332 N.C. 101, 104, 418 S.E.2d 471, 473 (1992); *State v. Moss*, 332 N.C. 65, 74, 418 S.E.2d 213, 218 (1992). This violation is, however, subject to harmless error analysis. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991); *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). The harmlessness of the error must be demonstrated by the State beyond a reasonable doubt. *Huff*, 325 N.C. at 33, 281 S.E.2d at 653. Where "the transcript reveals the substance of the conversations, or the substance is adequately reconstructed by the trial judge at trial," the State may be able to prove that the error was harmless beyond a reasonable doubt. *Boyd*, 332 N.C. at 106, 418 S.E.2d at 474.

Here the transcript reveals that the substance of the unrecorded communications with the three jurors was adequately reconstructed by the trial judge and that the defendant's absence from the conference was harmless. We said in *Payne*, "[t]hose potential jurors who were excused because of their responses to questions about statutory qualifications, physical infirmities, and personal hardships were either ineligible to serve or excused for manifestly unobjectionable reasons regardless of what defendant might have observed or desired." *Payne*, 328 N.C. at 389, 402 S.E.2d at 589. Similarly, in the case at bar, prospective jurors Gillian and Holler were ineligible to serve due to their recent service as prospective jurors; prospective juror Sloan, who had arranged to be a pallbearer at a funeral, was deferred for a "manifestly unobjectionable" reason. Thus, the State has shown that the error in communicating *ex parte* with prospective jurors was harmless beyond a reasonable doubt.

[2] Defendant, apparently recognizing that any error with regard to prospective jurors Sloan, Gillian and Holler, has been rendered harmless, argues that because the record does not reveal whether other prospective jurors were questioned off the record, the State cannot demonstrate harmlessness. However, it is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal. *State v. Milby and State v. Boyd*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981) (appellant has duty to "make the irregularity manifest") (citing *State v. Hilton*, 271 N.C. 456, 156 S.E.2d 833 (1967); *State v. Duncan*, 270 N.C. 241, 154 S.E.2d 53 (1967)). This means defendant must show from the record that the trial judge examined off the record prospective jurors other

than those named. It is not enough for defendant to assert that there may have been other impermissible *ex parte* communications. The record must reveal that such communications in fact occurred. *Id.; see also State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record"). Here the record, including the transcript of the trial, does not reveal that any other prospective jurors were questioned by the trial judge. "[W]e must assume that the trial court caused the record to speak the complete truth in this regard." *Artis*, 325 N.C. at 297, 384 S.E.2d at 480 (quoting *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987)). Furthermore, the clear implication from the transcript is that the three named prospective jurors and no others were questioned by the trial judge. Indeed, after the trial judge had spoken *ex parte* with the prospective jurors, he responded to their requests *on the record*, naming the jurors and describing the excuses given by each one. His very thoroughness in creating a record suggests that he left no one out of his account.

Defendant argues in his brief, "[t]he incompleteness of the record precludes the State from satisfying its burden of proving harmless error beyond a reasonable doubt." To the contrary, however, whatever incompleteness may exist in the record precludes defendant from showing that error occurred as to any juror other than those the trial judge excused or deferred on the record.

B.

[3] By his second assignment of error, defendant, who is white, contends the trial court erred by permitting the prosecution to exercise peremptory challenges against various black jurors on account of their race in violation of the Fourteenth Amendment's Equal Protection Clause as interpreted by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), and *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991). *Batson* held a prosecutor may not purposefully discriminate against jurors who are members of the same "cognizable racial group" as the defendant by exercising "peremptory challenges to remove from the venire members of defendant's race . . . on account of their race." 476 U.S. at 96, 90 L. Ed. 2d at 87-88. Concluding that "*Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large,"

499 U.S. at ---, 113 L. Ed. 2d at 422, the Court in *Powers* prohibited discriminatory use of peremptory challenges against black jurors in a case in which the defendant was white. Although the defendant now asserts that the State used its peremptory challenges in violation of *Batson*, the record reveals that defendant failed to object to the prosecution's use of peremptory challenges on the ground they were based on race. Defendant's failure to object to the prosecutor's challenges on this ground precludes him from raising this issue on appeal. With certain exceptions, to preserve on appeal a trial error a timely objection to the error at trial is required. N.C.G.S. § 15A-1446(a) & (b) (1983 & Cum. Supp. 1985); *see State v. Davis*, 325 N.C. 607, 617-18, 386 S.E.2d 418, 423 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. Robbins*, 319 N.C. 465, 477-78, 356 S.E.2d 279, 293, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. McDougall*, 308 N.C. 1, 9, 301 S.E.2d 308, 314, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

Defendant, citing *Robbins* and *Davis*, argues that no objection to discriminatory peremptory challenges is necessary. *Robbins* and *Davis*, however, emphasized the general rule that the party raising this issue on appeal must ordinarily have made an objection at trial. *Robbins*, 319 N.C. at 487-88, 356 S.E.2d at 293; *Davis*, 325 N.C. at 617-18, 386 S.E.2d at 423. In *Robbins* and *Davis* the defendants were permitted to challenge on appeal the prosecutor's alleged violation of *Batson* without having objected at trial only because *Batson* had not yet been decided at the time of trial. Both cases expressly limited their holdings to such situations. In *Robbins*, the Court stated:

> Although the case *sub judice* was tried prior to the date the rule in *Batson* was announced, the applicability of *Batson* to this case has since been settled by *Griffith v. Kentucky*, 479 U.S. ---, 93 L.Ed. 2d 649 (1987), which mandates that the rule has retrospective application to all cases pending on direct appeal or which were not yet final when *Batson* was decided.
>
> Initially, we note that whereas in *Batson* the defendant entered a timely objection at trial to the prosecutor's removal of all black persons on the venire, defendant here neither objected to the use of the district attorney's peremptory challenges to remove black jurors nor made a challenge to the petit jury before the jury was empaneled. *Normally, failure to object at trial would preclude our consideration of this issue.* N.C.G.S.

> § 15A-1446(a), (b) (1983 & Cum. Supp. 1985); *see State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *Miller v. State*, 237 N.C. 29, 74 S.E.2d 513, *cert. denied*, 345 U.S. 930, 97 L. Ed. 2d 1360 (1953). However, defendant claims that any such objection would have been futile under the law of North Carolina as it existed at the time. Although the futility of presenting an objection at trial cannot alone constitute cause for a failure to object, *Engle v. Isaac*, 456 U.S. 107, 130, 71 L. Ed. 2d 783, 802 (1982), we find it difficult to hold that defendant has waived a right *which he did not know existed at the time of trial.*

Robbins, 319 N.C. at 487-88, 356 S.E.2d at 293 (emphasis added). Similarly, in *State v. Davis* we permitted the defendant to challenge the prosecutor's peremptory challenges even though the defendant had made no objection at trial. *Davis*, 325 N.C. at 617-18, 386 S.E.2d at 423. In *Davis*, however, as in *Robbins*, the case was tried before the *Batson* decision; furthermore, the defendant in *Davis* made a pretrial motion to prohibit the State from exercising its peremptory challenges in a racially discriminatory fashion. *Id.*

In the present case, unlike the situations presented in *Robbins* and *Davis*, trial was held some two years after the Supreme Court's holding in *Batson*. We must assume defendant through counsel was familiar with *Batson* but elected not to raise the issue at trial. Defendant cannot, therefore, avail himself of the exception to the objection requirement enunciated in *Robbins* and *Davis*.

C.

[4] By his third assignment, defendant contends that the trial court erred in denying his motion for a mistrial on the basis of the prosecutor's "insulting" and "improper" cross-examination of defense expert Dr. John Warren. The cross-examination of Dr. Warren occurred over the course of two days and covers over 170 pages of the trial transcript. Defendant argues that some of the prosecutor's cross-examination of Dr. Warren was designed solely to badger, insult, belittle and otherwise harass the witness.

We have stated that counsel may not "ask impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and humiliate the witness." *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975), *appeal after remand*, 291 N.C. 528, 231 S.E.2d 644 (1977).

Without setting out in detail those portions of the cross-examination complained of, we agree with defendant that some of it was improper. Some of the cross-examination appears to have been designed merely to belittle and insult the witness who, testifying as an expert, was trying to give his honestly held opinions of defendant's mental state based in part on certain psychological tests which he had administered to defendant. Other portions are the prosecutor's declaratory responses to the witness' answers, which responses seem designed merely to produce laughter in the courtroom and did, according to the transcript, cause laughter among the jurors. This caused the trial judge at one point to take a recess, saying, "Jurors, this is a very tense moment and we need to be recessed by five minutes."

It suffices for us to say by way of reminder that criminal trials, especially capital trials, are not circuses conducted for the purpose of entertainment. They are solemn proceedings at which witnesses are examined and cross-examined according to the rules of evidence by counsel who are expected to conduct themselves with dignity, courtesy and a sense of fair play toward the court, opposing counsel, parties and witnesses according to the traditions of the legal profession and the admonitions in the Code of Professional Conduct. Sometimes humor in the courtroom occurs spontaneously and harmlessly; sometimes it is appropriate for counsel purposely to employ it to make a proper point. It should never be employed merely for counsel's own amusement or to embarrass or belittle unfairly other trial participants, including witnesses. We conclude that some of the cross-examination here fell on the wrong side of this line which, we admit, is not always easy to draw.

We do, however, wish to address one particularly disturbing instance during the cross-examination of Dr. Warren. The prosecutor, apparently out of sight of the trial judge, was tapping a yardstick on the side of the witness stand when Dr. Warren grabbed the stick out of the prosecutor's hand. The following exchange then took place:

> MR. ZIMMERMAN [the prosecutor]: You leave my stuff alone, professor. (Referring to yardstick counsel is holding.)
>
> [Defense Counsel]: Objection.
>
> A. I feel like that you're going to use a stick here on me.

> Q. (Mr. Zimmerman) We'll put the stick down, please go right ahead now, now tell us what picture number three has it in [sic].
>
> THE COURT: Wait, now, Dr. Warren, had you finished your answer.
>
> A. I believe so. He was pounding the stick over here where you can't see it.

Later during the State's closing arguments Mr. Zimmerman, the prosecutor, stated as follows:

> . . . [D]o you remember the professor, Dr. Warren, was up here on the stand and I had the yardstick and I was tap, tap, tapping it and what did he do, he reached around and grabbed the yardstick because as he said, I was irritating him. *I was trying to irritate him to see what he'd do to reach around and grab the stick.*

(Emphasis added.)

The tactic of tapping or pounding a stick near a witness in a manner which causes the witness to believe he may be struck and for the purpose of irritating or provoking a witness amounts to prosecutorial misconduct which warrants our condemnation. Such conduct violates our Rules of Professional Conduct and generally applicable professional standards. Further, an attorney engaging in such conduct may be subject to appropriate sanctions. Rule 7.6 of our Rules of Professional Conduct, dealing with trial conduct, provides in part:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> . . .
>
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
>
> . . .
>
> (8) Engage in conduct intended to disrupt a tribunal.

Rules of Professional Conduct, Rule 7.6(C)(6),(8) *North Carolina Rules of Court* 446 (West Publishing Co. 1994). The Prosecution Function Standards of the American Bar Association Standards for Criminal Justice provide:

> The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

ABA Standards for Criminal Justice, Prosecution Function and Defense Function std. 3-5.7(a) (3d ed. 1993). Regarding professionalism in the courtroom, those standards also provide:

> As an officer of the court, the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom.

Id. std. 3-5.2. A prosecuting attorney "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935).

While we think the prosecutor's behavior in the cross-examination of Dr. Warren did not comport with the foregoing rules and standards, particularly as to the stick-tapping incident, we are also bound to conclude that it did not constitute reversible error entitling defendant to a new trial on the issue of his guilt. Where improper prosecutorial conduct prejudices the defendant, subverting his right to a fair trial, he is entitled to a new trial. *Britt*, 288 N.C. at 712, 220 S.E.2d at 292; *State v. Phillips*, 240 N.C. 516, 529, 82 S.E.2d 762, 771 (1954) (repeated and flagrant violations of rules governing cross-examination require reversal). Where there is no reasonable possibility that the misconduct affected the outcome, however, the sentence imposed by the trial court will be upheld. *State v. Whisenant*, 308 N.C. 792, 794-95, 303 S.E.2d 784, 786 (1983) (improper question asked of defense witness regarding defendant's criminal history does not warrant new trial where there was no reasonable possibility that the question affected the result in light of the overwhelming evidence of defendant's guilt); *State v. Cofield*, 77 N.C. App. 699, 703-04, 336 S.E.2d 439, 441 (1985), *rev'd on other grounds*, 320 N.C. 297, 357 S.E.2d 622 (1987), *appeal after remand*, 324 N.C. 452, 379 S.E.2d 834 (1989) (prosecutor's improper questions did not warrant new trial due to trial court's prompt action and to question's lack of inflammatory impact); *State v. Heath*, 25 N.C. App. 71, 72-73, 212

S.E.2d 400, 401 (1975) (question of defendant by prosecutor relating to lie detector test did not warrant new trial since the question did not affect outcome).

Here we think the prosecutor's conduct during the cross-examination of Dr. Warren had little, if anything, to do with the outcome of the case. The transcript reveals that the trial judge was actively overseeing the cross-examination of Dr. Warren in an effort to "rein-in" the prosecutor's overzealousness. For the most part, the judge succeeded. He frequently and properly sustained defendant's objections to unseemly prosecutorial remarks to the psychologist. Furthermore, despite the prosecutor's barrage of questions and comments directed at impugning his credibility and entertaining the jury, Dr. Warren maintained his composure and in some instances succeeded in bolstering his testimony. The substance of Dr. Warren's testimony thus appears largely unharmed by the prosecutor's conduct. No inherently prejudicial information came before the jury. Dr. Rose, whose cross-examination by the prosecutor is not the subject of complaint, gave testimony which was essentially the same as that of Dr. Warren. For all these reasons, we conclude the improper conduct of the prosecutor during the cross-examination of Dr. Warren is not cause for a new trial on defendant's guilt. *Compare State v. Britt*, 288 N.C. at 707-08, 712, 220 S.E.2d at 289, 292 (improper prosecutor's cross-examination entitled defendant to a new trial because it revealed to jury that defendant previously had been sentenced to death).

D.

[5] By his fourth assignment of error, defendant contends the trial court erred in its charge to the jury by giving an incomplete and inaccurate instruction on the law of diminished capacity. Although the trial court gave a diminished capacity instruction with regard to defendant's marijuana use on the night of the murder, defendant argues the trial court also should have given an instruction with regard to his mental disabilities as bearing on his ability to form the specific intent to kill at the actual time of the murder. The instruction which the trial court gave at this point is as follows:

> There is evidence which tends to show that the defendant used marijuana shortly before the crimes alleged in this case. Generally, a voluntarily drugged condition is not a legal excuse for a crime. However, if you find that the defendant was under the influence of marijuana, you should consider whether this

condition affected his ability to formulate a specific intent which is required for conviction of first degree murder.

In order for you to find that defendant—in order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he had the required specific intent to commit first degree murder.

If as a result of a drugged condition even though voluntary, the defendant did not have the required specific intent, then you must not find the defendant guilty of first degree murder. The law does not require any specific intent for the defendant to be guilty of the crime of second degree murder, thus the defendant's drugged condition would have no bearing upon that determination.

Therefore, I charge that if upon considering the evidence with respect to the defendant's drugged condition you have a reasonable doubt as to whether the defendant formulated the specific intent required for the conviction of first degree murder, you will not return a verdict of guilty of first degree murder.

In *State v. Shank* this Court, expressly overruling prior cases, held that evidence of a "mental or emotional disturbance" of the defendant at the time of an alleged murder "would tend to make it less probable that he acted after deliberation." *State v. Shank*, 322 N.C. 243, 248-49, 367 S.E.2d 639, 643 (1988). *Shank* thus established the principle that evidence of a mental or emotional disturbance falling short of legal insanity might nevertheless be relevant in a homicide case on the issues of specific intent to kill and premeditation and deliberation. Applying the principle that the defendant is entitled to an instruction on "all substantial features of the case," this Court held shortly after *Shank* that it was reversible error to deny a defendant's request for an instruction on the defendant's mental condition as it related to his ability to premeditate and deliberate where such instruction was supported by the evidence. *State v. Rose*, 323 N.C. 455, 457-58, 373 S.E.2d 426, 428 (1988), *appeal after remand*, 327 N.C. 599, 398 S.E.2d 314 (1990).

Shank and *Rose*, therefore, establish that the instruction for which defendant now argues should have been given by the trial court. Defendant, however, did not object to the instruction as given nor did he present the trial court with any request—written or otherwise—for an instruction on defendant's mental disabilities.

Our review of this issue, therefore, is limited to whether the error in the trial court's failure to give the instruction constituted "plain error." *State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992). Plain error is an error that is "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). The burden of demonstrating plain error is upon the defendant. *State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 705 (1986).

We are confident defendant has not shown plain error in the trial court's instruction as given.

To establish that defendant's personality disorder affected his ability to premeditate and deliberate, defendant relied on the testimony of Dr. Warren, an expert in forensic psychology.[2] Dr. Warren testified that defendant suffered from borderline personality disorder, which is characterized by "wild mood swings" and "reckless" behavior. He testified that someone with this disorder can become disorganized and impulsive, and that violent reactions are consistent with this disorder. Dr. Warren further testified that defendant had "dependent and histrionic traits," referring to defendant's dependency on others and on marijuana and to defendant's tendency to act out his feelings. In response to defense counsel's question regarding defendant's ability to form the specific intent to kill, Dr. Warren testified:

> My opinion is that—that prior to going to the house, Tommy was capable of forming specific intent. At some point, he became disorganized and fell apart and was no longer able to form that intent. He was not calm, he was not together, he was in pieces and very disorganized.

However, when describing defendant's histrionic traits, Dr. Warren testified that defendant's tendency was to "withdraw and run away." Further, when questioned as to whether the violent death of Ms. Foster is consistent with defendant's specific history, Dr. Warren admitted as follows:

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2. Dr. Rose, defendant's other mental health expert and a psychiatrist by training, testified only that in his opinion defendant did not intend to kill the victim, not that his personality disorder rendered him incapable of such an intent. Dr. Rose's opinion was based, not on his assessment of defendant's mental deficiencies, but on defendant's statements to him and to the police.

> [N]o, it's not reported not consistent with his reported history or family history or school history or any event.
>
> . . .
>
> No, his history as reported by his parents and by [defendant] and looking at his school records and even the mental health center records indicate that he's kind of withdrawn and shy, and there's—even his other history, there's no indication of any violence in his history.

It is clear from Dr. Warren's entire testimony that defendant's history demonstrated that, under stress or pressure, defendant's disorganization and impulsivity manifested itself in flight and withdrawal. To the detriment of defendant's argument, these statements tend to diminish the weight of Dr. Warren's opinion that, although defendant was capable of forming the specific intent to kill prior to the murder, under the stress of the confrontation with Ms. Foster defendant was "no longer able to form that intent."

Further, defendant's clear and unequivocal out-of-court confessions of a deliberate killing of the victim made to police on the morning of the murder make it improbable that the jury would have found that he was incapable of forming the specific intent to kill. In light of Dr. Warren's entire testimony and the other evidence in the case, we are satisfied that the defendant has not shown that an instruction on defendant's personality disorder as it related to his capacity to premeditate and deliberate and to form a specific intent to kill would have "probably resulted in the jury reaching a different verdict." *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). There is, therefore, no reversible error in the trial court's failure to instruct on this point.

We are cognizant of defendant's argument that applying the plain error standard of review to this error would be unfair because this Court's decision in *Rose* was published only after the verdict in his case was rendered. *Rose*, however, merely applied the principle we had earlier announced in *Shank*, a decision published several months before defendant's trial. Since it is well established that a judge is required to instruct on all substantial features of the case which are supported by the evidence, *see State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982), defendant should have been aware after *Shank* that he was entitled to an instruction

on mental illness as it relates to the *mens rea* elements of first degree murder. It is not unfair, therefore, to require defendant at trial either to have requested the instruction, as did the defendant in *Rose*, or to have objected to its omission, in order to preserve the trial court's error in failing to give it for review under the normal standard.

E.

[6] In his final assignment of error as to guilt phase issues, defendant contends the trial court violated his due process rights by instructing the jurors that a "reasonable doubt" was equivalent to an "honest, substantial misgiving" in contravention of the United States Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990) (per curiam). Having previously addressed this exact issue in a case filed one week after oral argument in the case *sub judice*, *see State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 136, *reh'g denied*, --- U.S. ---, 122 L. Ed. 2d 762 (1993), we disagree.

The trial court instructed the jury as follows:

> A reasonable doubt, members of the jury, means just that, a reasonable doubt. It is not a mere possible, fanciful or academic doubt, nor is it proof beyond a shadow of a doubt nor proof beyond all doubts, for there are few things in human existence that are beyond all doubt.
>
> Nor it is [sic] a doubt suggested by the ingenuity of counsel or by your own mental ingenuity, not warranted by the testimony, nor is it a doubt born of a merciful inclination or disposition to permit—to permit the defendant to escape the penalty of the law. Nor is it a doubt suggested or prompted by sympathy for the defendant or those with whom he may be connected.
>
> A reasonable doubt is a sane, rational doubt, an honest—*honest, substantial misgiving*, one based on reason and common sense, fairly arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence, as the case may be.
>
> Proof beyond a reasonable doubt is such proof that fully satisfies or entirely convinces you of the defendant's guilt.

(Emphasis added.) This instruction is essentially the same instruction given by the trial court considered in *Hudson*. *See Hudson*, 331 N.C. at 141, 415 S.E.2d at 742.

Just as did the *Hudson* defendant, defendant here contends that the trial court's use of the terms "honest, substantial misgiving" in defining reasonable doubt could have led the jurors to interpret 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. Writing for a unanimous Court in *Hudson*, Justice Meyer stated:

> Significantly, the combination of the terms found offensive by the *Cage* Court is not present here. Indeed, none of the objectionable language in *Cage*, "grave uncertainty," "actual substantial doubt," or "moral certainty," is evident in the instant jury instruction. Rather, here we are concerned merely with the phrase "substantial misgiving." Thus, like other courts that have considered this question, we conclude that the reasonable doubt instruction given here is not constitutionally unsound. *See Parker v. Alabama*, 587 So. 2d 1072, 1085 (Ala. Crim. App. 1991); *South Carolina v. Johnson*, 410 S.E.2d 547, 554 (S.C. 1991), *petition for cert. filed* (26 February 1992) (U.S. No. 91-7474) [footnote omitted].[3]

Hudson, 331 N.C. at 142-43, 415 S.E.2d at 742-43. We likewise hold that defendant's assignment in the instant case is without merit.

III.

Sentencing Phase Issue

[7] Defendant also assigns error to the trial court's instructions to the jury during the sentencing phase of his trial. Defendant argues that the court's charge violates the principles enunciated by the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L.Ed.2d 369 (1990), by requiring the jury to unanimously find mitigating circumstances before considering any of those mitigating circumstances in their deliberations on punishment. Further, defendant contends this error was not harmless and requires a new sentencing hearing. The State has conceded

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3. The United States Supreme Court subsequently denied the *Johnson* defendant's petition for writ of certiorari. *Johnson v. South Carolina*, --- U.S. ---, 118 L. Ed. 2d 404 (1992).

both points in brief and in oral argument, and has recommended that this Court remand defendant's case for re-sentencing. We concur and order a new capital sentencing proceeding.

NO ERROR IN THE TRIAL.

DEATH SENTENCE VACATED AND REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

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

Justice MITCHELL concurring in the result.

I concur in the result reached by the majority. I am unable to agree, however, with the apparent view of the majority that the District Attorney somehow behaved improperly or unethically if his conduct violated the Prosecution Function Standards of the American Bar Association Standards for Criminal Justice. Those standards have no force or effect in North Carolina or in the overwhelming number of jurisdictions of this nation. The District Attorneys of North Carolina—like the members of this Court—are independently elected constitutional officers who have performed their constitutionally prescribed functions for more than two centuries without officious instructions from the American Bar Association or other private organizations. I believe that our District Attorneys are quite capable of continuing to perform those functions without such assistance and that the "Prosecution Function Standards" cited by the majority should not be relied upon in this jurisdiction.

STATE OF NORTH CAROLINA v. ROBERT THURMAN CARTER

No. 436A92

(Filed 28 January 1994)

1. Jury § 192 (NCI4th)— murder—jury selection—excusal for cause denied—challenge not renewed—no error

There was no error in a murder prosecution where the trial court denied defendant's challenge for cause of a prospec-

tive juror and defendant did not renew his challenge for cause after exhausting his peremptory challenges as mandated by N.C.G.S. § 15A-1214(h) and (i). Even if defendant had complied with the statute, any error would have been harmless because the original juror was excused on a peremptory challenge and, although defendant was denied an additional peremptory challenge with which to strike an alternate juror, the alternate did not serve as one of the jurors who decided the case.

Am Jur 2d, Jury § 218.

2. **Homicide § 378 (NCI4th)— murder—evidence of self-defense introduced by State—other evidence raising inference of premeditation**

The trial court did not err by submitting to the jury first-degree murder based on premeditation and deliberation where defendant contended that the State was bound by defendant's claim of self-defense because the State introduced the claim during its direct examination of two officers and did not present any contradictory evidence, but there was evidence which, while not directly contradictory, raised the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense.

Am Jur 2d, Homicide § 448.

3. **Evidence and Witnesses § 754 (NCI4th)— murder—seizure of weapon—no prejudice—claim of self-defense**

There was no prejudicial error in a first-degree murder prosecution in the admission of the handgun used in the killings where defendant contended that the warrant under which the handgun was seized was invalid but also claimed self-defense. He told a bartender that he had shot two people, told a detective that he had killed two people and asked to be brought in, and admitted in the presence of another detective that he had shot the victims. Under these circumstances, admission of the gun was of such insignificant probative value that its admission was harmless.

Am Jur 2d, Appeal and Error § 806.

4. **Evidence and Witnesses § 1080 (NCI4th)— murder—rights read to defendant—admissible**

The trial court did not err in a murder prosecution by admitting testimony by a detective that defendant was ad-

vised of his rights in the interrogation room at the police department. The detective only testified that defendant was read his rights and understood those rights and was not asked whether defendant had exercised his right to remain silent. Defense counsel had attacked the professionalism of the law enforcement officers who had investigated the case at numerous points; the evidence that defendant was read his rights and that he understood those rights tends to refute the characterization of the officers' conduct as unprofessional.

Am Jur 2d, Evidence §§ 638 et seq.; Homicide § 339.

Comment Note.—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

Appeal pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hobgood, J., at the 21 November 1991 Criminal Session of Superior Court, Scotland County, upon a jury verdict finding defendant guilty of first-degree murder. On 16 April 1993 this Court allowed defendant's motion to bypass the Court of Appeals as to an additional judgment of imprisonment entered upon a jury verdict finding defendant guilty of second-degree murder. Presented before the Supreme Court on 13 October 1993 for decision upon written briefs without oral argument pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was indicted for two counts of first-degree murder and was tried capitally. A jury found defendant guilty of the first-degree murder of Ezekiel Ross, Jr. and of the second-degree murder of Carrie Council. The trial court sentenced defendant to consecutive terms of life imprisonment for the first-degree murder, pursuant to the jury's recommendation, and fifty years imprisonment for

the second-degree murder. On appeal, defendant raises four assignments of error. We find no error.

The State's evidence tended to show that on 19 September 1989 at about 12:30 p.m., law enforcement officers found the body of Carrie Council in the carport of her home. She had been shot three times, once in the abdomen, once in the chest, and once in the arm. There was no gunpowder residue on her clothing or wounds, which indicated that the gun was fired from a distance.

The officers found the body of Council's boyfriend, Ezekiel Ross, Jr., inside Council's house in the hallway leading to the bathroom. He had been shot three times. One of the three bullets entered Ross's back. There was no gunpowder residue on Ross's wounds or clothing, which indicated that the gun was fired from a distance. According to the testimony of the medical examiner, Council and Ross had been dead for at least three hours when officers found their bodies.

SBI Agent Marrs testified that four of the bullets recovered from the bodies and the area beneath the bodies had been fired from defendant's .32 Smith and Wesson revolver. Two bullets were too deformed to identify their source; however, Marrs testified that they had probably been fired from the same revolver.

Carrie Council's neighbor, Martha Broady, testified that Council had been at home the evening before the shootings. On the morning of the shootings, Broady walked outside her house at about 8:30 a.m. and noticed Council's car and a blue and white car that she had not seen before in the driveway. Between 10:00 a.m. and 11:00 a.m., Broady noticed a brown and black Chevrolet Blazer at Council's, which she later saw speed by her and then return to Council's driveway. She then saw a tall, heavy-set, black man enter the carport and bend down to do something. Broady had seen this man and his truck at Council's on other occasions. Several other witnesses testified that defendant owned a brown and black Blazer.

Sheila Amaning, Council's daughter, testified that Ross had been her mother's boyfriend in 1982 and 1983. She stated that in April of 1989 defendant showed up at her mother's house and told Council that he had heard about her and was looking for a good woman. Defendant frequently called Council, sometimes four times a night. In June or July of 1989 defendant arrived at Council's

house as Council was thanking Roy Wilson, the father of a neighbor, for cutting her lawn. Amaning testified that defendant told Council, "If I ever come here and see another man in this house, I'll kill him."

Jasper Mears testified that he sold alcoholic beverages by the glass in his home without a permit. Defendant was one of his customers; he often stopped there after work in the morning for a drink. On the morning of the shootings, defendant arrived at Mears' home between 8:15 and 8:30 a.m. after having visited Council. He told Mears that he had lost his girlfriend because she had gone back to her former boyfriend, who was at Council's residence when defendant left. Defendant left Mears' home about 9:00 a.m. but returned five minutes later. Defendant was pacing and stated that he was going back to Council's. Mears stated that defendant was not drinking. Defendant left Mears' home about 9:30 a.m.

Mears further testified that later that day defendant phoned him and stated, "I know I owe you but I can't pay you now because I just shot two people." He told Mears that he was at home and Detective Jack Poe was coming to pick him up. Ray Lynn Ford, who had been visiting Mears' establishment that day, corroborated Mears' testimony. After the phone call from defendant, Mears went to defendant's home, approached defendant, who was in a police car, and asked him, "Did you really shoot those people?" Mears testified that defendant only smiled. The officers who were present testified that defendant nodded affirmatively in response.

Lieutenant Jack Poe, Chief of Detectives of the Laurinburg Police Department, testified that after viewing the scene of the shootings, he spoke with Broady, who told him about the Blazer. Poe had known defendant for twenty years and knew defendant drove a Blazer that fit the description that Broady gave. Poe called Mears and spoke with Ford, who told Poe about the call defendant had made to Mears. Poe obtained an arrest warrant and called defendant, who told him he had killed two people and he wanted Poe to pick him up.

Poe testified that he went to defendant's home. At defendant's request Poe allowed defendant to go into his bedroom to remove his jewelry. Poe followed him and noticed a revolver under the pillow on the bed. He did not tell other officers about the revolver. Poe then took defendant to the police department.

While defendant was in the patrol car on the way to the police department, he explained what had happened that morning. He told Poe that Council had called him and asked him to come to her home at 7:00 a.m. Defendant arrived about 8:00 a.m. and found a man there with Council. The man told defendant to leave, to which defendant responded that it was up to Council to tell him to leave. Defendant and the man began to argue. The man opened a cabinet drawer to get a knife. Defendant then shot the man and Council. Defendant repeated several times that he shot the man in self-defense.

No weapon was found at the scene. Detective A.E. Woodard testified that Detective Michael Porter obtained a search warrant for the gun. Woodard then went to the jail where defendant was being held and told defendant they had a warrant and were going to search his house. Defendant told Woodard he would save them time, to get the key to his house from the jailer, and that the gun was under a pillow on the bed in his bedroom. Woodard did not ask defendant any questions. Officers then went to defendant's home and executed the warrant. The revolver, which was seized, was under a bed pillow, fully loaded. A box of ammunition was found in a closet.

Defendant presented no evidence.

[1] Defendant assigns as error the trial court's denial of his challenge for cause to prospective juror Maxine White. Defendant failed to renew his challenge for cause and therefore did not comply with N.C.G.S. § 15A-1214(h) and (i). These provisions mandate:

> (h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.
>
> (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

> (1) Had peremptorily challenged the juror; or
>
> (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

N.C.G.S. § 15A-1214(h), (i) (1988). Defendant exhausted his peremptories but did not renew his challenge for cause. Failure to comply with these requirements forecloses defendant's appeal of the denial of the challenge for cause. *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 455-56 (1986).

Even if defendant had complied with the statute, he would not be entitled to relief. Defendant contends that because he used all his peremptories, including one to strike prospective juror White, and was denied an additional peremptory with which to strike alternate juror Mitchell Peele, he was denied his right to an impartial jury. Alternate juror Peele did not serve as one of the twelve jurors who decided defendant's case. In *Sanders* we stated:

> When a defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, the defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief.

Sanders, 317 N.C. at 609, 346 S.E.2d at 456. Here, defendant used either peremptories or challenges for cause to remove all jurors whom he deemed unacceptable from the twelve who actually decided his case. Thus, even if the trial court's denial of his challenge for cause were error, it would be harmless. *Young*, 287 N.C. at 389, 214 S.E.2d at 772 (citing *State v. Levy*, 187 N.C. 581, 587-88, 122 S.E. 386, 390 (1924)).

[2] Defendant next assigns as error the trial court's denial of his motion to dismiss the first-degree murder charge based on malice, premeditation and deliberation. After his arrest, defendant made voluntary statements claiming that Ross opened a kitchen drawer to retrieve a knife with which to attack defendant and that defendant then shot him in self-defense. The State introduced defendant's claim of self-defense during its direct examination of Detective A.E. Woodard and Lieutenant Jack Poe. According to defendant, because the State did not present any evidence to con-

tradict the exculpatory features of defendant's statements, the State is bound by defendant's claim of self-defense, which would excuse the killing if the self-defense were perfect or reduce the charge from murder to manslaughter if imperfect.

In ruling on a motion to dismiss a first-degree murder charge, the trial court must consider the evidence in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom. *State v. Jackson*, 317 N.C. 1, 22, 343 S.E.2d 814, 827 (1986), *judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Substantial evidence must be introduced that tends to prove each essential element of the crime charged and that defendant committed the crime. *Id.* The evidence may contain contradictions or discrepancies; these are for the jury to resolve and do not require dismissal. *Id.* at 22-23, 343 S.E.2d at 827.

First-degree murder is the killing of a human being with malice, premeditation and deliberation. *See* N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation" means that the defendant formed the specific intent to kill the victim "for some length of time, however short" before the murderous act. *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (quoting *State v. Biggs*, 292 N.C. 328, 337, 233 S.E.2d 512, 517 (1977)). "Deliberation" means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. *State v. Stager*, 329 N.C. 278, 323, 406 S.E.2d 876, 902 (1991). Usually premeditation and deliberation are not proved by direct evidence but instead are proved "by actions and circumstances surrounding the killing." *Joyner*, 329 N.C. at 215, 404 S.E.2d at 655. Examples of such circumstances and actions are:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Huffstetler, 312 N.C. 92, 109-10, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

In *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961), this Court stated:

> 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.
>
> And when the State's evidence and that of the defendant is to the same effect, and tend only to exculpate the defendant, his motion for judgment as of nonsuit should be allowed.

(Citations omitted.) The State, however, is not bound by an exculpatory statement "which it introduces if there is 'other evidence tending to throw a different light on the circumstances of the homicide.' " *State v. Rook*, 304 N.C. 201, 228, 283 S.E.2d 732, 748-49 (1981) (quoting *State v. Bright*, 237 N.C. 475, 477, 75 S.E.2d 407, 408 (1953)), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982); *see also Jackson*, 317 N.C. at 23-24, 343 S.E.2d at 828; *State v. Wooten*, 295 N.C. 378, 385-88, 245 S.E.2d 699, 704-05 (1978).

Here, defendant's claim of self-defense is set in relief by other evidence that casts a different light on the circumstances of this killing. The evidence, taken in the light most favorable to the State, showed that no knives or other weapons were found at the scene of the crime and no drawers were open. Ross was shot three times, once in the back. Prior to the day of the shooting, defendant threatened, "If I ever come here and see another man in this house, I'll kill him." After the shooting, defendant told Jasper Mears and later Lieutenant Poe that he had shot two people but did not at that time claim that he had done so in self-defense. Though this evidence does not directly contradict defendant's statement, it raises the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense. The issue is for the jury to resolve, and the trial court did not err in submitting the first-degree murder charge based on premeditation and deliberation. *See Wooten*, 295 N.C. at 387-88, 245 S.E.2d at 704-05 (upholding denial of defendant's motion for judgment as of nonsuit where defendant stated he killed in self-defense rather than in course of robbery, and evidence, taken as a whole, supported felony-murder theory); *State v. Hankerson*, 288 N.C. 632, 637-38, 220 S.E.2d 575, 580-81 (upholding denial of defendant's motion for judgment as of nonsuit where defendant made exculpatory statements claiming self-defense, and evidence, though not directly contradictory,

supported second-degree murder), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977).

[3] By his third assignment of error, defendant argues that the trial court should not have admitted into evidence the handgun used in the shootings. Officers seized the handgun pursuant to a search warrant after defendant's arrest. According to defendant, the affidavit supporting the warrant contained information that was obtained in violation of defendant's Fifth Amendment right to counsel, which consequently rendered the warrant invalid and the handgun seized pursuant thereto inadmissible.

We need not address the question of whether the information in the warrant was obtained in violation of defendant's constitutional right to counsel. Assuming arguendo that defendant's constitutional right was violated, the admission of the gun was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Defendant's defense to the charge of Ross's murder was self-defense, not that he was not the killer. Defendant told Mears that he had shot two people. When Detective Poe called defendant, defendant stated that he had killed two people and asked to be brought in. In the presence of Detective Woodard, defendant again admitted he had shot Council and Ross. Under these circumstances, admission of the gun "was of such insignificant probative value when compared with the overwhelming competent evidence of guilt that its admission did not contribute to defendant's conviction and therefore admission of the evidence was harmless . . . beyond a reasonable doubt." *State v. Gardner*, 315 N.C. 444, 449, 340 S.E.2d 701, 705-06 (1986) (quoting *State v. Williams*, 288 N.C. 680, 693, 220 S.E.2d 558, 568 (1975)).

[4] By his final assignment of error, defendant contends that the trial court should not have admitted the testimony of Detective Porter, elicited by the State, that defendant was advised of his Miranda rights while in the interrogation room at the police department. Defendant argues that his exercise of his right to remain silent was used against him, which violated his privilege against self-incrimination under the United States and North Carolina Constitutions. U.S. Const. amends. V, XIV; N.C. Const. art. I, § 23. Further, defendant claims this evidence was not relevant to any material issue in the case and that it suggested to the jury that defendant refused to make a statement and allowed it to infer guilt therefrom.

A criminal defendant's exercise of his right to remain silent cannot be used against him "to impeach an explanation subsequently offered at trial." *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98 (1976); *see State v. Hoyle*, 325 N.C. 232, 236-37, 382 S.E.2d 752, 754 (1989). In *Greer v. Miller*, 483 U.S. 756, 764, 97 L. Ed. 2d 618, 629 (1987), the United States Supreme Court stated that *Doyle* applies to those cases in which "the trial court has permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence." Here, the State did not ask Porter whether defendant exercised his right to remain silent. Porter only testified that defendant was read his rights and indicated he understood those rights. No specific inquiry or argument was made about defendant's silence. Defendant's exercise of his right to remain silent therefore was not used against him and his constitutional rights were not violated.

Contrary to defendant's assertion, the evidence that defendant was read his Miranda rights and that he understood them was relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). At numerous points in the trial, defense counsel attacked the professionalism of the conduct of the law enforcement officers who investigated the case. When examining these officers, defense counsel suggested that the crime scene had not been secured, that the evidence had been moved, and that various tests, such as blood tracing and bullet trajectory tracking, should have been performed on the evidence. The evidence that defendant was read his Miranda rights according to law and that he indicated his understanding of them tends to refute the characterization of the officers' conduct as unprofessional. This assignment of error is overruled.

We conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

BOBBY THOMAS MITCHELL v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 226A93

(Filed 28 January 1994)

1. **Insurance § 528 (NCI4th)— underinsured motorist coverage— stacking under mother's policy**

The trial court correctly held, and the Court of Appeals properly affirmed, that a plaintiff who was injured in a motor vehicle accident was entitled to have his rights to underinsured motorist coverage determined under his mother's policy where the only distinction between this case and *Harrington v. Stevens*, 334 N.C. 586, is that plaintiff in this case was an insured of the second class as to the policy of the person who owned and operated the automobile in which he was riding, while the injured party in *Harrington* was an insured of the first class on all policies. However, there is nothing in N.C.G.S. § 20-279.21 which indicates that if a person is otherwise covered as a first class insured he loses this coverage if he is covered as a second class insured on another policy.

Am Jur 2d, Automobile Insurance § 322.

2. **Insurance § 530 (NCI4th)— underinsured motorist coverage— stacking—reduction clause—not effective**

A reduction clause in an automobile insurance policy was not available to reduce the amount of stacked underinsured coverage.

Am Jur 2d, Automobile Insurance § 322.

3. **Insurance § 528 (NCI4th)— underinsured motorist coverage— extent of coverage**

Defendant insurance company was liable to plaintiff for $50,000 where plaintiff was injured while a passenger in a vehicle owned and operated by Stewart, the accident was caused by the negligence of Lopez, the vehicle operated by Lopez had liability coverage of $25,000, the vehicle operated by Stewart had $50,000 in underinsured motorist coverage, a policy issued to plaintiff's mother, with whom he lived, provided an additional $50,000 in underinsured coverage, the policies of Stewart and plaintiff's mother were issued by defendant,

plaintiff's medical expenses were in excess of $90,000, Lopez's liability carrier paid $25,000, and defendant paid plaintiff $25,000 on the Stewart policy but refused to pay anything on the policy of plaintiff's mother. Although defendant contends it owes nothing since clear language in the mother's policy provides that it shall pay only a sum by which its coverage exceeds payments under applicable policies, $50,000 had been paid, and the limit of its liability on plaintiff's mother's policy was $50,000, this policy provision is contradicted by N.C.G.S. § 20-279.21(b)(4). That statutory definition is a part of the policy of plaintiff's mother and overrides any contrary terms of the policy.

Am Jur 2d, Automobile Insurance § 322.

Justice MEYER dissenting.

On appeal by the defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 16, 429 S.E.2d 351 (1993), affirming a judgment entered by Brooks, J., on 5 November 1991, in Superior Court, Wake County. On 1 July 1993, this Court allowed Nationwide's petition for discretionary review as to an additional issue. Heard in the Supreme Court 16 November 1993.

This is an action pursuant to N.C.G.S. § 1-253 for a declaratory judgment. The cause was heard in superior court on stipulated facts. The facts upon which the parties agreed were that plaintiff was injured in an accident while riding in a vehicle owned and operated by Ronnie Stewart. The accident was caused by the negligence of James Lopez. The vehicle operated by Lopez, the tortfeasor, had liability coverage of $25,000. The vehicle owned by Stewart had $50,000 in underinsured motorist coverage. A policy issued to plaintiff's mother, Peggy Wiggs Baker, with whom he lived, provided an additional $50,000 in underinsured motorist coverage. The policies of Stewart and the plaintiff's mother were issued by the defendant. The plaintiff's medical expenses were in excess of $90,000.

The tortfeasor's liability carrier paid the plaintiff $25,000. The defendant paid the plaintiff $25,000 on the Stewart policy but refused to pay anything on the policy of the plaintiff's mother.

The plaintiff brought this action to have his rights determined under his mother's policy. The superior court entered judgment for the plaintiff, holding that the defendant was liable to him for $50,000. The Court of Appeals affirmed with a dissent.

The defendant appealed to this Court.

Farris and Farris, P.A., by Robert A. Farris, Jr. and Thomas J. Farris, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for defendant-appellant.

WEBB, Justice.

This case brings to the Court yet another stacking case. We hold that pursuant to *Harrington v. Stevens*, 334 N.C. 586, 434 S.E.2d 212 (1993), we are bound to affirm the Court of Appeals.

[1] In *Harrington*, we held that N.C.G.S. § 20-279.21(b)(3) and N.C.G.S. § 20-279.21(b)(4), as they were in effect for that case and for this case, required that a person living in the household with relatives be allowed to aggregate or stack, both interpolicy and intrapolicy, the underinsured motorist coverages of the relatives and to collect on those stacked coverages. Under this holding, the defendant is liable to the plaintiff on his mother's policy.

The only distinction between this case and *Harrington* is that as to the Stewart policy, the plaintiff was an insured of the second class. The injured party in *Harrington* was an insured of the first class on all policies. We hold this is a distinction without a difference. There is nothing in N.C.G.S. § 20-279.21 which indicates that if a person is otherwise covered as a first class insured he loses this coverage if he is covered as a second class insured on another policy. *See Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127 (1986).

[2] The defendant also argues that it is not liable for any further payment to plaintiff because of the following provision in the policy of the plaintiff's mother.

> Any amounts 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. . . .

The defendant says it is entitled to deduct, under the policy of defendant's mother, $25,000 which was paid on the tortfeasor's policy and $25,000 which was paid on the underinsured motorist coverage under the Stewart policy. It says this is so because both these payments were made "on behalf of persons or organizations who" were legally responsible for the payments. We reject this argument for the reason stated in *Harrington*, 334 N.C. at 592, 434 S.E.2d at 214.

[3] The defendant argues further that it is not liable for any payment to the plaintiff because of a provision in the policy of the plaintiff's mother which reads as follows:

> The most we will pay under this coverage is the lesser of the amount by which the:
>
> a. limit of liability for this coverage; or
>
> b. damages sustained by the **covered person** for bodily injury;
>
> exceeds the amount paid under all bodily injury liability bonds and insurance policies applicable to the **covered person's** bodily injury.

The defendant contends this clear language of the policy provides that it shall pay only a sum by which its coverage exceeds payments under the Lopez and Stewart policies. The defendant argues that a total of $50,000 was paid by the Lopez and Stewart policies and the limit of its liability on the policy of the plaintiff's mother was $50,000. Its liability does not exceed the amount paid on the other two policies, says the defendant, and for this reason it does not owe anything to the plaintiff under the terms of the policy.

If the defendant is right in this argument, this policy provision is contradicted by N.C.G.S. § 20-279.21(b)(4) which provided that underinsured motorist coverage "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[.]" N.C.G.S. § 20-279.21(b)(4) (1985). This definition is a part of the policy of the plaintiff's mother and it overrides any contrary terms of the policy. *Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977). The defendant is liable to the plaintiff for $50,000 under this definition.

For the reasons stated in this opinion, we affirm the Court of Appeals.

AFFIRMED.

Justice MEYER dissenting.

I dissent from the majority's decision to allow the stacking of coverages under the facts of this case for the same reasons I expressed in my dissents in *Harrington v. Stevens*, 334 N.C. 586, 593, 434 S.E.2d 212, 215 (1993), and *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 195, 420 S.E.2d 124, 131 (1992).

STATE OF NORTH CAROLINA v. REGINALD PATTERSON

No. 29A93

(Filed 28 January 1994)

1. Criminal Law § 762 (NCI4th)— first-degree murder— instructions—reasonable doubt—moral certainty

There was no error in a noncapital first-degree murder prosecution where the trial court instructed the jury that "[it] must be fully satisfied, entirely convinced or satisfied to a *moral certainty* of the Defendant's guilt." The use of the term "moral certainty" alone—not in combination with "grave uncertainty," "actual substantial doubt," or terms of similar import—does not raise a reasonable likelihood that the jury applied the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Am Jur 2d, Trial § 832.

2. Criminal Law § 753 (NCI4th)— first-degree murder— instructions—reasonable doubt—substance of requested instruction

The trial court did not err in a noncapital first-degree murder prosecution by not giving defendant's requested instruction that "in a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence that the defendant's guilt has been proven beyond a reasonable

doubt." It is sufficient if the trial court gives requested instructions in substance; here the instructions given made it "overly clear" that the jury could acquit defendant if it found that the State failed to prove its case beyond a reasonable doubt.

Am Jur 2d, Trial §§ 827 et seq.

3. **Criminal Law § 787 (NCI4th)— first-degree murder—requested instructions on accident—given in substance**

The trial court did not err in a noncapital first-degree murder prosecution in its instruction on the law of accident where, considering the instructions in their entirety, the trial court explained the law sufficiently and substantially in accordance with defendant's request.

Am Jur 2d, Trial §§ 726 et seq.

4. **Homicide § 246 (NCI4th)— first-degree murder—premeditation and deliberation—evidence sufficient**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss for insufficient evidence where defendant contended at trial that he had killed the victim accidentally and on appeal that she was shot during a quarrel, but the physical evidence contradicted both versions, there was physical evidence from which the jury could reasonably infer that defendant intentionally pointed a shotgun at the victim at close range and intentionally pulled the trigger, and there was other evidence which allowed the jury to find that defendant intentionally killed the victim with malice and with premeditation and deliberation.

Am Jur 2d, Homicide §§ 437 et seq.

5. **Criminal Law § 113 (NCI4th)— first-degree murder—custodial statement—not disclosed by State—no prejudicial error**

There was no prejudicial error in a noncapital first-degree murder prosecution where the State violated discovery statutes in that defendant filed a request for voluntary discovery, the State filed a copy of a written statement defendant gave to an officer after having been advised of his rights, and later filed a supplementary discovery of oral statements made to another officer. The State in its initial response omitted the *essence* of the first version proffered by defendant and thus failed to disclose the substance of defendant's custodial state-

ment. The subsequent discovery response did not "cure" the error because the State failed to refer back to its initial omission or otherwise inform defendant that the written record of his custodial statement, earlier disclosed, was incomplete; furthermore, unlike the initial response, the supplementary discovery response did not indicate that the State intended to use the evidence at trial. The error was harmless because defendant had elicited the same evidence earlier in the trial; defendant could have moved to suppress the statement at issue during the trial; there is no indication in the record that the statement was not voluntarily and understandingly made; and defendant fully availed himself of the opportunity to question both officers to whom statements were made and was free to argue to the jury the exculpatory implications of his multiple versions of how the murder weapon came to discharge.

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

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Allsbrook, J., at the 2 August 1992 Criminal Session of Superior Court, Halifax County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 September 1993.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Nora Henry Hargrove for defendant appellant.

WHICHARD, Justice.

Defendant was indicted for one count of first-degree murder. After a noncapital trial, a jury found defendant guilty thereof, and the trial court sentenced defendant to the mandatory term of life imprisonment. On appeal, defendant brings forward four assignments of error. After a thorough review of the record, we conclude that defendant received a fair trial, free of prejudicial error.

The State presented evidence that tended to show the following:

Sometime in the early morning hours of 29 February 1992, Tonya Renee Mitchell suffered a fatal shotgun wound to her head. She died at Duke University Medical Center on 2 March 1992.

Officer Johnny Manley of the Littleton Police Department testified that shortly after midnight on 29 February 1992, he waited in the New Dixie Mart on Highway 15 while the clerk closed the store and completed the deposit. At about 1:05 a.m. defendant drove into the parking lot, walked to the door and knocked on the window, and motioned to Manley to come outside. Manley did so. Defendant told Manley he had shot his girlfriend through the head and thought he had killed her. Manley asked where the shooting had occurred; defendant replied that it occurred at his residence, adding that he started to leave, changed his mind, and threw the gun in Thelma Lake. Manley arrested defendant at that time and drove defendant to his home.

Manley knocked on the door of defendant's home, but no one responded. Hearing moaning from the back of the house, Manley entered and walked through the living room towards an open door. Entering the room, Manley observed a young woman lying on the floor behind the bed, her face to the dresser and wall and her body in a slumped-over position. A suitcase containing clothes was on the bed. Manley also observed blood all around the woman's head and on the dresser and wall. He later identified the woman as Tonya Renee Mitchell.

On cross-examination Manley noted that he interpreted defendant's statement as a request for assistance for the victim. Manley observed no blood, torn clothes, bruises, scratches, or other evidence that defendant had been in any kind of argument or fight, and defendant was cooperative. Manley did not advise defendant of his rights, but asked him no questions.

Halifax County Deputy Sheriff Robby Hedgepath testified that he arrived at the scene at approximately 1:15 a.m. Hedgepath noticed defendant sitting in Manley's car surrounded by a crowd, and he walked outside to clear the area. He overheard defendant tell the people around the car that he did not mean to shoot the victim. Hedgepath testified on cross-examination that later, during the custodial interview at the police station, defendant said that he threw the gun down on the bed and it went off, the shot hitting the left side of the victim's face.

Detective Henry Whittle, an investigator with the Halifax County Sheriff's Department, testified that he arrived at the scene of the shooting shortly after 1:00 a.m. He observed defendant in the back of a patrol car. Defendant told Whittle he had just killed

his girlfriend and wanted to see her. Whittle instructed defendant to calm down and proceeded into the home to complete his investigation there. Whittle later drove to the Littleton Police Department where he met with defendant around 1:50 a.m.

Whittle told defendant he wished to speak with him, and defendant agreed to talk to Whittle. Defendant appeared to be coherent and not under the influence of any narcotic or controlled substance. He did not appear to be confused, sleepy, hysterical, upset or visibly emotional. Whittle advised defendant of his rights from a printed Miranda rights form while defendant read along; at 2:02 a.m. defendant signed the form indicating he understood his rights. Defendant indicated he was not under the influence of any alcoholic beverage or drugs. He never requested any refreshment or break and never asked to stop the conversation. Whittle made no promises.

Defendant gave Whittle the following account of the shooting:

His girlfriend, Tonya Mitchell, left to go to work, and defendant went to the Green Store. Later, she returned from work and went to the Green Store. Defendant was behind the store when she arrived. She came around back, they exchanged words, and she returned to her car and drove back to their residence. Defendant followed her in his vehicle.

At the house defendant removed his shotgun from the rear floor of his vehicle. When he got to the bedroom, the victim was packing her clothes to move. Defendant threw the shotgun onto the bed and the shotgun went off. He then took the shotgun, drove to Thelma Lake, and threw the gun into the water. While driving back to Littleton on the way to Washington, D.C., defendant saw Officer Manley at a convenience store.

Whittle testified that he told defendant he was going to take a written statement and he wanted defendant to tell him the truth and sign the statement when they finished. Defendant made the following statement to Whittle:

> On the 28th of February, 1992, I, Reginald Patterson, and my girlfriend, Tonya Renee Mitchell, was at our house around 11:15 p.m., and she, Tonya, went to work at the Bibb Company in Roanoke Rapids, N.C. Before she left she told me, "Don't stay out to [sic] long Reginald." So, I went down to the Green Store like you are going toward Hollister on Highway #4 and then she came up while I was behind the store taking a leak.

My brother came up and told me she was here at the store and then I told my brother, Earnest, to take my keys to my brother, William, and when he came back around the store to tell me that she already knew I was behind the store she followed my brother back and when she got there told me, "You sorry mother f---- you," and then she left and I got into my car and I followed her to my house. When I got to the house she was getting her clothes, I guess to leave. When I got out of my car I got my 20 gauge shotgun out of the floor of the rear of my car and went into the house and she was getting her clothes and I saw her getting her clothes and I had the shotgun in my hands and I had the gun up in the air and had it with one hand. I brought the gun down to throw the gun down and the gun went off and shot her. I didn't mean to shoot her cause I love her. Then, I walked back through the house and told my mother that I have just shot Tonya and then I went on out the house and got into my car and took the shotgun with me and drove to Littleton. I was leaving to go to Washington, D.C., and I drove to Thelma to the Thelma Bridge where I threw the shotgun into the river. Then, I started to leave and go to D.C. but I turned around and drove back to Littleton, N.C. When I got to Littleton I saw Officer Manley at the New Dixie Mart and I stopped and told him what had happen.

Willie McWilliams testified that, while in the Halifax County Jail with defendant, defendant asked him to destroy the gun—melt it down—if McWilliams got out. Defendant told McWilliams he could find the gun in the left hand side ditch near Faison Store Cleaners. Defendant told him that without the murder weapon there might not be a case. McWilliams told certain detectives about defendant's request.

Captain Charles E. Ward, Halifax County Sheriff's Department, testified that based on McWilliams' directions, he found a sawed-off shotgun in a clearing near the ditch beside Faison Store Cleaners. The shotgun was identified by other witnesses as belonging to defendant.

S.B.I. Special Agent William Turner, Jr., of the Firearm and Tool Mark Section, testifying as an expert in firearms' identification, stated that he examined the shotgun and 20 gauge shotgun shell found in the ditch, as well as the pellets removed from the

victim's body. Turner identified the shell as 20 gauge number 6 shot, which would have contained 197 pellets.

Turner test-fired the shotgun using 20 gauge shells. It fired in the normal manner, by chambering the shell, closing the bridge latch, pulling the hammer back, and releasing it by pulling the trigger. The trigger pull force on the shotgun ranged from three to four pounds. Turner attempted to fire the weapon by other than normal means. It would sometimes fire when Turner pulled the hammer back almost until the gun cocked and then released it, or when he pulled the trigger and struck the hammer with a moderate blow from a heavy object. Hitting the shotgun on the floor with hard force produced no discharge, nor did any other blows or drops.

Dr. Robert L. Thompson, the forensic pathologist who performed the autopsy, testified as an expert in the field of forensic pathology. Thompson observed a shotgun wound to the left temporal area, or left ear area, into the brain. He observed no other wounds on the face or head. Based on the spread of the shotgun pellets, Thompson concluded the wound was from a shotgun fired at close range. In his opinion, the victim died of a shotgun wound to the head.

Defendant did not testify or present evidence.

[1] In his first assignment of error, defendant contends that the trial court erred by giving a reasonable doubt instruction that reduced the State's burden of proof below the standard required by the Due Process Clause. At the charge conference defendant tendered a written request for the following instruction: "In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence that the defendant's guilt has been proven beyond a reasonable doubt." The trial court noted that "it's overly clear that the State has a burden of proof beyond a reasonable doubt," declined to give the requested instruction, and subsequently instructed the jury:

> The State must prove to you that the Defendant is guilty beyond a reasonable doubt. Of course a reasonable doubt of a Defendant's guilt also might arise from a lack or insufficiency of the evidence. However, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. Proof beyond a reasonable doubt means that you must be

fully satisfied, entirely convinced or satisfied to a moral certainty of the Defendant's guilt.

Defendant relies upon *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990). In *Cage*, the United States Supreme Court held that the following instruction violated the Due Process Clause:

> 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.*

Cage, 498 U.S. at 40, 112 L. Ed. 2d at 341-42 (emphasis in original). The Supreme Court focused on the combination of terms, stating:

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

Id. at 41, 112 L. Ed. 2d at 342.

In reviewing an instruction for *Cage* error, we inquire " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*

v. McGuire, 502 U.S. ---, ---, 116 L. Ed. 2d 385, 399 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990)). To satisfy this "reasonable likelihood" standard, a defendant must show more than a "possibility" that the jury applied the instruction in an unconstitutional manner, but need not establish that the jury was "more likely than not" to have misapplied the instruction. *Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329.

In *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), we reviewed the following instruction for *Cage* error:

> 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.

Id. at 339, 432 S.E.2d at 294-95 (emphasis in original). We found *Cage* error, stating: "We believe the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* is 'moral certainty.'" *Id.* at 342, 432 S.E.2d at 297.

> 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*.

Id. at 343, 432 S.E.2d at 297.

Here the trial court instructed the jury that "[it] must be fully satisfied, entirely convinced or satisfied to a *moral certainty* of the Defendant's guilt." However, unlike the trial courts in *Cage* and *Bryant*, it did not define reasonable doubt in terms of "grave uncertainty," "actual substantial doubt," "honest substantial misgiving," or other terms which suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Rather, it defined reasonable doubt as "not a vain, imaginary or fanciful doubt but . . . a sane, rational doubt," and referred the jury back to the evidentiary standard.

Thus, the question is whether use of the term "moral certainty" alone—not in combination with "grave uncertainty," "actual substantial doubt," or terms of similar import—raises a reasonable likelihood that the jury applied the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. We hold that it does not. Absent those terms, the *possibility* raised by use of the term "moral certainty" remains only a possibility, and does not ripen into a *reasonable likelihood. See id.* at 343, 432 S.E.2d at 297; *see also Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329. Therefore, we decline to find *Cage* error.

[2] Within this same assignment of error, defendant contends that the trial court erred in refusing to add to the definition of reasonable doubt the following language, taken almost verbatim from *State v. Riera*, 276 N.C. 361, 367, 172 S.E.2d 535, 539 (1970): "In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence that the defendant's guilt has been proven beyond a reasonable doubt." Neither statutory nor case law, however, requires that the trial court give the requested instructions verbatim; it is sufficient if it gives them in substance, but only insofar as they are a correct statement of the law and are supported by the evidence. *E.g.*, *State v. Avery*, 315 N.C. 1, 33, 337 S.E.2d 786, 804 (1985). While the language was appropriate, we agree with the trial court that the instructions given made it "overly clear" that the jury could acquit defendant if it found that the State failed to prove its case beyond a reasonable doubt. This assignment of error is overruled.

[3] Defendant contends that the trial court similarly erred in failing to give requested instructions on accident. Defendant submitted in writing the following requested instructions, adapted almost ver-

batim from *State v. Phillips*, 264 N.C. 508, 512-13, 142 S.E.2d 237, 339-40 (1965):

> A defendant's assertion that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden of proof to him to exculpate himself from a charge of murder. On the contrary, it is merely a denial that the defendant has committed the crime, and the burden remains on the State to prove an intentional killing, an essential element of the crime of murder, before any presumption arises against the defendant.
>
> Where the death of a human being is the result of accident or misadventure, in the true meaning of the terms, no criminal responsibility attaches to the act of the slayer. Where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, that it was done while he was engaged in a lawful enterprise, and that it was not the result of negligence, the homicide will be excused on the score of the accident. The negligence referred to in the foregoing rule of law imports wantonness, recklessness or other conduct, amounting to culpable negligence.
>
> The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent. It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt.
>
> An intent to inflict a wound which produces a homicide is an essential element of murder. Therefore, to convict a defendant of murder, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased.
>
> When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired by some accidental means is competent to rebut

> an intentional shooting. No burden rests on the defendant. He merely offers his evidence to refute one of the essential elements of murder in the second degree. If upon consideration of all the testimony, including the statement of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed deceased, it should return a verdict of not guilty of murder.

Defendant also asked orally that the trial court add, after the instructions on the elements of, respectively, first-degree murder, and the lesser included offenses of second-degree murder and involuntary manslaughter, the following language: the defendant would be excused of, respectively, first-degree murder, second-degree murder, or involuntary manslaughter, if the jury finds the death of Tonya Renee Mitchell was accidental. Further, defendant requested that the trial court repeat the pattern jury instruction on accident after the final mandate on all charges and defenses.

The trial court instead instructed the jury, after the introduction to the three offenses submitted, as follows:

> However, if the deceased died by accident or misadventure, that is without wrongful purpose or criminal negligence on the part of the Defendant, the Defendant would not be guilty of any of these crimes. The burden of proving accident is not on the Defendant. His assertion of accident is merely a denial that he has committed any crime. The burden remains on the State to prove the Defendant's guilt beyond a reasonable doubt.

After the instructions on the elements of the three offenses—first-degree murder, second-degree murder, and involuntary manslaughter—the trial court instructed as follows:

> However, where evidence is offered that tends to show that the victim's death was accidental and you find that the killing was in fact accidental, the Defendant would not be guilty of any crime even though his acts were responsible for the victim's death. A killing is accidental if it is unintentional, occurs during the course of lawful conduct and does not involve criminal negligence, which I have just defined for you. A killing cannot be premeditated or intentional or criminally negligent if it was the result of an accident. When the Defendant asserts that the victim's death was the result of an accident, he is

> in effect denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him. Therefore, the burden is on the State to prove those essential facts and in so doing, disprove the Defendant's assertion of accidental death. The State must satisfy you beyond a reasonable doubt that the victim's death was not accidental before you may return a verdict of guilty.

After the final mandate on all charges and defenses, the trial court instructed as follows:

> Furthermore, members of the jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of the Defendant beyond a reasonable doubt, I charge that if you find from the evidence that the killing of the deceased was accidental; that is, that the victim's death was brought about by an unknown cause, or that it was from an unusual or unexpected event from a known cause and you also find that the killing of the deceased was unintentional, that at the time of the homicide the Defendant was engaged in the performance of a lawful act without any intention to do harm and that he was not criminally negligent, if you find these to be the facts, remembering that the burden is upon the State, then I charge that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to return a verdict of not guilty as to the Defendant.

Considering the instructions given in their entirety, we conclude that the trial court sufficiently, and substantially in accordance with defendant's request, explained the law regarding accident. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in denying his motion to dismiss because the State's evidence was insufficient to sustain a verdict of first-degree murder. We disagree.

> 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. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind

> might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). The trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *Id.* at 237, 400 S.E.2d at 61. "The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *Id.*

In a first-degree murder trial, "the trial court must determine whether the evidence, viewed in the light most favorable to the State, is sufficient to permit a jury to make a reasonable inference and finding that the defendant, after premeditation and deliberation, formed and executed a fixed purpose to kill." *Id.* at 237, 400 S.E.2d at 62.

> "First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily " 'are not susceptible to proof by direct evidence.' " *Id.* (quoting *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978)). "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. *Id.* "Deliberation" means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. *Id.*

Id. at 238, 400 S.E.2d at 62.

At trial, defendant contended that all the evidence tended to show that he killed the victim accidentally. He now contends that all the evidence tends to show that he shot her during a quarrel, in an emotional moment during their ongoing relationship, without "aforethought or calm consideration." Under either theory, defendant appears to contend, there was no substantial evidence

tending to show that the killing was intentional, premeditated or deliberated. We disagree.

Defendant first told officers that the shotgun discharged when he threw it on the bed. He later stated: "I had the gun up in the air . . . [and] I brought the gun down to throw the gun down and the gun went off and shot her." The physical evidence contradicted both versions, however. There was expert evidence that the shotgun had to be partially or fully cocked before it was fired, that the latch had to be manually adjusted before it was fired because the spring mechanism was broken, and that it took three to four pounds of pressure to pull the trigger. Further, the shotgun had been sawed off, eliminating the choking mechanism in the barrel, and the shotgun pellets would spread out once fired. The wound inflicted was a large hole, with no satellite wounds about the head and face, indicating that the shotgun was fired at close range. Investigators found no pellets or pellet marks anywhere else in the room. From this evidence, the jury could reasonably infer that defendant intentionally pointed the shotgun at Tonya Mitchell at close range and intentionally pulled the trigger.

Premeditation and deliberation generally are not subject to proof by direct evidence but must be proved by circumstantial evidence. *E.g.*, *id.* at 238, 400 S.E.2d at 62. Circumstances from which premeditation and deliberation may be inferred include lack of provocation on the part of the deceased, the conduct and statements of the defendant before and after the killing, and ill will or previous difficulty between the parties. *Id.* Defendant's own statement indicated prior difficulties between defendant and the victim and lack of provocation by the victim. On the night of the killing, defendant stated that the victim found him behind the Green Store and that he did not want her to find him there. She called him "you sorry mother f-----" in front of his brothers and left. Defendant followed her in his own vehicle to the residence they shared, approximately one-and-one-half miles away. Upon arriving, defendant removed his 20 gauge shotgun from the rear floor of the vehicle, entered the house with shotgun in hand, and found the victim in the bedroom packing her clothes. Defendant's statement made no mention of a quarrel.

Other evidence tended to show that defendant gave inconsistent versions of the alleged accident to law enforcement officers. Defendant first stated that the shotgun discharged when he threw

it on the bed; later, he stated: "I had the gun up in the air . . . [and] I brought the gun down to throw the gun down and the gun went off and shot her." Both versions were inconsistent with the physical evidence of the nature of the wound and the expert evidence that the shotgun would not fire unless it was cocked and latched and the trigger was pulled. *Cf. State v. Stager*, 329 N.C. 278, 323, 406 S.E.2d 876, 902 (1991) (evidence that defendant gave inconsistent versions of the alleged accident, both of which were inconsistent with the physical evidence, tended to show that defendant intentionally killed her victim with malice after premeditation and deliberation).

Further, after the deceased called defendant a "sorry mother f-----" in front of his brothers, defendant followed her, driving more than one-and-one-half miles from the Green Store to their shared residence. Arriving there, he removed his shotgun from the rear of the car and entered the house. From this evidence, the jury, having concluded that defendant intentionally shot the victim, could further conclude that he had thought about it for at least some short period of time beforehand—for example, while driving to his house and removing the shotgun from the rear floor of his car. It also could further conclude that he then executed his intention in a cool state of blood. Thus, this evidence allowed the jury to find that defendant intentionally killed the victim with malice and with premeditation and deliberation. *Cf. State v. Childress*, 321 N.C. 226, 229-30, 362 S.E.2d 263, 265-66 (1987) (evidence that defendant and victim lived together, victim died from gunshot wound in back fired from a distance of approximately two feet, pistol required cocking before it would fire, and trigger required thirteen pound pull to fire, was sufficient for the jury to find the defendant intentionally, with malice and premeditation and deliberation, killed the victim). This assignment of error is overruled.

[5] In his final assignment of error, defendant contends that the trial court erred by failing to suppress a portion of his custodial statement not disclosed by the State in response to his discovery request, in violation of the Due Process Clause and our discovery statutes, N.C.G.S. §§ 15A-903, -907, and -910. Prior to trial, defendant filed a request for voluntary discovery of, *inter alia*, a copy of any recorded or written statement and a transcription of any oral statement by the defendant. The State in response filed a copy of the written statement defendant gave to Whittle after having been advised of his rights, and sometime later, a supplementary

discovery of certain oral statements made by defendant to Hedgepath, noting that defendant had told Hedgepath that he did not mean to shoot the victim and that he threw the gun down on the bed and it went off, hitting her on the left side of the face.

During trial, Hedgepath testified on direct examination that while waiting in a patrol car at the scene, defendant said to family members and neighbors, "I didn't mean to do it." "Later, [at the police station] he advised that he threw the gun down on the bed and it went off." On recross-examination, counsel for defendant elicited from Hedgepath that defendant made that statement during the custodial interview conducted by Whittle:

> Mr. Whittle asked [defendant] to tell him what happened. . . . [H]e told him about slamming the gun on the bed, Mr. Whittle told him but I'm not going to write this report out but one time and the statement out but one time so be honest with the first time . . . and [then] he went ahead with the true story [that he had the gun in his hands and had the gun up in the air and had it with one hand and brought it down to throw the gun down and the gun went off and shot her].

Whittle later testified on direct examination that, after he read defendant his rights and defendant stated that he understood and waived those rights, "[defendant] gave me two statements." Counsel for defendant immediately objected, and outside the presence of the jury complained that the State's discovery responses never indicated that defendant gave *two* statements to Whittle.

On *voir dire*, Whittle testified that defendant first told him he had put the gun on the bed and it went off. Then Whittle continued, "I told Mr. Patterson that I was going to take a written statement and I wanted him to tell me the truth and I was going to have him sign it when we finish." Defendant then made the statement written down by Whittle, signed by defendant, and disclosed. In pertinent part, defendant stated: "I had the shotgun in my hands and I had the gun up in the air and had it with one hand. I brought the gun down to throw the gun down and the gun went off and shot her. I didn't mean to shoot her cause I love her."

Defendant argued that the State never disclosed defendant's first version to Whittle, which "caught us totally off guard and totally by surprise." If counsel had known there were two versions,

he argued, his trial tactics would have been different: he would have conducted *voir dire* of both Hedgepath and Whittle and might have filed a motion to suppress defendant's custodial statement. Finally, counsel moved to suppress "any reference to anything that [defendant] told Mr. Whittle other than what was furnished to us as the statement that the State intended to use."

The trial court ruled that it "was satisfied that the State sufficiently complied with the requirements of the discovery statutes." It stated: "Defendant was certainly alerted as of July 16, or shortly thereafter, that he allegedly had made a statement that he threw the gun down on the bed and it went off hitting the victim on the side of her face and that he did not mean to hit her." The court instructed Whittle, out of the jury's presence, not to designate the first statement a separate statement or version; it instructed the jury not to consider Whittle's earlier testimony that defendant made two statements.

Defendant now contends that the State violated the discovery statutes, that the evidence not disclosed should have been suppressed or excluded, and that failure to suppress the evidence so prejudiced him that we must grant him a new trial. We agree that the State violated the discovery statutes and the trial court erred in failing to find the violation. We find the error harmless, however.

The statute requires the prosecutor "[t]o divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made." N.C.G.S. § 15A-903(a)(2) (1988). Further, there is a continuing duty to disclose. N.C.G.S. § 15A-907 (1988). "As used in the statute, 'substance' means: 'Essence; the material or essential part of a thing, as distinguished from 'form.' That which is essential." *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (quoting *Black's Law Dictionary* 1280 (rev. 5th ed. 1979)). In its initial response to defendant's discovery request, the State omitted the *essence* of the first version proffered by defendant—that he put or threw the gun on the bed and it discharged—and thus failed to disclose the substance of defendant's custodial statement made during the interrogation by Whittle. The State's subsequent discovery response did not "cure" the error because the State therein failed to refer back to its initial omission or otherwise inform defendant that the written record of his custodial

statement, earlier disclosed, was incomplete. We note parenthetically that, unlike the initial response, the supplementary discovery response did not indicate that the State intended to use the evidence at trial. Thus, the trial court erred in failing to find the discovery violation.

After a thorough review of the record, however, we conclude that the error was harmless. Had the trial court found the violation, in its discretion it could have imposed any or all of the statutory sanctions, including the sanction requested by defendant at trial, *viz*, that "any reference to anything that [defendant] told Mr. Whittle other than what was furnished . . . as the statement that the State intended to use" be excluded. *See* N.C.G.S. § 15A-910 (1993) ("If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers *may* (1) Order the party to permit the discovery or inspection, or (2) Grant a continuance or recess, or (3) *Prohibit the party from introducing evidence not disclosed*, or (3a) Declare a mistrial, or (3b) Dismiss the charge, with or without prejudice, or (4) Enter other appropriate orders.") (emphasis added); *State v. Quarg*, 334 N.C. 92, 103, 431 S.E.2d 1, 6 (1993) ("What sanctions, if any, to impose for the State's failure to comply with discovery is in the discretion of the trial court."); *State v. Shaw*, 293 N.C. 616, 625, 239 S.E.2d 439, 444 (1977) ("By its express terms, this statute authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it."), *overruled on other grounds, State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982). In that case, our task would have been to determine whether the trial court properly exercised its discretion in the choice of a sanction. Because the court failed to find the violation, however, and consequently failed to exercise its discretion, the ruling is reviewable. *Cf. State v. Brogden*, 334 N.C. 39, 46, 430 S.E.2d 905, 909 (1993) (" '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.' ") (quoting *State v. Ford*, 297 N.C. 28, 30-31, 252 S.E.2d 717, 718 (1979)). We must decide whether Whittle's testimony should have been excluded as a matter of law. We conclude it should not have been. "[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v.*

Payne, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Defendant cannot have been unfairly surprised by Whittle's testimony because he elicited from Hedgepath earlier in the trial the very evidence he now argues should have been excluded.

Defendant also argues that his trial tactics would have been different had his custodial statement been properly disclosed; specifically, he argues, without elaboration, that he might have made a motion to suppress the custodial statement and he would have conducted *voir dire* of both Hedgepath and Whittle. We note first that defendant could have made a motion to suppress the custodial statement during the trial. *See* N.C.G.S. § 15A-975(b) (1988) ("A motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence, and the evidence is: (1) Evidence of a statement made by a defendant."). Notwithstanding, we find no indication in the record that after defendant had been fully advised as to his constitutional rights and had freely, understandingly and voluntarily waived them, his custodial statement was not voluntarily and understandingly made. *See, e.g., State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982) ("Even where the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1968), are recited by the officers and defendant signs a waiver stating that he understands his constitutional rights, . . . the ultimate test of the admissibility of a confession still remains whether the statement made . . . was in fact voluntarily and understandingly given."). We find no indication or suggestion of either physical or mental coercion, such as threats, promises, or other inducements offered in exchange for defendant's statement. Thus, there was no basis for a motion to suppress any or all of defendant's custodial statement, which defendant now asserts he might have made had that statement been completely disclosed.

Finally, we note that defendant was given, and fully availed himself of, the opportunity to question both Hedgepath, upon cross-examination, and Whittle, during *voir dire* and cross-examination, about his custodial statement. Further, defendant elicited, upon cross-examination of Whittle, testimony that the two versions he gave to Whittle during the custodial interview were substantially

similar. Defendant was also free to argue to the jury the exculpatory implications of his multiple versions of how the gun came to discharge.

We therefore conclude that the error was harmless beyond a reasonable doubt. This assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. FRANKLIN DWAYNE HOWELL

No. 12A92

(Filed 28 January 1994)

1. **Criminal Law § 133 (NCI4th)— first-degree murder—tender of guilty plea based on felony murder—acceptance not required**

Where there was evidence tending to show that a murder was committed while defendant was engaged in the commission of the felony of burglary, the trial court was not required to accept defendant's plea of guilty to first-degree murder based solely on the felony murder rule since this might preclude the use of the underlying felony as an aggravating circumstance.

Am Jur 2d, Criminal Law §§ 486-491.

2. **Criminal Law § 1298 (NCI4th)— first-degree murder—inability to show trigger man—appropriateness of death penalty**

Although the State indicated at a pretrial hearing that it would have trouble showing who was the trigger man in a murder, the decision of *Tison v. Arizona*, 481 U.S. 137, did not preclude a capital trial of defendant where the forecast of evidence at the hearing suggested that defendant was a major player in the events leading to the murder.

Am Jur 2d, Criminal Law §§ 609 et seq.

3. Searches and Seizures § 63 (NCI4th)— consent to search—sufficient evidence and findings

The trial court's conclusion that defendant knowingly, voluntarily and intelligently consented to the search of his truck was supported by evidence and findings that a detective advised defendant that he was going to inventory his truck and have the same stored as evidence; defendant responded "O.K."; defendant understood that the detective was going to search his truck; and defendant signed a permission to search form.

Am Jur 2d, Searches and Seizures § 83.

4. Indigent Persons § 26 (NCI4th)— capital trial—assistant counsel not de facto lead counsel

Assistant counsel did not improperly act as lead counsel in defendant's capital trial so as to deprive defendant of his right to be represented by a lead counsel with "five years experience in the general practice of law" because the assistant counsel examined and cross-examined more witnesses and interposed more objections than lead counsel where the attorney appointed as lead counsel cross-examined a number of the State's key witnesses, argued points of law to the court, and made closing arguments at both the guilt-innocence and sentencing phases of the trial, and this attorney fully participated in the trial with the understanding of defendant, counsel, and the court that he was acting as lead counsel and that the less experienced attorney was acting as assistant counsel. The mere division of labor does not necessarily determine which attorney in a co-counsel situation is the lead attorney. Rules of the N.C. State Bar, Art. VII, § 7.3(a).

Am Jur 2d, Criminal Law § 750.

5. Criminal Law § 412 (NCI4th)— opening statement—references to victim's physical condition and work history

The prosecutor's references in his opening statement to a murder victim's physical condition and work history were not so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu.*

Am Jur 2d, Trial § 522.

6. Evidence and Witnesses §§ 190, 740 (NCI4th)— victim's physical condition and work history—testimony not plain error

The admission of testimony by a murder victim's wife and daughter describing the victim's physical condition and work history was not plain error since the jury probably would not have reached a different result absent this testimony.

Am Jur 2d, Appeal and Error §§ 797, 798, 803; Evidence §§ 353, 439.

7. Appeal and Error § 147 (NCI4th)— admissibility of evidence—absence of specific grounds for objection—appellate review

Defendant failed to preserve for appellate review the admissibility of a letter on the grounds that it was irrelevant and referred to plea negotiations between defendant and the prosecutor because defendant's objection "for the record" was not a statement of these specific grounds, especially in light of defendant's previous objection based on the lack of a time frame establishing when the letter was received. N.C. R. App. P. 10(b)(2).

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

8. Criminal Law §§ 442, 461 (NCI4th)— closing arguments—no gross impropriety

The prosecutor's closing arguments in a capital trial, including a statement allegedly unsupported by evidence that the victim's wife knew something was wrong because the victim "hadn't called that night" and an argument urging the jury to act as the voice of the community, were not so grossly improper as to require the trial court to intervene *ex mero motu.*

Am Jur 2d, Trial §§ 569, 609.

9. Homicide § 489 (NCI4th)— premeditation and deliberation—lack of provocation—propriety of instruction

There was sufficient evidence in a first-degree murder trial for the court to instruct on lack of provocation as circumstantial evidence of premeditation and deliberation where the evidence tended to show that defendant broke into the victim's residence to rob him and that the victim was in poor physical condition; the record does not reflect any showing of provocation by the victim; defendant's own statements to individuals after the murder did not suggest that the victim

was argumentative or confrontational; and the medical examiner's testimony that the victim died from a gunshot wound to the head at a point behind his left ear would permit the jury to infer that the victim was not provoking defendant at the time of the homicide.

Am Jur 2d, Homicide § 501.

10. Burglary and Unlawful Breakings § 68 (NCI4th)— first-degree burglary—sufficient evidence of breaking

There was sufficient evidence of a breaking to support submission of a charge of first-degree burglary to the jury where it tended to show that the back door of the victim's mobile home was the one that everyone used; the weather was stormy on the night in question which prompted the victim's wife to leave for her daughter's home; when she left the mobile home, the victim was sitting at a dining room table with his back to the door; it is reasonable to infer that the victim would not be sitting at a dining room table on a stormy night with the door completely open; the victim was robbed and shot to death; and when the victim's wife returned home that night she got her house key out because she was expecting the door to be closed and locked as usual. It was for the jury to determine from the evidence whether it was satisfied beyond a reasonable doubt that the door was at least partially closed on the night in question so as to require that defendant use some force in order to enter the victim's dwelling.

Am Jur 2d, Burglary § 50.

11. Criminal Law § 1341 (NCI4th)— first-degree murder—premeditation and deliberation—aggravating circumstances—pecuniary gain and burglary—submission of both erroneous

The trial court in a capital sentencing proceeding for a first-degree murder based on premeditation and deliberation committed prejudicial error by submitting to the jury both the aggravating circumstance that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a burglary, N.C.G.S. § 15A-2000(e)(5), where the undisputed evidence established that the motive for the burglary was pecuniary gain, since the same evidence was used to support both aggravating circumstances.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 ALR4th 417.

12. Criminal Law § 1155 (NCI4th)— armed robbery—deadly weapon as aggravating circumstance—conflict in record—resentencing

Defendant is entitled to be resentenced for robbery with a dangerous weapon because of a conflict in the record as to whether the trial court improperly found as an aggravating factor that defendant was armed with a deadly weapon at the time of the crime. N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

Justice MITCHELL dissenting in part.

Justice MEYER joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Hight, Jr., J., at the 12 November 1991 Criminal Session of Superior Court, Johnston County. Defendant's motion to bypass the Court of Appeals as to his convictions of robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit burglary was allowed 2 December 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.

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

FRYE, Justice.

Defendant appeals from the imposition of a sentence of death for a conviction of first-degree murder. We find no reversible error in the pretrial or guilt-innocence phases of defendant's trial. We do, however, find error in the sentencing phase requiring a new capital sentencing hearing. For the reason stated herein, we also remand the judgment sentencing defendant for robbery with a dangerous weapon.

Defendant was indicted for first-degree murder, robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit burglary. In a capital trial, the jury returned a verdict finding defendant guilty of the first-degree murder of Leland Mac Grice (Mr. Grice) on the bases of malice, premeditation and deliberation and under the felony murder rule using both robbery with a dangerous weapon and first-degree burglary as the predicate felonies. The jury also found defendant guilty of robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit burglary. After a capital sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed a sentence of death for the first-degree murder conviction. On the same date, the trial court imposed sentences for the other convictions as follows: forty years imprisonment for robbery with a dangerous weapon, fifty years imprisonment for first-degree burglary, and three years imprisonment for conspiracy to commit burglary. Defendant gave oral notice of appeal on 26 November 1991. An order staying execution was entered by this Court on 8 January 1992.

Evidence presented at defendant's trial shows the following: On 1 May 1989, the victim, Mr. Grice, and his wife, Ruby Grice (Mrs. Grice), were living in a mobile home off 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 their mobile home at approximately 8:20 p.m. and drove to the residence of her daughter, Carol Daniels (Mrs. Daniels), less than a mile down the road.

Mrs. Grice left her daughter's house at approximately 11:20 p.m. and drove home. Upon arriving, 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 (Ms. 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 hemorrhaging along the wound track caused by the bullet.

On 18 June 1989, Detective Beasley received information that John Horton could help in the Grice homicide. Beasley met with Horton on that date 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 he was ready to talk. Horton then gave Detective Beasley a statement of the events of 1 May 1989.

In keeping with his statement to Detective Beasley, Horton testified at trial that on 1 May 1989 he lived with his girlfriend, Annette Cooper; his sister, Tammy Horton; and her boyfriend, Tommy Ray. Horton stated that shortly after he arrived home at approximately 5:00 or 5:30 p.m. on the night in question, Gordon Michael Marlow[1] and defendant came by Horton's mobile home in defendant's truck. Defendant asked Horton if he would "drive for him later that night." Horton asked defendant why he wanted him to drive, but defendant gave no reason. Horton then told defendant he would drive for him that night. Around 9:00 p.m., Marlow and defendant came back to Horton's mobile home and Horton went outside and spoke with them. Defendant again asked Horton to drive. Horton testified that he could tell that Marlow and defendant were "doing lacquer thinner" because he could smell it. Horton agreed to drive and went back to the mobile home to dress. Horton testified that he assumed Marlow and defendant wanted him to drive so that they could sniff more lacquer thinner.

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1. Marlow was tried capitally in the Superior Court, Johnston County on the same charges as defendant. His convictions and sentences were upheld by this Court in *State v. Marlow*, 334 N.C. 273, 432 S.E.2d 275 (1993).

Horton testified that he, Marlow, and defendant got into defendant's pickup truck with defendant driving and left the mobile home. Horton noticed that defendant's .22-caliber bolt-action rifle was in the cab. Horton had seen and fired the gun previously. He testified that defendant wore camouflage clothing and that Marlow was dressed in black pants and a black shirt. After driving around for a while, defendant asked Horton to drive. Defendant and Marlow, who had the rifle, got into the back of the truck.

Horton stated that defendant 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. Defendant also told Horton that after he and Marlow jumped out, Horton was to circle the dirt road twice and then they would jump back into the rear of the truck. Defendant 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 Marlow 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, defendant had something tucked under his arm and Marlow 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 Marlow running across the field with the rifle. Marlow 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 Marlow's instructions. When he got to the barn between the Grice and Daniels residences, Marlow screamed, "slow down." At that point, defendant jumped into the back of the truck. Horton proceeded down the road until it intersected Highway 39. Marlow and defendant then got back into the cab.

Horton testified that once Marlow and defendant were inside the cab, defendant asked, "who reloaded it?" Marlow responded

that he had. Horton stated that as he drove back to his mobile home, Marlow and defendant were "joking, carrying on." Once back at Horton's home, Marlow "pulled out a black bag" and threw it into the dash. 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 about the Grice murder until he heard the news the following morning.

Defendant did not testify at trial but some of the State's witnesses had testified that defendant and Marlow came looking for Horton before he got home on 1 May 1989. In order to counter this evidence offered by the State at the guilt-innocence phase, defendant presented the testimony of Kermit Matthews. In May of 1989, Matthews employed Marlow and defendant in his tire business. Although he had no documentary proof, Matthews testified that he believed Marlow and defendant went to Virginia on 1 May 1989 to pick up a load of tires. If they had travelled to Virginia that day, they would have left around 3:00 a.m. and returned home around 6:00 to 8:00 p.m.

During the capital sentencing proceeding, defendant presented evidence on his behalf through several witnesses. Two Johnston County Sheriff's Department employees testified that defendant was very cooperative and pleasant. Virginia Howell, defendant's half-sister, testified that defendant was a great brother and that he got along well with his father and grandparents. Patricia Oliver, defendant's mother, testified that he was her oldest child. Ms. Oliver testified that defendant's father beat her and defendant, so she divorced him after three years of marriage. She also testified that defendant's sister, Mindy, had terminal cancer and that defendant was the only person who could save her because his bone marrow would match hers.

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

I. PRETRIAL ISSUES

[1] In defendant's first assignment of error, he contends that the trial court erred by refusing to accept his proffered guilty plea. On 13 March 1990, defendant tendered a plea of guilty to first-

degree murder, first-degree burglary, conspiracy to commit second-degree burglary, and robbery with a dangerous weapon. The plea of first-degree murder was tendered upon a theory of felony murder. Judge Wiley F. Bowen rejected defendant's plea based on the potential existence of at least one aggravating circumstance in this case. Defendant later filed a Motion to Require Compliance With Plea Bargain which was heard by Judge Robert H. Hobgood and denied. Defendant contends that both Judge Bowen and Judge Hobgood erred by rejecting his proffered guilty plea.

Our death penalty statute does not permit a defendant to plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). Nor does our death penalty statute permit the State to recommend to the jury during the sentencing proceeding a sentence of life imprisonment when the State has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt. *Id.* In the instant case, there was evidence tending to show the existence of at least one aggravating circumstance, *i.e.*, that the murder was committed while defendant was engaged in the commission of the felony of burglary. N.C.G.S. § 15A-2000(e)(5) (1988). Thus, the trial judge was not required to accept a plea of guilty to first-degree murder based solely on the felony murder rule since this might preclude the use of the underlying felony as an aggravating circumstance.

[2] Defendant contends that there are reasons other than the absence of evidence of a statutory aggravating circumstance which can preclude sentencing a defendant to death. During the hearing with Judge Bowen regarding the proffered plea, the State indicated that it would have trouble showing who the actual trigger man was. Therefore, defendant argues that *Tison v. Arizona*, 481 U.S. 137, 95 L. E. 2d 127, *reh'g denied*, 482 U.S. 921, 96 L. E. 2d 698 (1987), precludes his sentence of death. In *Tison*, the United States Supreme Court held that the death penalty could not be imposed upon a criminal defendant who did not actually kill, intend to kill, or participate in a major way in criminal conduct which resulted in death while acting with reckless indifference to human life. Here, however, the forecast of evidence at the hearing suggested that defendant was a major player in the events that occurred on 1 May 1989 leading to the murder of Mr. Grice; thus, *Tison* is not

controlling. It was therefore not error for the trial court to reject the proffered plea.

[3] In defendant's second assignment of error, he contends the hearing judge erred in denying his motion to suppress items seized from his truck. Prior to ruling on the motion, Judge Bowen held a hearing and made factual findings in pertinent part as follows:

> 1. On June 18, 1989, at 11:15 p.m. defendant, Franklin Dwayne Howell, was arrested at his residence [pursuant to valid arrest warrants] on charges of First Degree Burglary and First Degree Murder.
>
> . . . .
>
> 3. Defendant came to the door with a drawn .44 special revolver.
>
> 4. All of the officers were armed; however, none of the officers ever drew their pistols.
>
> 5. Deputy Billie Williams and Stg. [sic] Ronald Medlin each held a warrant and arrested defendant.
>
> 6. Thereafter Detective Tommy Beasley advised defendant he had information that his 1977 Ford truck, blue and white in color, had been used as transportation in the Grice case. Defendant testified that the 1977 Ford truck, blue and white in color, license plate number CRK-9745, is his truck.
>
> 7. Detective Beasley further advised defendant that he was going to do an inventory of the vehicle and have same stored as evidence.
>
> 8. Defendant advised Detective Beasley "OK."
>
> 9. Defendant testified at the suppression hearing he understood that Detective Beasley was going to search his truck.
>
> 10. Major Bob Atkinson went over with and read to defendant a "Permission to Search Person, Premises, and Auto" form, introduced into evidence as State's Exhibit #1.
>
> . . . .

12. State's Exhibit #1 was signed by defendant below the last paragraph and witnessed by Major Atkinson and Deputy Billie Williams.

. . . .

17. Detective Beasley and Major Atkinson did not coerce, threaten, or promise defendant anything to obtain defendant's consent to search his property or his truck.

Findings of fact when supported by competent evidence are binding on appeal. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). However, conclusions of law are questions of law which are fully reviewable by this Court on appeal. *State v. Barber*, 335 N.C. 120, 436 S.E.2d 106 (1993). The findings of fact set forth in pertinent part above are supported by competent evidence in the record and are binding on appeal. These findings of fact support the hearing judge's conclusion that defendant knowingly, voluntarily, and intelligently consented to the search of his 1977 Ford truck. Thus, the judge did not err in denying defendant's motion to suppress the items seized from the truck.

II. GUILT-INNOCENCE PHASE ISSUES

[4] In defendant's third assignment of error he contends the trial court erred by allowing Johnny Morgan to act as "defacto" lead counsel in violation of the Rules and Regulations Relating To The Appointment Of Counsel For Indigent Defendants adopted pursuant to N.C.G.S. § 7A-459. These rules and regulations provide, inter alia:

> No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:
>
> (a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; . . . .

Rules of the North Carolina State Bar, Art. VII, § 7.3(a) (1993).

James Levinson was appointed lead counsel for defendant in December 1990, after defendant's prior appointed attorneys were permitted to withdraw. At the same time Morgan, who was licensed in September 1987, was appointed assistant counsel. In April 1991, Levinson moved and was allowed to withdraw as counsel and the court appointed Robert L. Anderson. The issue of who was serving

as lead counsel came up at a hearing before Judge Anthony Brannon on 29 July 1991. Both Morgan and Anderson stated for the record that Anderson would serve as lead counsel and Morgan as assistant counsel. Defendant stated on the record that he consented to this assignment of duties.

Defendant now contends that the division of labor between Morgan and Anderson demonstrates that Anderson's status as lead counsel was purely nominal and, as a result, defendant was deprived of his right to be represented by a lead counsel with "five years experience in the general practice of law" and should be awarded a new trial. Essentially, defendant contends that Morgan dominated his representation by examining and cross-examining more witnesses than Anderson, interposing more objections, and by acting as "defacto" lead counsel. However, mere division of labor does not necessarily determine which attorney in a co-counsel situation is the lead attorney. Anderson cross-examined a number of the State's key witnesses, argued points of law to the court, and gave closing arguments at both the guilt-innocence phase and at the sentencing hearing. Anderson fully participated in the trial of the case with the understanding of defendant, counsel, and the court that Anderson was acting as lead attorney and that Morgan was acting as assistant counsel. Under these circumstances, defendant's assignment of error is without merit.

[5] In defendant's fourth assignment of error, he contends that the trial court erred by permitting the prosecutor to 1) refer to Mr. Grice's physical condition and work history in his opening statement, and 2) to elicit testimony concerning Mr. Grice's physical condition and work history from two of the State's witnesses.

Defendant concedes that he did not object to the prosecutor's opening statement. This Court has stated:

> [i]n capital cases, an appellate court may review the prosecution's closing argument, notwithstanding the fact that no objection was made at trial. However, review is limited to an examination of whether the argument was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu*. *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed.2d 247 (1983); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). Reason dictates that the same standard apply to situations where no objection was made to the opening statement and we so hold.

State v. Gladden, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986). Upon review of the entire opening statement, we conclude that the prosecutor's references to the victim's physical condition and work history were not so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.

[6] Defendant also takes issue with the testimony of Mrs. Grice and Mrs. Daniels describing Mr. Grice's physical condition and work history in response to questions by the prosecutor. According to the State, this evidence was relevant because it had a tendency to make the existence of a physical confrontation between the victim and defendant less likely. A physical confrontation, the State contends, could be some evidence of provocation on the part of the victim. Defendant, on the other hand, argues that this evidence was irrelevant and extremely prejudicial. Nevertheless, defendant interposed no objection to this evidence at trial.

Since defendant did not object to this testimony, this assignment of error must be considered under the plain error rule. *See State v. Bronson*, 333 N.C. 67, 423 S.E.2d 772 (1992). Under this rule, defendant may prevail only if he can demonstrate that, absent the alleged error, the jury probably would have returned a different verdict. *Id.* at 75, 423 S.E.2d at 777. Considering the testimony of Mrs. Grice and Mrs. Daniels in light of all the evidence presented at trial, we are not convinced that, absent their testimony describing the victim's physical condition and work history, the jury probably would have reached a different verdict. Accordingly, defendant cannot show error under the plain error rule.

In defendant's fifth assignment of error, he contends that the trial court erred by permitting the State to introduce a letter written by him to Tammy Horton following his arrest for the Grice murder. During her testimony, Ms. Horton identified State's Exhibits 60 through 63B which included an envelope and three letters Ms. Horton had received from the defendant when he was in pretrial confinement on these charges. When the State sought introduction of the exhibits, defendant objected and a *voir dire* was conducted. As the basis for his objection, defense counsel stated that he objected to the lack of time frame for establishing when the letters could have been written because they were not dated. The witness was then questioned about when she received the letters and she responded that she had received all the letters since the defendant had been in jail. Following *voir dire*, and after laying a proper

foundation establishing a time frame for when the letters were received, the State sought introduction of these exhibits again. Defendant objected again "for the record" and the trial judge overruled the objection. After the objection was overruled, Ms. Horton read one of the letters, State's Exhibit Number 61, to the jury.

[7] Defendant now argues that his objection should have been sustained because this letter was not relevant and it referred to plea negotiations between defendant and the prosecutor. Defendant's objection "for the record" was not a statement of these specific grounds, especially in light of his previous objection based on the lack of time frame establishing when the letters were received.

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C. R. App. P. 10(b)(1). Here, defendant did not state the specific grounds for the objection and the specific grounds were not apparent from the context. Defendant has therefore failed to preserve the question for appellate review. Accordingly, this assignment of error is rejected.

[8] In defendant's sixth assignment of error, he contends that the trial court erred by refusing to intervene *ex mero motu* during the State's closing argument at the guilt-innocence phase. Control of counsel's argument is largely left to the trial court's discretion. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). 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. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

Defendant argues that the prosecutor made a number of improper arguments including: "serious factual misstatements;" urging the jury to convict defendant on the basis of "completely irrelevant considerations;" misstating the controlling law and discussing defendant's attitude at length. As an example of a "serious factual misstatement," defendant contends that there was no evidence to support the prosecutor's argument that Mrs. Grice knew something

was "wrong" because "Mr. Grice hadn't called that night." Defendant also argues that the prosecutor's argument urging the jury to act as the voice of the community went beyond permissible limits encouraging the jury to convict defendant on the basis of "completely irrelevant considerations." After reviewing the transcript, we conclude that the prosecutor's closing arguments were not so grossly improper as to constitute a denial of defendant's due process rights. *See id.* Therefore, the trial court did not err by not intervening *ex mero motu.*

[9] In his seventh assignment of error, defendant argues that the trial court erred by instructing the jury that it could infer the existence of premeditation and deliberation from, among other things, the absence of provocation by the victim. The portion of the jury charge objected to by defendant is the underlined clause in the following excerpt of the jury charge:

> Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred such as the lack of provocation by the victim; the conduct of the defendant before, during and after the killing; and the manner in which or the means by which the killing was done.

(Emphasis added.) In considering a similar assignment of error in *State v. Thomas*, 332 N.C. 544, 562-64, 423 S.E.2d 75, 85-86 (1992), we said:

> The examples listed in the above instruction, which is taken directly from the North Carolina Pattern Jury Instructions, N.C.P.I.—Crim. 206.13 (1989), "are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). However, when the trial judge focuses his instruction upon one or more of such elements as circumstantial proof of premeditation and deliberation, those focused upon must be supported by competent evidence. *State v. McDowell*, 329 N.C. 363, 388, 407 S.E.2d 200, 214 (1991).

Id. at 563, 423 S.E.2d at 86.

We find that, when viewed in the light most favorable to the State, there is competent evidence to support an instruction on lack of provocation by the victim. First, the record does not reflect any showing of provocation by Mr. Grice. Second, defendant's own statements to individuals after the murder did not suggest that Mr. Grice was in any way argumentative or confrontational. Third, Dr. Clark testified that Mr. Grice died as a result of a gunshot wound to the head which entered his body at a point behind his left ear. This evidence would permit a jury to infer that the victim was not provoking defendant at the time of the homicide. When combined with the testimony regarding the victim's poor physical condition and the circumstances under which defendant entered the residence, this evidence is sufficient for the trial court to instruct on lack of provocation as circumstantial evidence of premeditation and deliberation.

[10] In defendant's final assignment of error in the guilt-innocence phase, he contends the trial court erred in failing to dismiss the first-degree burglary charge at the close of all the evidence due to the insufficiency of the evidence.

> The elements of burglary in the first-degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment (6) which is actually occupied at the time of the offense.

State v. Davis, 282 N.C. 107, 116, 191 S.E.2d 664, 670 (1972) (citations omitted). Defendant argues that the evidence is insufficient to establish the occurrence of a breaking which consists of any force, however slight, "employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed." *State v. Jolly*, 297 N.C. 121, 127-128, 254 S.E.2d 1, 5-6 (1979) (quoting *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976)). Absent evidence of a forced entry giving rise to the inference of a breaking, a breaking may be proved by circumstantial evidence. *State v. Madden*, 212 N.C. 56, 192 S.E.2d 859 (1937). While circumstantial evidence in burglary cases usually includes testimony that prior to entry all doors and windows were closed, evidence of habit or custom is also admissible to establish an essential element of the crime. *See State v. Simpson*, 299 N.C. 335, 261 S.E.2d 818 (1980).

In support of its position that there was sufficient evidence of the breaking, the State pointed to evidence such as the testimony of Sharon Hicks who said that the back door of the residence was the one that everyone used and the testimony of Mrs. Grice that when she left the residence, Mr. Grice was sitting at the end of the table in the dining room with his back to the door. The door in question was the only one at that entry point and there was no storm door. The weather was stormy in the area on 1 May 1989 which prompted Mrs. Grice to leave for her daughter's home. Although Mrs. Grice did not say that she closed the door when she left, it is reasonable to infer that, on a stormy day, Mr. Grice would not be sitting at the dining room table with the door completely open. Additionally, Mrs. Grice testified that when she returned home that night she got her house key out because she was expecting the door to be closed and locked as usual.

It was for the jury to determine from the evidence whether it was satisfied beyond a reasonable doubt that the door was at least partially closed on the night in question so as to require that defendant use some force in order to enter the Grice dwelling. *See State v. Simpson*, 299 N.C. 335, 261 S.E.2d 818. Viewing the evidence in the light most favorable to the State, we find it to be sufficient to establish the breaking element.

III. CAPITAL SENTENCING ISSUES

In his next eight assignments of error, defendant contends that the trial court committed several errors which deprived him of a fair capital sentencing proceeding. We find merit in one of his assignments of error and order a new capital sentencing hearing on that basis. We need not address the other alleged errors as they are unlikely to recur at the new capital sentencing hearing.

[11] Over defendant's objection, the trial court, at the capital sentencing proceeding, submitted to the jury as statutory aggravating circumstances whether the murder of Mr. Grice "[w]as . . . committed for pecuniary gain," N.C.G.S. § 15A-2000(e)(6), and whether the murder was "committed while [defendant] was engaged in the commission of a burglary." N.C.G.S. § 15A-2000(e)(5). The jury answered "yes" to both. Defendant contends that the trial court erred by permitting the jury to consider both the (e)(5) and the (e)(6) aggravating circumstances. We agree with defendant that it was 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); *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979). Thus, defendant is entitled to a new capital sentencing proceeding.

In *Quesinberry*, the jury found defendant guilty of first-degree murder based upon both felony murder and premeditation and deliberation. At the penalty phase of defendant's capital trial, the trial court submitted for the jury's consideration whether the murder was committed during the course of an armed robbery, N.C.G.S. § 15A-2000(e)(5), and whether the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). This Court stated:

> The new question now before us—one of first impression in our jurisdiction—is whether these two factors, when submitted together for purposes of sentencing a defendant convicted of first degree murder on the basis of premeditation and deliberation, are redundant. We conclude that one plainly comprises the other. Although the pecuniary gain factor addresses motive specifically, the other cannot be perceived as conduct alone, for under the facts of this case the motive of pecuniary gain provided the impetus for the robbery itself. Admittedly, situations are conceivable in which an armed robber murders motivated by some impulse other than pecuniary gain, *e.g.*, where the robbery is committed to obtain something of purely reputational or sentimental, rather than pecuniary, value. The facts of this case, though, reveal that defendant murdered the shopkeeper for the single purpose of pecuniary gain by means of committing an armed robbery.

Id. at 238, 354 S.E.2d at 452.

Quesinberry controls the instant case. Here, the undisputed evidence establishes that the motive for the burglary of the Grices' mobile home was pecuniary gain. Thus, the same evidence was used to support both the (e)(5) and (e)(6) aggravating circumstances. Because it is impossible now to determine the weight ascribed to each aggravating circumstance by the jury in recommending the sentence of death, we are unable to find the error harmless beyond a reasonable doubt. *See, e.g., State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446; *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). Defendant is accordingly entitled to a new capital sentencing hearing pursuant to N.C.G.S. § 15A-2000(d)(3).

IV. NON-CAPITAL SENTENCING ISSUES

[12] We have held that defendant is entitled to a new capital sentencing hearing for the first-degree murder conviction. Defendant should also be resentenced on the robbery with a dangerous weapon conviction due to a conflict in the record as to whether the trial court improperly found as an aggravating factor that "defendant was armed with a deadly weapon at the time of the crime." N.C.G.S. § 15A-1340.4(a)(1) (1993). We find no other errors relating to the noncapital offenses.

GUILT PHASE: NO ERROR.

CAPITAL SENTENCING PHASE: NEW SENTENCING HEARING.

NON-CAPITAL SENTENCING PHASE: NO ERROR AS TO FIRST-DEGREE BURGLARY AND CONSPIRACY TO COMMIT BURGLARY; REMANDED FOR RESENTENCING ON ROBBERY WITH A DANGEROUS WEAPON.

Justice MITCHELL dissenting in part.

For reasons nearly identical to those in the dissent in *State v. Quesinberry*, 319 N.C. 228, 241, 354 S.E.2d 446, 454 (1987) (Martin, J., joined by Meyer and Mitchell, JJ., dissenting in part), I do not believe that the trial court erred in submitting both the aggravating circumstance that the murder was committed for pecuniary gain and the aggravating circumstance that the murder was committed while the defendant was engaged in the commission of a burglary. Therefore, I dissent from that part of the opinion of the majority awarding the defendant a new capital sentencing proceeding.

Justice Meyer joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. MICHAEL THOMAS BROWN

No. 132A92

(Filed 28 January 1994)

1. Evidence and Witnesses § 981 (NCI4th)— murder—statement of unavailable witness—excluded—no error

The trial court did not err in a noncapital prosecution for first-degree murder by excluding statements made by a codefendant, Williams, where defendant wished to use the statements to show that defendant was not an integral part of the plan to kill a police officer; Williams, who had not yet been tried, repeatedly invoked the Fifth Amendment when called by defendant; and the trial court ruled that Williams was unavailable as a witness, that the statements were against his penal interest when made and that they were made voluntarily, but that they bore insufficient indications of trustworthiness. The trial court's determination that the statements made by Williams were not trustworthy is well supported by the record. N.C.G.S. § 8C-1, Rule 804(b)(3).

Am Jur 2d, Evidence § 1081.

2. Constitutional Law § 346 (NCI4th)— murder—statement of unavailable witness—exclusion—not violation of due process or right to confrontation

The trial court did not err in a noncapital first-degree murder prosecution by excluding pretrial statements of a codefendant who had not yet been tried and who invoked the Fifth Amendment when called by defendant. The rationale underlying the award of a new trial in *Chambers v. Mississippi*, 410 U.S. 284, does not apply because the trial court here ruled that the statements at issue did not have the assurances of trustworthiness found in the rejected testimony in *Chambers*.

Am Jur 2d, Criminal Law §§ 921-923.

3. Evidence and Witnesses § 90 (NCI4th)— murder—statements of nontestifying witness—exclusion—no error

The trial court did not err in a noncapital murder prosecution by excluding under N.C.G.S. § 8C-1, Rule 403 the pretrial statements of a codefendant who had not yet been tried who invoked the Fifth Amendment when called by defendant where

the probative value of the statements was slight and the trial court specifically found the statements to be untrustworthy. The admission of a statement that is so clearly false and that was made by a witness who is unavailable to testify or be cross-examined would have been misleading to the jury.

Am Jur 2d, Evidence § 260.

4. **Criminal Law § 537 (NCI4th)— murder—display of victim's photograph by victim's daughter—no mistrial**

The trial court did not err in a noncapital first-degree murder prosecution by denying a mistrial where the victim's daughter displayed a photograph of the victim during the defendant's cross-examination. The trial court conducted a voir dire examination of the bailiff and the juror who reported the incident, instructed the jury, and recessed for the remainder of the afternoon. There is nothing to indicate that any of the jurors were influenced in any way by the photograph or that defendant was prejudiced. N.C.G.S. § 15A-1061.

Am Jur 2d, Trial §§ 39 et seq.

5. **Evidence and Witnesses § 2152 (NCI4th)— murder—testimony by psychiatric expert—ability to conspire—excluded**

The trial court did not err in a noncapital first-degree murder prosecution by excluding testimony from an expert in forensic psychiatry that defendant lacked the mental capacity and ability to conspire. An answer to the question objected to would have required the witness to have knowledge of the legal elements necessary for entrance into a conspiracy and knowledge of the substantive legal definition of a conspiracy. Testimony concerning the type of person or personality necessary to enter into a conspiracy would be fraught with substantial risk of confusing or misleading the jury.

Am Jur 2d, Expert and Opinion Evidence §§ 136 et seq.

6. **Criminal Law § 753 (NCI4th)— murder—requested instructions—given in substance**

The trial court did not err in a noncapital first-degree murder prosecution in its instructions on conspiracy and aiding and abetting where the court charged in substantial conformity with defendant's requested instruction.

Am Jur 2d, Trial §§ 754 et seq., 827 et seq.

7. Criminal Law § 775 (NCI4th)— murder—voluntary intoxication—instruction refused—no error

The trial court did not err in a noncapital first-degree murder prosecution by refusing to give the requested instruction on voluntary intoxication where defendant's evidence showed that he had consumed ten or eleven beers on the evening of the murder and his expert testified that defendant's drinking could have caused an "accumulative impairment of mental functions," that defendant would have been acutely intoxicated at the time of the murder, and that his capacity to plan and have good judgment would have been adversely affected. The evidence suggests that defendant was intoxicated to some degree, but nothing in the record suggests that his degree of intoxication approached the level necessary to support an instruction on the defense of voluntary intoxication.

Am Jur 2d, Trial § 743.

8. Evidence and Witnesses § 2954 (NCI4th)— murder—defense expert provided by court—impeachment—payment of fee

The trial court did not err in a noncapital murder prosecution by allowing the State to impeach a defense expert concerning the witness's fee where the expert was provided by order of the court and was being paid with State funds. Defendant was free to demonstrate through redirect examination that the circumstances surrounding the retention and payment of the witness were such that the jury would have inferred no bias on his part.

Am Jur 2d, Witnesses § 554.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Cashwell, J., at the 4 November 1991 session of Superior Court, Brunswick County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments entered on other felony convictions was allowed by the Supreme Court on 13 May 1993. Heard in the Supreme Court 17 November 1993.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

MEYER, Justice.

On 15 July 1991, a Columbus County grand jury indicted defendant for first-degree murder, conspiracy to commit murder, robbery with a firearm, and conspiracy to commit robbery with a firearm. Defendant was tried capitally in the Superior Court, Brunswick County, in November 1991 and was found guilty as charged in each case, the jury specifically finding defendant guilty of first-degree murder based on malice, premeditation, and deliberation; felony murder; and lying in wait. Upon a jury recommendation, defendant was sentenced to life imprisonment for first-degree murder. Judge Narley L. Cashwell imposed consecutive sentences totalling seventy years for the other offenses.

Although inconsistent and at times conflicting, the evidence presented at trial tended to show the following: On the afternoon of 17 June 1991, defendant's friend, Aquino Williams, showed up at defendant's house to retrieve a .22-caliber pistol that he had handed over to defendant the night before. The pistol, which Williams had recently stolen from a tavern in the area, had belonged to the owner of the tavern, Vern Bellamy. Williams had shown the weapon to defendant and had stated that he was going to use it to kill a police officer so that Williams could steal the police officer's weapon. Williams left defendant's house, and defendant did not see him again until 6:00 that evening when Williams returned to defendant's house, and the two men left for Tammy Clark's house. Defendant drank two beers at Clark's house, then he and Williams returned to defendant's home. After they had been at defendant's home for about ten minutes, Shane Shipman arrived, and the three of them talked and watched T.V. until about 8:30 or 9:00 p.m. At that time, Williams and Shane Shipman left to go to Vern Bellamy's tavern. Some time later, Lee Shipman and Jeff Moore showed up at defendant's house. Defendant gave them $8.00 to buy some beer; they left and returned about fifteen minutes later. The three men carried the beer to a park across from defendant's house and began to drink it. After defendant drank about five of these beers, they all went to Tammy Clark's house. Once there, defendant drank about four more beers. At around 10:00 p.m., Williams arrived at Tammy Clark's house with Shane Shipman and Deautry Toon. Around 11:00 p.m., Williams, Shane Shipman and defendant left Tammy Clark's house and returned to defendant's house. They returned to Tammy Clark's house at around 11:45 p.m. After Tammy told them that she was going

to bed, defendant and the two others went to their homes. Williams showed up again at defendant's home at around 12:15 a.m. Williams went to defendant's room and told defendant that he wanted to kill a cop. He told defendant to go to the nearby Timesaver convenience store and call in a fake breaking and entering report. Defendant and Williams walked together to the Timesaver, where defendant called the Sheriff's dispatcher and, identifying himself as John Norris, told the dispatcher that there was a break-in at the sixth house on the right on Mill Pond Road. The dispatcher radioed this information to Corporal Hinson, who was on patrol in the area. At 12:26 a.m., Corporal Hinson arrived at the location described to the dispatcher. Corporal Hinson then called back to the dispatcher on his radio and requested that the dispatcher call the subject back and have him turn on his house lights. The dispatcher advised him that the call had been made from a pay phone. At this point, Corporal Hinson informed the dispatcher that he had passed a subject on the way to the residence whom he thought could have been the person who called the dispatcher.

As defendant and Williams walked toward defendant's residence from the Timesaver, Corporal Hinson approached them in his patrol car. Corporal Hinson pulled alongside Williams and defendant, rolled down the driver's side window of his patrol car, and asked them if they were the ones who had made the break-in call. Williams gave some reply, then immediately shot Corporal Hinson in the face with the .22-caliber pistol three times, killing him. Williams opened the door of the vehicle and pushed Corporal Hinson's body from the driver's seat. Williams then sat in the driver's seat, and defendant sat in the rear passenger seat of the car. Williams drove the vehicle to some dumpsters that were located nearby on Airport Road. On the way to the dumpsters, defendant removed the officer's badge carrier from his right rear pocket. He later threw it into the woods across the road from the dumpsters. Williams removed the officer's pistol from its holster and put it in the front of his pants. Defendant and Williams then opened the trunk of the vehicle and removed four long guns. They hid these guns near a dirt path that ran alongside Airport Road. Defendant and Williams then walked back to defendant's house, where they watched a movie on defendant's VCR. After about an hour and a half, Williams left defendant's house.

By this time, Corporal Hinson's vehicle and body had been discovered by Corporal Billy Hammond of the Columbus County

Sheriff's Department, and the State Bureau of Investigation was called to assist in the investigation of the killing. At 3:30 a.m., SBI Agent Matthew White had ascertained that Corporal Hinson's last responding call was the sixth house on Mill Pond Road. While travelling in this area, Agent White observed a person in the area of the second or third house on Mill Pond Road. Agent White called the individual over to him, but after he did, the individual, who turned out to be Williams, walked away, bending down twice as he did so. Agent White looked around in the area where he saw Williams bend down and observed a .45-caliber pistol and a box of .45-caliber ammunition. Williams was subsequently taken into custody and gave several statements, first denying the offense, then admitting the killing but stating that he had acted alone, and finally indicating that defendant was involved in the shooting.

Defendant was taken into custody later that day. He was advised of his rights, whereupon he waived his rights and gave a statement detailing his involvement in the killing. At trial, defendant testified that although he had called in the fake break-in report and that he was with Williams at the time of the killing, he did not believe that Williams was serious when he said that he intended to kill a policeman.

Other evidence will be presented as necessary for the proper resolution of the issues raised by defendant.

[1] In his first assignment of error, defendant contends that the trial court erred in excluding statements made by Williams, thus depriving defendant of his right to present a defense and of his right to confront witnesses against him.

Subsequent to being taken into custody on 18 June 1991, Williams made five statements to law enforcement officers. In the first of these statements, made to SBI Agents Kennedy and Moser at approximately 4:45 a.m., he denied any involvement in the killing. Later that morning, at around 7:58 a.m., he made another statement, this time to Agent White, in which he admitted shooting Corporal Hinson but indicated that he was alone at the time. At this time, Williams' story was that while walking alone down Mill Pond Road, he happened to find a loaded .22-caliber pistol in a ditch beside the road. He retrieved the pistol and moments later was approached by a patrol car. When the officer saw the pistol in his hand, the officer began to unbuckle his seat belt,

and that was when Williams shot him. He then stated that he threw the gun in a cornfield next to the road.

Around mid-morning following this statement, Agent Kennedy removed Williams from jail and took him to the spot where Williams claimed he threw the pistol into the cornfield. As a search for the pistol was conducted, Williams made a third statement while sitting in Agent Kennedy's patrol car. Again, Williams stated that he was alone at the time of the killing, that he had not called in any fake break-in call, and that he had found the pistol in a ditch. He stated that if there had been anyone else involved, "he would tell it."

Later that afternoon, around 5:20 p.m., Williams was reinterviewed by Agent White. It was during this interview that he made a statement in which he described the events in a manner that was consistent with the statements given by defendant and the evidence presented at trial. Williams now admitted that he and defendant had planned the killing, that they had walked to the Timesaver where defendant made the fake break-in call, and that he and defendant had been together when Williams shot Corporal Hinson.

Finally, Williams was asked at 9:20 p.m. if he would go over the facts concerning the killing again. He agreed and stated that he first began to discuss his plan for killing a police officer while at Vern Bellamy's tavern the night of the killing. He then walked to Tammy Clark's residence where he and defendant discussed the plan further, agreeing to make a fake break-in call from the Timesaver. He again stated that he and defendant were together when Williams shot Corporal Hinson and that they had ridden in the patrol car to the location on Airport Road, taken the weapons from the trunk, hidden them beside the road, and walked to defendant's residence from the location where they had parked the patrol car.

Defendant wished to use Williams' statements that he had acted alone to show that defendant was not an integral part of the plan to kill a police officer. Williams and defendant were to be tried separately, and at the time of defendant's trial, Williams' charges were pending. When defendant called Williams to testify, Williams repeatedly invoked his Fifth Amendment privilege not to give testimony that would implicate himself. Defendant then attempted to have the statements introduced under the Rule 804(b)(3)

exception to the hearsay rule concerning statements against interest. After lengthy hearings concerning the admissibility of Williams' statements, the trial court ruled that Williams was unavailable as a witness, that the statements were against his penal interests when made, and that they were made voluntarily. The trial court refused to allow the introduction of the statements, however, because it ruled that the statements bore insufficient indications of trustworthiness.

The trial court ruled, and the State concedes, that Williams was unavailable to testify within the meaning of N.C.G.S. § 8C-1, Rule 804(a)(1). In order for the hearsay statement of an unavailable witness to be admitted as a statement against interest, however, the statement must also meet the requirements of N.C.G.S. § 8C-1, Rule 804(b)(3), which reads as follows:

> Statement Against Interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

N.C.G.S. § 8C-1, Rule 804(b)(3) (1992) (emphasis added). The determination of whether the trustworthiness of the statement is indicated by corroborating circumstances is a preliminary matter to be decided by the trial judge. *See* N.C.G.S. § 8C-1, Rule 104 (1992).

In the first statement in which Williams admitted shooting Corporal Hinson, he claimed that he had found the loaded .22-caliber pistol in a ditch only moments before his encounter with Corporal Hinson. This assertion in itself appears highly unlikely given its coincidental nature and the darkened condition of the road at the time. In addition, this account of his acquisition of the pistol conflicts with his own subsequent explanation that he had acquired the pistol from defendant.

Williams further claimed that he threw the pistol into a cornfield after he shot the deputy. Even after Williams accompanied law enforcement officers to this location only a few hours later,

no gun was found, even with the aid of tracking dogs. The gun was actually found in defendant's house some time later.

When Williams was questioned again concerning the killing, he continued to insist that he acted alone. He again stated that he had thrown the gun into a cornfield after the killing, even after he was informed that a search had been conducted but no gun had been found. Williams continued to maintain that he was alone. However, as the trial court was aware at the time of the motion hearing, defendant had later confessed his involvement and his fingerprints had been found on the car. These circumstances indicate that the statements made by Williams wherein he insisted that he acted alone when he killed Corporal Hinson were untrue. The trial court's determination that the statements made by Williams were not trustworthy is well supported by the record. Accordingly, defendant was properly precluded from introducing the statements under the Rule 804 statement against interest exception to the prohibition against hearsay. N.C.G.S. § 8C-1, Rule 804(b)(3). Defendant's assignment of error on these grounds is without merit.

[2] Defendant further contends that the failure to admit the statements violated his right of confrontation and his right to due process. We disagree. The right to due process does not include the right to admit untrustworthy declarations.

We are persuaded by the reasoning employed by the United States Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973). In that case, defendant Chambers was on trial for the murder of a policeman. Another man, McDonald, had given a sworn confession that he was the person who had killed the policeman. Although Chambers was allowed to call McDonald as a witness and to introduce his sworn statement, it was clear that McDonald had previously repudiated the statement. While on the witness stand, McDonald testified to the fact that he had retracted his confession and was allowed to present alibi evidence of his own. In addition, the United States Supreme Court observed:

> The trial court refused to allow [Chambers] to introduce the testimony of [three witnesses]. Each would have testified to the statements purportedly made by McDonald, on three separate occasions shortly after the crime, naming [McDonald]

> as the murderer. The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay.

Chambers, 410 U.S. at 298, 35 L. Ed. 2d at 310.

Although the United States Supreme Court granted Chambers a new trial, holding that "the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process," *id.* at 302, 35 L. Ed. 2d at 313, the Court took great care to emphasize that "[t]he hearsay statements involved in [that] case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *id.* at 300, 35 L. Ed. 2d at 311-12. The Court further stated that "[t]he testimony rejected by the trial court [there] bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Id.* at 302, 35 L. Ed. 2d at 313.

The trial court in the case *sub judice* ruled that the statements at issue did not have any such assurances of trustworthiness; therefore, the rationale underlying the award of a new trial in *Chambers* does not apply. The trial court properly refused to allow the admission of Williams' statements. Defendant was not deprived of his right to due process by the exclusion of the statements, and his assignment of error on this issue is without merit.

[3] Finally, with regard to Williams' statements that no one was with him at the time of the killing, defendant contends that inasmuch as they were not hearsay at all, they should not be barred under either of the prior analyses. Defendant argues that his purpose for admitting the statements was not to prove the truth of the matter asserted, that is, that defendant was not present at the scene of the killing. Instead, defendant argues that Williams' insistence that he was alone is an indication that defendant's participation was incidental or that defendant was not a significant participant in the crime. Defendant contends that this evidence would have been relevant to show that there was no conspiracy between the two and to rebut the theory that defendant and Williams were acting in concert.

Assuming, *arguendo*, that the statements were not hearsay and that they had relevance when presented in this manner, we

note that they are still subject to exclusion if their "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403 (1992).

"In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion," and it is only "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision" that it will be overturned on appeal. *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant himself testified that he was, in fact, present at the time of the killing and that he did participate in the planning of the crime. Thus, if used to show defendant's nonparticipation, the probative value of the statements, if any, was slight. Furthermore, the trial court specifically found the statements to be untrustworthy, clearly viewing them as nothing more than untruths told by defendant's accomplice. The admission of a statement that is so clearly false and that was made by a witness who is unavailable to testify or be cross-examined would have been misleading to the jury. We hold that in the present case, the trial court did not err in refusing to admit these untrustworthy and uncorroborated statements made by defendant's accomplice.

[4] In his next assignment of error, defendant contends that the trial court improperly denied his motion for mistrial based upon the conduct of the victim's daughter in displaying a photograph of the victim during defendant's cross-examination.

The rule governing the declaration of a mistrial is N.C.G.S. § 15A-1061, which states as follows:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C.G.S. § 15A-1061 (1988). " 'A mistrial should be granted 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 ver-

dict.' " *Id.* (quoting *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990)).

In the present case, the victim's daughter, Karen McPherson, had in her possession a two-inch by four-inch color photograph of the victim taken while he was in uniform. During defendant's cross-examination, Ms. McPherson was seated in the courtroom two rows behind the district attorney's seat, some six to eight feet from the jury box. At some point, she held the photograph up, facing defendant while he was testifying. She stated on *voir dire* that she did not know what her purpose was in doing so but that she was not attempting to show the picture to the members of the jury. While she was holding the photograph, however, a juror saw it and reported the incident to the bailiff, who in turn informed the trial court. The trial court then conducted a *voir dire* examination of the bailiff and Ms. McPherson. After doing so and after hearing arguments of counsel, the trial court denied defendant's motion for mistrial. Subsequently, the jury was instructed that

> a matter of law has arisen which the Court has resolved by appropriate instructions to all persons who have been in and about the courtroom area during the trial of this matter. You, the jury, are to remain fair and impartial throughout the trial of this case and to base any decision you make in this case solely upon the evidence presented in this courtroom and the law as I will give it to you at the close of all that evidence. You are not to make any decision upon any other bases.

The trial court then recessed for the remainder of the afternoon; the trial did not resume until the following morning. Defendant has not shown nor does the record indicate that Ms. McPherson's conduct resulted in the "irreparable prejudice" necessary to merit the granting of a motion for mistrial. N.C.G.S. § 15A-1061. There is nothing to indicate that any of the jurors were influenced in any way by the photograph or that defendant was prejudiced by Ms. McPherson's conduct. In addition, defendant's argument that the trial court's instructions were inadequate to cure the alleged prejudice is likewise unavailing, as defendant has not shown any prejudice. We hold that the trial court properly denied defendant's motion for mistrial. Defendant's assignment of error on this issue is without merit.

[5] In his next assignment of error, defendant contends that the trial court erred in prohibiting the testimony of his expert witness that defendant lacked the mental capacity and ability to conspire. Dr. Thomas Brown was admitted as an expert in the field of forensic psychiatry with a specialty in addictive medicine.

Defendant concedes that this Court has ruled that even qualified expert witnesses may not give opinion testimony concerning legal terms that have specific meanings not readily apparent to the witness or that have definitions that vary from the common definition of the term. *See State v. Daniel*, 333 N.C. 756, 429 S.E.2d 724 (1993); *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 602 (1993); *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988); *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). Defendant contends, however, that the term "conspiracy" is not such a term and insists that "most of the population past the third grade knows what conspiracy means." We disagree.

The specific question objected to was as follows:

> Dr. Brown, I want to ask you if you have an opinion as to whether, based upon your examination of [defendant] and your conclusions and the other things you consider, do you have an opinion as to whether or not [defendant] *is the type of person or has the* mental, the *personality* and mental state, to enter into a conspiracy to kill somebody?

(Emphasis added.) An answer to this inartfully phrased question would require Dr. Brown to have not only knowledge of the substantive legal definition of a "conspiracy," but also knowledge of the legal elements necessary for entrance into a conspiracy. Finally, testimony by Dr. Brown concerning the "type of person" or "personality" necessary to enter into a conspiracy would be fraught with substantial risk of confusing or misleading the jury. No attempt was made to rephrase or clarify the question. We hold that the trial court correctly sustained the State's objection to this question. This assignment of error is overruled.

[6] In his next assignment of error, defendant contends that the trial court erred in failing to give certain jury instructions requested by him. Specifically, defendant contends that the trial court should have instructed the jury (1) that a conspiracy requires a union of wills and the intent to effectuate the object of the con-

spiracy; and (2) that in order to aid and abet Williams, defendant must have known that Williams intended to rob and murder Corporal Hinson.

With regard to a defendant's request for jury instructions, this Court has consistently held that a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, but that it is sufficient if the court gives the instruction in substantial conformity with the request. *State v. Rhinehart*, 324 N.C. 310, 315, 377 S.E.2d 746, 749 (1989); *State v. Davis*, 291 N.C. 1, 14, 229 S.E.2d 285, 294 (1976); *State v. Bailey*, 254 N.C. 380, 386, 119 S.E.2d 165, 170 (1961).

With regard to the charge of conspiracy to commit murder, the trial court instructed the jury as follows:

> I charge . . . that for you, the jury, to find the defendant, Michael Thomas Brown, guilty of conspiracy to commit murder, the state must prove three things, each beyond a reasonable doubt. First, that the defendant, Michael Thomas Brown, and Aquino Lee Williams entered into an agreement. Second, that the agreement was to commit murder.
>
> Murder, ladies and gentlemen, is the unlawful killing of another human being with malice. Third, that the defendant, Michael Thomas Brown, and Aquino Lee Williams intended that the agreement be carried out at the time the agreement was made.

Similar instructions were given for the charge of feloniously conspiring to commit robbery with a firearm.

By instructing the jury that defendant and Williams must have entered into an agreement to commit murder and that at the time the agreement was made, they intended that it be carried out, the trial court charged in substantial conformity with the requested instruction regarding the requirement of a union of wills. The trial court also clearly complied with defendant's request that the jury be instructed that it must find that defendant and Williams intended to effectuate the object of the conspiracy.

With regard to the charge of first-degree murder on the basis of aiding and abetting, the trial court instructed the jury as follows:

> For you to find the defendant, Michael Thomas Brown, guilty of first degree murder on the basis of malice, premedita-

tion and deliberation because of aiding and abetting, the state must prove four things, each beyond a reasonable doubt. First, that first degree murder on the basis of malice, premeditation and deliberation was committed by Aquino Lee Williams.

. . . .

Second, the defendant, Michael Thomas Brown, knowingly advised, instigated, encouraged or procured or aided Aquino Lee Williams to commit first degree murder. Again, ladies and gentlemen, the defendant is not guilty of first degree murder merely because he is present at the scene, even though he may silently approve of the crime or secretly intends to assist in its commission.

To be guilty, the defendant, Michael Thomas Brown, must aid or actively encourage Aquino Lee Williams in committing the crime or, in some way, communicate to Aquino Lee Williams's [sic] the defendant's intention to assist in the commission of the crime. Third, that the defendant, Michael Thomas Brown, himself, acted after premeditation, as I have previously defined that term, with deliberation, as I have previously defined that term, and willfully, that is, intentionally and purposefully.

. . . .

. . . Fourth, that the defendant, Michael Thomas Brown's actions or statements caused or contributed to the commission of the first degree murder of Robert Howard Hinson by Aquino Lee Williams.

Similar instructions were given for the charges of felony murder and murder by lying in wait.

In instructing the jury that defendant was required to "aid or actively encourage Aquino Lee Williams in committing the crime or, in some way, communicate to Aquino Lee Williams's [sic] the defendant's intention to assist in the commission of the crime," the jury was required to determine that defendant knew that Williams intended to rob and murder Corporal Hinson. The trial court gave jury instructions that incorporated those features requested by defendant, and his assignment of error on these grounds is therefore without merit.

[7] In his next assignment of error, defendant contends that the trial court erred when it refused to give the requested instruction on voluntary intoxication as a defense to those charges requiring intent.

"[I]n order for an instruction on voluntary intoxication to be required the evidence must be that defendant's intoxication rendered him 'utterly incapable' of forming a deliberate and premeditated intent to kill." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)). Mere intoxication is not sufficient to meet this burden. *State v. Reeb*, 331 N.C. 159, 174, 415 S.E.2d 362, 370 (1992).

In the present case, defendant offered evidence that showed that he had consumed approximately ten or eleven beers beginning about 7:30 p.m. the evening of the murder. His expert witness testified that he had learned that defendant had been engaged in a pattern of drinking eight to twelve beers a day, which could have caused an "accumulative impairment of mental functions." In addition, defendant's expert testified that defendant would have been acutely intoxicated at the time of the murder and that his capacity to plan and have good judgment would have been adversely affected.

Taken in the light most favorable to defendant, the evidence tends to show that defendant was intoxicated at the time of the killing. Again, however, evidence of intoxication is not sufficient to mandate an instruction on the defense of voluntary intoxication. *See State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993); *see also State v. Medley*, 295 N.C. 75, 243 S.E.2d 374 (1978). Rather, "[t]he 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." *Medley*, 295 N.C. at 79, 243 S.E.2d at 377. The evidence in the present case suggests that defendant was intoxicated to some degree, but nothing in the record, taken in the light most favorable to defendant, suggests that his degree of intoxication approached the level necessary to support an instruction on the defense of voluntary intoxication. Defendant's assignment of error on these grounds is overruled.

[8] In his last assignment of error, defendant contends that the trial court erred in allowing the State to impeach defendant's expert witness concerning the witness' fee. Defendant appears to

agree that this Court has consistently held that "an expert witness' compensation is a permissible cross-examination subject to test partiality towards the party by whom the expert was called." *State v. Allen*, 322 N.C. 176, 195, 367 S.E.2d 626, 636 (1988); *see also State v. Creech*, 229 N.C. 662, 51 S.E.2d 48 (1949). Defendant argues that in the present case, the cross-examination was improper because the expert witness had been provided to defendant by order of the trial court and was being paid for with state funds. We disagree.

"[W]here evidence of bias is elicited on cross-examination the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias so that the witness may stand in a fair and just light before the jury." *State v. Patterson*, 284 N.C. 190, 196, 200 S.E.2d 16, 20 (1973); *see also State v. Hicks*, 233 N.C. 511, 64 S.E.2d 871, *cert. denied*, 342 U.S. 831, 96 L. Ed. 629 (1951).

If defendant believed at trial that the circumstances surrounding the retention and payment of the expert witness were such that the jury would have inferred no bias on his part, he was free to demonstrate this through redirect examination. Defendant's final assignment of error is without merit.

We conclude that defendant received a fair trial free from prejudicial error and that the judgment appealed from must be upheld.

NO ERROR.

STATE EX REL. UTILITIES COMMISSION v. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION v. ATTORNEY GENERAL

No. 64A93

(Filed 28 January 1994)

1. Utilities Commission § 44 (NCI3d)— final decision by Commission—absence of appeal—reconsideration of issue not required

Where a water service company asked the Utilities Commission to determine how the gain on a sale of certain service

areas would be distributed so that it could calculate its bargaining position, the Commission determined that the gain would be split between the company's stockholders and ratepayers, the company negotiated the sale of the service areas based on the Commission's decision, the company did not appeal this decision within thirty days after it became final, and the company later asked the Commission to reconsider this issue in a general rate case, the Commission was not required to rehear the issue of the division of the gain on sale in the general rate case. The water service company should have followed the correct channels of appeal at the time of the initial decision and appealed the final decision of the full Commission to the Supreme Court within thirty days. N.C.G.S. §§ 62-80, 62-90(a).

Am Jur 2d, Public Utilities §§ 276 et seq.

2. **Utilities Commission § 51 (NCI3d)— water rates—panel decision—failure to exhaust administrative remedies**

A water service company failed to exhaust its administrative remedies on the issue of the disallowance of certain expenses and is barred from pursuing judicial review of this issue where the recommended decision of a panel disallowing these expenses was not excepted to or brought before the full Commission and thus became the final order of the full Commission by operation of statute. While G.S. Ch. 62 does not explicitly set out a procedure for administrative exhaustion of issues brought before the Utilities Commission, consideration of the statute in general and public policy dictate that exhaustion be required. N.C.G.S. § 62-78(c).

Am Jur 2d, Public Utilities §§ 276 et seq.

3. **Utilities Commission § 31 (NCI3d)— rate penalty for inadequate service—insufficient evidence—inadequate order**

The Utilities Commission's decision imposing a 1% rate of return penalty on a water service company for inadequate service was not supported by competent, material, and substantial evidence where the company presented evidence that its service met all state and federal requirements; quality and service complaints were made by only 1% of its customers; there were no complaints from fifty of the eighty-nine subdivisions served by the company; most of the complaints came from seven subdivisions; and the Commission penalized the

company based on its overall service to its customers. In addition, the Commission's order was inadequate for the imposition of a rate penalty for inadequate service where the order indicates neither in what manner the company violated the Commission's standards nor what those standards are, and the order does not state what the company is to do to make the service adequate. N.C.G.S. § 62-79(a).

Am Jur 2d, Public Utilities §§ 269, 274.

4. Utilities Commission § 35 (NCI3d)— water rates—elevated storage tanks—excess capacity

Competent, material, and substantial evidence supported the Utilities Commission's decision that a calculation of 200 gallons per day per connection be used to determine how much excess capacity existed in a water service company's elevated storage tanks for its nonmunicipal water systems.

Am Jur 2d, Public Utilities §§ 138 et seq.

5. Utilities Commission § 35 (NCI3d)— water rates—rate capacity allowance—insufficient evidence—absence of adjustment for future revenues

A Utilities Commission decision permitting a 35% capacity allowance for future growth in a water service company's rate base was not supported by competent, material, and substantial evidence where there was evidence that a 35% figure had been approved by the Commission in the past for a typical residential subdivision but there was no specific evidence that subdivisions subject to the capacity allowance will expand by a rate of 35% in the near future, and the Commission did not follow the approved practice of setting out a matching adjustment for revenues expected to be obtained due to the potential increase in customers in the near future.

Am Jur 2d, Public Utilities §§ 138 et seq.

6. Utilities Commission § 52 (NCI3d)— water and sewer rates—method of calculating excess capacity—effect of failure to appeal prior decisions

Where the Public Staff failed to appeal in previous cases the Utilities Commission's decision to include original costs and capitalized rehabilitation costs of certain sewage treat-

ment plants in the rate base rather than in its consideration of the total treatment plant cost in determining excess capacity, the Public Staff is bound by those decisions and may not obtain review of this method of calculation in the present case.

Am Jur 2d, Public Utilities §§ 138 et seq.

7. Utilities Commission § 35 (NCI3d)— water and sewer rates—abandoned property—unamortized portion improperly included in rate base

The Utilities Commission erred in determining that the unamortized portion of an extraordinary property retirement should be included in the rate base of a water and sewer company since there is no statutory authority for including in the rate base costs from a completed plant that is no longer used and useful.

Am Jur 2d, Public Utilities §§ 138 et seq.

Appeal pursuant to N.C.G.S. § 7A-29(b) by Carolina Water Service, Inc. of North Carolina from a final order of the North Carolina Utilities Commission in Docket No. W-34, Sub 111, entered 12 October 1992, approving a partial rate increase and requiring improvements. Heard in the Supreme Court 16 September 1993.

Hunton & Williams, by Edward S. Finley, Jr., for applicant-appellant and -appellee Carolina Water Service, Inc. of North Carolina.

Public Staff Legal Division, by David T. Drooz and A.W. Turner, Jr., Staff Attorneys, for intervenor-appellant and -appellee Public Staff—North Carolina Utilities Commission.

Michael F. Easley, Attorney General, by Ted R. Williams, Associate Attorney General, for intervenor-cross-appellant and -appellee Attorney General.

MEYER, Justice.

On 23 December 1991, Carolina Water Service Company ("CWS") filed an application with the North Carolina Utilities Commission for an increase in its rates for water and sewer service to its retail customers in North Carolina so as to increase annual revenue by approximately $1,553,773, or 20.8%. In the application, CWS

proposed to make the rate increase effective on 1 February 1992. In an order issued 23 January 1992, the Commission determined that the application constituted a general rate case and suspended the proposed rate increase for a period up to 270 days. On that date, the Commission issued an order scheduling public hearings on the proposed rate increase and establishing the test period as the twelve-month period ending 30 June 1991. Public hearings were held by the Commission in various areas of the state in March, April, and May of 1992.

On 31 July 1992, the three-member Commission panel that heard the evidence issued a recommended order assessing a rate of return penalty and granting a partial rate increase. The order granted CWS an increase in gross annual revenues of $480,532 from its North Carolina retail operations. This increase included calculations of a 1% rate penalty for inadequate service. CWS, the Public Staff, and the Attorney General all requested that the full Commission review various parts of the order.

A hearing was held before the full Commission on 9 September 1992. On 12 October 1992, the Commission issued its final order, which granted CWS a partial rate increase and assessed a 1% rate of return penalty for inadequacies of service. The Commission ordered an increase of $416,608. CWS and the Public Staff appealed, and the Attorney General cross-appealed to this Court.

[1] The first issue raised by CWS relates to the 10 April and 24 May 1990 applications of CWS requesting permission to relinquish its certificate of public convenience and necessity for its Beatties Ford/Hyde Park East ("Beatties Ford"), Genoa/Raintree ("Genoa"), and Riverbend Plantation ("Riverbend") service areas. At CWS's request, the Commission determined, before CWS executed binding contracts, that the division of gain on sale for the particular areas at issue would be split between CWS's stockholders and ratepayers. CWS did not appeal the decision of the Commission at that time. However, when filing this application for a general rate increase, after renegotiating the sale of the Beatties Ford and Genoa systems, CWS again asked the Commission to examine the merits of its earlier decision to split the gain on sale. The Commission chose not to reconsider the issue of the division of gain on sale for the two systems, finding that the issue had been fully and finally determined at an earlier date. CWS appealed the division of gain on sale issue to this Court. The Public Staff argues

that this issue has been fully and finally adjudicated and that CWS should therefore be estopped from seeking 100% of the gains for the stockholders.

We conclude that this decision of the Commission was clearly final and authoritative and that the issue will not be considered because CWS did not follow the correct procedures for appealing the decision of the Commission. CWS had specifically requested that the Commission determine the manner in which the gain on sale would be distributed so that it could calculate its bargaining position. CWS cannot now, after striking a bargain based on the Commission's decision, have the Commission consider its request to change the decision. This would result in an injustice to the buyers of the system, as CWS negotiated the sale of the systems under the theory that it would be receiving only 50% of the gain on sale. Thirty days after the final order was entered, the Commission's order could no longer be appealed. N.C.G.S. § 62-90(a) (1989). While the Commission can choose to rescind, alter, or amend a final decision on its own accord, it is not required to rehear an issue brought by a party after the order has been final for thirty days. N.C.G.S. § 62-80 (1989). We hold that CWS should have followed the correct channels of appeal at the time of the initial decision and appealed the final decision of the full Commission to the Supreme Court within thirty days. N.C.G.S. § 62-90(a).

[2] We also find that CWS has not correctly followed administrative procedure in regard to appealing the decision of the panel to disallow certain expenses of CWS attributable to Water Service Corporation, as the decision of the panel was not excepted to or brought before the full Commission. As CWS failed to exhaust its administrative remedies before bringing this issue before this Court, we find that CWS cannot now appeal the decision of the panel adopted by the full Commission to this Court. CWS must first exhaust its administrative remedies before bringing an issue before the judicial system; failure to do so results in a waiver of the issue.

Chapter 62 does not explicitly set out a procedure for administrative exhaustion of issues brought before the Utilities Commission. However, consideration of the statute in general and of public policy dictate that administrative exhaustion is required in this situation. The United States Supreme Court has recently noted that even if administrative exhaustion is not specifically mandated by the legislature, it may still be required based on judicial discre-

tion. *McCarthy v. Madigan*, --- U.S. ---, ---, 117 L. Ed. 2d 291, 299 (1992). In addition, we have held that "[o]nly those who have exhausted their administrative remedy can seek the benefit of the statute [authorizing judicial review]." *Sinodis v. Board of Alcoholic Control*, 258 N.C. 282, 287, 128 S.E.2d 587, 590 (1962). The exhaustion requirement means that the "legislative process, administered by authorized officials and boards, must be completed before resort may be had to the courts." *Bazemore v. Board of Elections*, 254 N.C. 398, 406-07, 119 S.E.2d 637, 644 (1961). The North Carolina statute clearly states that "parties shall be afforded an opportunity to file exceptions to the recommended decision or order [of a panel decision or decision of a commissioner or examiner] and a brief in support thereof, provided the time so fixed shall be not less than 15 days from the date of such recommended decision or order." N.C.G.S. § 62-78(b) (1989). CWS filed no exception alleging error in the panel's decision to disallow certain expenses of CWS attributed to Water Service Corporation.

Administrative "[e]xhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, --- U.S. at ---, 117 L. Ed. 2d at 299. "When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Commission and shall immediately become effective unless the order is stayed or postponed by the Commission . . . ." N.C.G.S. § 62-78(c) (1989). To allow an appeal from a recommended order to which no exception has been taken and which has become the final order of the full Commission by operation of the statute would allow a party, in effect, to "bypass" the full Commission, usurping the administrative agency's authority. In addition, the hearing of such appeals would create an unnecessary burden on the judiciary. The only records in such cases would be the records in support of the recommended order. No product of review by the full Commission would be available to the Court. No longer would the Court have the benefit of reviewing an issue only after it has been taken through the agency's appeal procedures and thus been given scrutiny at the agency's highest level of review.

Here, it is clear that the Commission simply adopted the identical order recommended by the panel on the issue of disallowance of certain expenses of Water Service Corporation. Because CWS chose not to bring this particular issue to the attention of the full

Commission, we find that the issue cannot now be appealed to this Court. CWS failed to exhaust its administrative remedies and thus is barred from pursuing judicial review of this issue.

[3] The remaining issues raised by CWS were correctly appealed to the full Commission from the panel's order. The second issue raised by CWS involves the penalty (1% reduction in rate increase) imposed upon CWS due to inadequate service. In addressing this issue, we note that a Commission decision will stand unless:

> the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b) (1989).

We consider this issue with regard to N.C.G.S. § 62-94(b)(5), whether the decision was supported by "competent, material and substantial evidence." The Commission's panel recommendation of 31 July 1992 was that, due to inadequate service, CWS should be penalized by decreasing the rate of return by 1%. CWS filed exception to the recommended decision on the service issue and asked to be allowed to reopen the hearing to call state and county officials to testify as to the quality of service that CWS provides. This request was denied. Upon review, the full Commission affirmed the panel's finding of inadequate service. CWS appeals this decision, claiming that the Commission did not adequately set out the standard for determining what constitutes adequate service and that the Commission did not tell CWS how to improve its service to meet the Commission's unidentified standard of service adequacy.

Upon review of the entire record, we conclude that the Commission's decision imposing a 1% penalty for inadequate service is not supported by competent, material, and substantial evidence.

CWS has presented evidence that its service met all state and federal requirements. Although a number of complaints regarding the quality of the water furnished were presented by customers at the hearings scheduled throughout the state, these quality and service complaints were made by a small fraction of 1% of the customers, there were no complaints made from fifty of the eighty-nine subdivisions that CWS services, and most of the complaints came from seven subdivisions. Yet the Commission penalized CWS based on its overall service to all customers.

In addition, the Commission failed to satisfy two statutory requirements of Chapter 62 when setting out its order. N.C.G.S. § 62-79 states:

> (a) All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C.G.S. § 62-79(a) (1989).

In addition, the "Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order." N.C.G.S. § 62-42(a) (1989). The Commission order at issue does not set forth what service improvements or what repairs should be made, nor does it set forth the basis upon which it determined that water quality and service which meets the requirements of the Division of Environmental Health ("DEH") is inadequate.

In *Utilities Comm. v. Telephone Co.*, 12 N.C. App. 598, 184 S.E.2d 526 (1971), *modified & aff'd*, 281 N.C. 318, 189 S.E.2d 705 (1972), the Court of Appeals reminded the Commission that "[s]pecific and unambiguous factual findings by the Commission are necessary to enable a reviewing court to determine whether the duty imposed by statute [to consider all evidence] has been performed." *Id.* at 612, 184 S.E.2d at 534. This Court has stressed in the past how

important it is that the Commission "enter final orders that are sufficient in detail to enable this Court on appeal to determine the controverted issues. . . . Failure to include all necessary findings of fact and details is an error of law and a basis for remand under N.C.G.S. § 62-94(b)(4) because it frustrates appellate review." *State ex rel. Utilities Comm. v. AT&T Communications*, 321 N.C. 586, 588, 364 S.E.2d 386, 387 (1988). Specifically, we have held that where the Commission finds that poor service lowers the rate of return a company will receive, it must "make a specific finding showing the effect it gave this relevant factor." *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 361, 189 S.E.2d 705, 733 (need specific finding when poor service is used to justify subtraction from original and reproduction costs of plant before ascertaining fair value of plant).

While the Commission here has set forth specific complaints from some customers, the order does not state what CWS is to do to make the service adequate. The order indicates neither in what manner CWS violated the Commission's standards nor what those standards are. CWS presented undisputed evidence that it has complied with the state health standards. No Public Staff witness recommended that CWS be penalized for inadequate service. Nevertheless, the Commission determined that it was not enough that CWS complied with the state health standards and penalized CWS for service inadequacy. We hold that the company must be given specific information as to why its service is inadequate and guidance as to required or recommended corrective actions by the Commission when being penalized for inadequate service and conclude that the order before us is inadequate. We thus reverse the Commission and remand the issue for further consideration.

[4] The third issue raised by CWS involves the Commission's determination of the appropriate figure for determining the capacity of elevated storage tanks. The panel had recommended that a calculation of 400 gallons per day (gpd) per connection be used to determine how much excess capacity existed in the elevated storage tanks of CWS in different systems. The Public Staff appealed the decision of the panel to the full Commission, arguing that the evidence supported a finding of 200 gpd per connection as the correct standard. The full Commission determined that the correct calculation was 200 gpd per connection. CWS appealed the issue to this Court. We conclude that competent, material, and substantial evidence in the record supports the Commission's decision, and we therefore uphold the Commission's decision.

This Court has previously held that the Commission cannot simply substitute the design criteria of another agency as a substitute for its own determination. *State ex rel. Utilities Commission v. Public Staff*, 333 N.C. 195, 207, 424 S.E.2d 133, 140 (1993). However, the Commission may consider another agency's standards when making its own determination. *Id.* If, after considering all the evidence, the Commission then determines that a certain agency's standard is appropriate, the decision will be affirmed on appeal. In the present case, the Commission reviewed the testimony of Mr. W. E. Venrick, chief of DEH's water supply section, and Mr. J. C. Lin, head of DEH's plan review unit, which indicated that the division's policy requires a minimum of 200 gpd per connection, not 400 gpd per connection. The Commission also considered whether 200 gpd per connection was adequate to serve the customers. In reaching its determination that 200 gpd per connection was the correct calculation for determining excess capacity, the Commission noted that CWS owned several systems that provided less than 400 gpd per connection to its customers and that CWS was unable to show that any service problems existed in any of the service areas that provided less than 400 gpd per connection. The Commission also noted that 200 gpd per connection is an adequate standard for elevated storage tanks because while the storage tanks are being required to hold 200 gpd per connection, there is another 400 gpd per connection that is available to the customers through the wells that are required to be able to pump 400 gpd per connection into the storage tank in a twelve-hour period.

CWS argued that there is a statutory requirement of 400 gpd per connection and that CWS relied to its detriment on other Commission decisions which found that 400 gpd per connection is the minimum requirement. We note that there is no formal requirement for elevated storage tanks for nonmunicipal water systems like those owned by CWS. While there is a stated regulation for municipalities, that regulation does not control in this situation. *See* 15A NCAC 18C .0805(c) (February 1991). In addition, CWS has repeatedly sought and received design approvals for water systems with elevated storage capacities of 200 gpd per connection, and there is no evidence that a tank with a service capacity of 200 gpd per connection has been found to be inadequate. As there was competent, material, and substantial evidence presented that the minimum design criterion has always been 200 gpd per connection, the decision of the Commission is affirmed.

[5] The first issue raised by the Public Staff relates to the rate base calculation of the Commission in the case at hand and, in particular, the inclusion of a 35% capacity allowance for future growth. The Public Staff argues that the Commission reached this figure in error or, in the alternative, that the Commission erred because it did not consider the future revenues that would be produced by future customers who create the costs for which the present customers were being charged.

Our review of this issue on appeal is limited to whether the Commission correctly followed requisite guidelines specified in N.C.G.S. § 62-133(c) and based its determination on competent, material, and substantial evidence in light of the entire record. *See Public Staff*, 333 N.C. at 203, 424 S.E.2d at 138. We reverse the decision of the Commission which permitted a 35% rate base capacity allowance because it is not supported by competent, material and substantial evidence. The Commission failed to provide any fact-specific support for determining that a 35% increase is a valid figure and did not follow the "approved practice" of setting out a matching adjustment for pro forma revenues that will be obtained due to the potential increase in customers in the near future. *Id.* at 208, 424 S.E.2d at 141.

In *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.2d 705, the leading case on this issue, we established that present customers could in fact be assessed costs for future customers when the costs were based on a short-term projection. In *State ex rel. Utilities Comm. v. Carolina Water Service*, 328 N.C. 299, 401 S.E.2d 353 (1991), we held that N.C.G.S. § 62-133(c) "requires the Commission to consider post test period usage of plants as well as costs and revenues." *Id.* at 305, 401 S.E.2d at 356. In *Public Staff*, 333 N.C. 195, 424 S.E.2d 133, we held that an inappropriate "mismatch" resulted when the rate increase was based on a comparison of revenues from present customers, but the costs were determined based on present and future customers. *Id.* at 207, 424 S.E.2d at 141. Thus, while the inclusion of an allowance for costs that will be utilized by future customers in the near future may be assessed the present customers in rate base, the approved practice is to also include the future revenues that will be received from these customers in rate base to "prevent present customers from paying for that portion of a plant that will serve only future customers." *Carolina Water Service*, 328 N.C. at 304, 401 S.E.2d at 355. In *Public Staff*, we noted that the approved practice in

determining excess capacity is to match future revenues and future costs and remanded the Commission's decision, which did not match revenues and costs. We concluded that " 'there must be a limit to the extent to which [ratepayers] can be compelled to pay for providing possible future facilities for future business.' " *Utilities Comm. v. Telephone Co.*, 281 N.C. at 351, 189 S.E.2d at 726 (quoting *St. Joseph Stockyards Co. v. United States*, 11 F. Supp. 322, 329 (W.D. Mo.), *aff'd*, 298 U.S. 38, 80 L. Ed. 1033 (1936)), *quoted in Public Staff*, 333 N.C. at 205, 424 S.E.2d at 138-39. " 'The present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future.' " *Public Staff*, 333 N.C. at 206, 424 S.E.2d at 139 (quoting *Utilities Comm. v. Telephone Co.*, 281 N.C. at 353, 189 S.E.2d at 727).

In this case, the Commission failed to consider future revenues, and its decision to allocate a capacity allowance of 35% is not supported by the evidence. In the past, capacity allowances have been upheld based on evidence of particular annual growth in the subdivision at issue. *Public Staff*, 333 N.C. at 198, 424 S.E.2d at 135. In this case, there is no specific evidence of the customer growth rates in the subdivisions subject to the capacity allowance. The Commission in its order cites no evidence of how much growth is anticipated or how far into the future the planning horizon extends. The only evidence presented by CWS that 35% is a valid figure was the testimony of CWS rebuttal witness Mr. Dopuch, who said that he based his opinion that 35% was valid on the fact that such a figure had been approved by the Commission in the past for a typical residential subdivision. The witness had no personal knowledge that these particular subdivisions would expand by a rate of 35% in the near future.

We conclude that because of the lack of evidence justifying the 35% capacity increase and because the Commission did not consider the future revenue potential, the decision of the Commission is not supported by competent, material, and substantial evidence and may unjustifiably burden present customers. We reverse the decision of the Commission and remand the issue for further consideration.

[6] The second issue raised by the Public Staff relates to the failure of the Commission to include in the total treatment plant cost the original costs and capitalized rehabilitation costs of sewage

treatment plants in the Brandywine Bay, Cabarrus Woods, and Danby systems. The Commission has included the original costs and capitalized rehabilitation costs of these systems in rate base. Without reaching the question of the correctness of the Commission's decision not to include the original costs and capitalized rehabilitation costs in its consideration of the total treatment plant cost, we conclude that the Public Staff cannot prevail on this issue.

CWS purchased the different systems at issue as early as 1986 at a cost well below their original costs. The original costs and capitalized rehabilitation costs stemming from these systems have been included in rate base in their entirety since the systems were purchased. The Public Staff has not appealed to this Court the Commission's decision to include in rate base the original costs and capitalized rehabilitation costs of these plants until the present case. In *In re Application by Carolina Water Service*, Docket No. W-354, Sub 69 (1989) ("Sub 69"), and *In re Application by Carolina Water Service*, Docket No. W-354, Sub 74, 79, 81 (1990) ("Sub 81"), the full Commission addressed the issue of the cost of these plants that would be used in determining the amount to be excluded from rate base as excess capacity. The Commission looked at the original costs and the expansion costs separately, finding that if the original capacity was sufficient to satisfy the customer needs, then the entire expansion cost would be deemed excess capacity and not included in rate base. *Carolina Water Service*, 328 N.C. at 302, 401 S.E.2d at 354. Portions of the Commission's decision in Sub 69 were appealed to this Court, *Carolina Water Service*, 328 N.C. 299, 401 S.E.2d 353; however, the method of calculation of costs in determining excess capacity was not an issue that was appealed. In *Carolina Water Service*, we implicitly approved the calculations of the Commission, affirming the decision. *Id.*

This year, CWS has again included expansion costs in rate base. In calculating the excess capacity, the Commission relied on its calculations in Sub 69 and Sub 81 to determine the total treatment plant cost. The Public Staff now argues that the original costs and capitalized rehabilitation costs should be included in the total treatment plant cost. Without reaching a conclusion on the prudence behind the Commission's calculations, we conclude that the method of calculation as it relates to these particular plants has been made before and that if the Public Staff objects to the separate consideration of the original plant costs and the expansion plant costs, such objection should have been made to this Court

when the procedure was first used for these particular systems. The decision of the Commission in Sub 69 was appealed and heard by this Court, *Carolina Water Service*, 328 N.C. 299, 401 S.E.2d 353, but no objection was made as to the method of calculation. The Public Staff should have appealed this decision within thirty days of the final order that included these particular calculations. N.C.G.S. § 62-90(a). In addition, the same method of calculation for these same plants involving the same original plant cost was used in Sub 81, and no appeal of that decision was made at all. Because the Public Staff did not appeal as to this procedure in a timely manner, we will not address the correctness of the method of calculation of excess capacity for these particular plants. The Public Staff is now bound by the final order of the Commission in Sub 69 and Sub 81 in this regard.

[7] The third issue raised by the Public Staff relates to the inclusion by the Commission of the Mt. Carmel wastewater treatment plant in rate base. It was determined by the Commission that Mt. Carmel was not in service at the end of the test year and, in fact, would never again be in service. On the basis of this evidence, the Commission concluded that the plant should be treated as an extraordinary property retirement and that the unrecoverable costs should be amortized over ten years with the unamortized portion being included in rate base. The Public Staff argues that such a plant is not used or useful; thus, the unamortized costs should not be included in rate base.

Relying on our previous case law, we agree with the Public Staff and conclude that the Commission has committed an error of law and that the issue should be remanded. N.C.G.S. § 62-94(b).

The clear wording of N.C.G.S. § 62-133(b) requires the Commission to determine the utility's rate base by computing the "reasonable cost of the utility's property which is used and useful in providing service to the public, minus accumulated depreciation, and plus the reasonable cost of the investment in construction work in progress." *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 467 n.2, 385 S.E.2d 451, 453 n.2 (1989) ("*Thornburg I*"). To be included in rate base, the cost must be both reasonable *and* incurred for property that is used and useful in providing service to customers. *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 484, 491, 385 S.E.2d 463, 467 (1989) (*Thornburg II*). In *Thornburg II*, we held that facilities which are "*excess*, as a matter

of law, . . . cannot be considered 'used and useful' as that term is used in N.C.G.S. § 62-133(b)(1)." *Id.* at 495, 385 S.E.2d at 469. If facilities are not used and useful, they cannot be included in rate base. *Id.* Including costs in rate base allows the company to earn a return on its investment at the expense of the ratepayers. We do not allow such a return for property that will not be used or useful within the near future. *Id.* at 496, 385 S.E.2d at 469. Costs for abandoned property may be recovered as operating expenses through amortization, but a return on the investment may not be recovered by including the unamortized portion of the property in rate base. *Id.* at 497, 385 S.E.2d at 470.

Similarly, in *Public Staff*, we concluded that to allow a company to recover its investment in a plant that at one time was used and useful by allowing the "unamortized balance" of the property to be included in rate base after labeling the property an "extraordinary property retirement" and amortizing the investment over a specific time period allowed a company to recover substantially more than its investment in the property. *Public Staff*, 333 N.C. at 202, 424 S.E.2d at 137. By allowing amortization and inclusion in rate base, the company is allowed to recover its investment in a plant that is not used or useful and to earn a rate of return or profit on any portion of the unused plant that is included in the rate base. There is no statutory authority for including in rate base costs from a completed plant that is no longer used and useful within the meaning of this term as determined by our case law. *Id.*

Concluding that the Mt. Carmel wastewater treatment plant is no longer "used or useful," we hold that no portion of its costs may be included in rate base. The decision of the Commission is reversed, and the issue is remanded for determination consistent with this opinion.

To summarize, we hold: (1) that the issues involving division of gain on sale, disallowance of certain CWS expenses, and the calculation of total treatment plant costs are not properly before this Court for review; (2) that the Commission erred in its assessment of a 1% penalty due to inadequacy of service; (3) that the Commission correctly determined that 200 gpd per connection is the appropriate figure for calculating the excess capacity of elevated storage tanks; (4) that the Commission erred in determining a capacity allowance of 35% for rate base; and (5) that the Commission

incorrectly determined that the unamortized portion of an extraordinary property retirement should be included in rate base. For the reasons stated herein, the order of the Commission is affirmed in part, reversed in part, and remanded to the Commission for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE OF NORTH CAROLINA v. JEFFERSON D. JOHNSON, III

No. 5PA93

(Filed 28 January 1994)

Embezzlement § 4 (NCI4th)— attorney's settlement of case without client's knowledge—lawful possession of draft—forgery of client's signature—money deposited in attorney's personal account

The evidence was sufficient to show that defendant attorney came into possession of a draft lawfully so far as his client was concerned and to support defendant's conviction of embezzlement where it tended to show that defendant represented his client on a claim for damages incurred in an automobile accident; defendant told the tortfeasor's insurer that his client would accept the insurer's offer of $20,000 in full payment of her claim, but the client was not advised of the offer; the insurer delivered a draft for $20,000 to defendant with instructions to hold the draft until the client signed the release; the client's signature was forged on both the release and the draft, and the proceeds of the draft were deposited in defendant's personal account; and the client did not receive anything on her claim. Even if defendant may have been guilty of obtaining property by a false pretense as to the insurer when he obtained the draft by a misrepresentation to the insurer that the client would accept the settlement offer, defendant was in possession of the draft as the client's agent, the client owned an interest in the draft in that she could ratify her agent's actions and be entitled to the draft, and

so far as the client was concerned, defendant was in lawful possession of the draft in which she had a legal interest.

Am Jur 2d, Embezzlement § 15.

Justice FRYE concurring.

Justice WHICHARD dissenting.

Justice PARKER joins in this dissenting opinion.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 108 N.C. App. 550, 424 S.E.2d 165 (1993), reversing a judgment entered by Ross, J., at the 23 May 1991 Criminal Session of Superior Court, Sampson County. Heard in the Supreme Court 11 October 1993.

The defendant was tried for embezzlement. The evidence showed that the defendant, an attorney, represented Ms. Lillie Joyce McCoy on a claim for damages incurred in an automobile accident. State Farm Mutual Insurance Company, which was the liability coverage carrier for the vehicle that collided with Ms. McCoy's vehicle, offered to settle the case by paying Ms. McCoy $20,000. The defendant, or someone in his office, told the adjuster for State Farm that Ms. McCoy would accept this sum in full payment of her claim. In fact, Ms. McCoy was not advised of the offer from State Farm.

State Farm delivered a draft for $20,000 to defendant with instructions to hold the draft until Ms. McCoy signed the release, at which time the release was to be returned to State Farm. Ms. McCoy's signature was forged on the draft and it was deposited in the defendant's personal account. Ms. McCoy did not receive anything on her claim. Ms. McCoy's signature was forged on the release, which was delivered to State Farm.

The jury found the defendant guilty as charged. The court imposed a prison sentence which was suspended and the defendant was placed on probation for five years. The Court of Appeals held it was error not to dismiss the charge at the end of the evidence and reversed. We granted the State's petition for discretionary review.

Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State appellant.

Tharrington, Smith & Hargrove, by Roger W. Smith and Douglas E. Kingsbery, for defendant-appellee.

WEBB, Justice.

The defendant argues, and the Court of Appeals agreed, that there was not sufficient evidence to convict the defendant of embezzlement because the evidence did not show the defendant came into possession of the draft lawfully. This is an element which must be proved in order to convict a person of embezzlement. *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990); *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230 (1953).

We believe the evidence showed the defendant came into possession of the draft lawfully so far as Ms. McCoy was concerned and that he wrongfully converted it to his own use. The defendant was the agent of Ms. McCoy with authority to negotiate the settlement of her claim. If he obtained the draft by a misrepresentation to State Farm that Ms. McCoy would accept the offer of settlement, he may have been guilty of obtaining property by a false pretense as to State Farm, but he was still the agent of Ms. McCoy and in possession of the draft as her agent. At that point, Ms. McCoy had the right to ratify the act of her agent and accept the draft. *McCrillis v. Enterprises*, 270 N.C. 637, 155 S.E.2d 281 (1967). The defendant so far had not committed any fraudulent act toward Ms. McCoy. She owned an interest in the draft in that she could, by accepting State Farm's offer, be entitled to the draft. The defendant, so far as Ms. McCoy was concerned, was in lawful possession of the draft in which she had a legal interest. When he converted it to his own use he was guilty of embezzlement. We believe that the relationship between the principal and agent governs as to whether the possession of the property was lawfully gained. Lawful possession does not depend on the relation between the agent and a third party.

The defendant says that because he received the draft from State Farm with instructions to hold it until Ms. McCoy signed the release he was acting as an agent for State Farm, holding the draft in escrow for State Farm until the release was signed. He says the title to the draft remained in State Farm and did not pass to Ms. McCoy. For this reason, he could not have em-

bezzled the draft from Ms. McCoy. Whatever the relationship between the defendant and State Farm as to title to the draft, Ms. McCoy had sufficient property interest in the draft so that the defendant could have embezzled it from her.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for remand to Superior Court, Sampson County for the reinstatement of the sentence.

REVERSED AND REMANDED.

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

Justice FRYE concurring.

I concur fully in the majority's opinion. I write separately only to emphasize that the State has presented sufficient evidence to support a finding of all of the elements of embezzlement.

To constitute an embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship. *State v. Speckman*, 326 N.C. 576, 391 S.E.2d 165 (1990); *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230 (1953). Because he had satisfactorily represented her in a similar case in 1982, Ms. McCoy employed defendant in 1987 for the express purpose of collecting money for damages caused by an automobile accident. Thus, by the very terms of his employment, defendant was charged with receiving money on behalf of Ms. McCoy from the tort-feasor's insurance company, State Farm Mutual (hereinafter State Farm). The fact that a settlement was not expressly authorized by Ms. McCoy does not require a finding that the $20,000 draft was acquired unlawfully. It is well settled in the law of agency that when an agent contracts in the name of his principal without authority, upon knowledge of the formation of such a contract, the principal can either ratify the agent's act or disavow it. *See Patterson v. Lynch, Inc.*, 266 N.C. 489, 146 S.E.2d 390 (1966); 2A C.J.S. *Agency* § 67, at 652-54 (1972).

The elements of embezzlement are as follows:

> First, that the accused was the agent of the person or corporation alleged, and . . . by the terms of his employment he was charged with receiving the money or property of his prin-

> cipal; second, that he did, in fact, receive such money; third, that he received it in the course of his employment; further, that he, knowing it was not his own, converted it to his own use or to the use of some third person, not the true owner.

State v. Blackley, 138 N.C. 620, 625-26, 50 S.E. 310, 312 (1905) (citations omitted).

As Ms. McCoy's attorney and agent, defendant was charged with receiving the money or property of his principal; thus, the State has presented sufficient evidence of the first element. The point of contention between the majority and the dissent is whether the second element of embezzlement—that the agent did in fact receive such money or property of his principal—has been satisfied.

The draft was jointly payable to Ms. McCoy and defendant as her attorney along with instructions to hold it until Ms. McCoy signed the release. According to the dissent, Ms. McCoy did not have a property interest in the draft since she "never endorsed the draft, signed the release, or took control of the funds." These acts may be necessary in order to allege "actual ownership" of property but as the dissent correctly points out, the State can also properly allege ownership in a person with a "special property interest." *State v. Carr*, 21 N.C. App. 470, 204 S.E.2d 892 (1974), citing *State v. Smith*, 266 N.C. 747, 147 S.E.2d 165 (1966), and *State v. Law*, 228 N.C. 443, 45 S.E.2d 374 (1947).

Ms. McCoy is indeed a person with a "special property interest" even though she did not expressly authorize this specific settlement of her claim with State Farm. She was not even aware that the draft existed. Nevertheless, as a principal, she had the right to ratify or reject this unauthorized action of her agent, defendant. *See Patterson v. Lynch, Inc.*, 266 N.C. 489, 146 S.E.2d 390; 2A C.J.S. *Agency* § 67, at 652-54 (1972). Under the law of agency:

> 'It is not necessary . . . that the principal's assent or sanction be given in advance of the performance of the transaction which constitutes the subject-matter or purpose of the agency. If his assent be obtained after the transaction by a confirmation of the assumed relation, it is equally binding and efficacious. . . .'

Walker Grading & Hauling v. S.R.F. Management Corp., 311 N.C. 170, 182, 316 S.E.2d 298, 305 (1984), citing *Trollinger v. Fleer*, 157 N.C. 81, 87, 72 S.E. 795, 797 (1911). It is the majority's position

that this right of ratification is a sufficient property interest to satisfy the ownership element of embezzlement. Conversely, the dissent concludes that "prior to [actual] ratification, the principal retains no benefit from the unauthorized contract and consequently has nothing of value from the agent's transaction." It is my position that the right of ratification itself, notwithstanding whether Ms. McCoy ultimately chose to exercise it or not, is extremely beneficial to her and is a sufficient property interest to satisfy the ownership element of embezzlement.

The record reflects that Ms. McCoy was under continual care of doctors after the accident and that as a result she could not return to work for some time. During this period, Ms. McCoy's source of income was her husband's social security. Because her car was a total loss as a result of the accident, she purchased a new car from an area auto dealership. Ms. McCoy testified that she returned to work even though she had not been released from the doctor because she had bills to pay. Under these circumstances, I am at a loss to see how the dissent concludes that the right to ratify the unauthorized contract with State Farm and accept the draft for $20,000 was of no benefit to Ms. McCoy. She had a right to sign both the release and draft and have the funds represented by the draft paid to her or applied for her benefit. By forging her signature on the release and draft and converting the funds to his own use, defendant deprived Ms. McCoy of this right. In doing so, defendant took a valuable property right from his client, not a "mere possibility" as suggested by the dissenting opinion.

Additionally, the State has presented sufficient evidence of the remaining elements of embezzlement by showing that defendant received the draft in the course of his employment as the attorney representing Ms. McCoy in this matter, and finally that defendant, knowing that the draft was not his, converted it to his own use by depositing it into his personal bank account. Thus, the trial court was correct in entering judgment on the jury verdict finding defendant guilty of embezzlement.

Justice WHICHARD dissenting.

I agree with the Court of Appeals' conclusion that the State did not present substantial evidence to support the charge of embezzlement. Embezzlement occurs when a person has "been entrusted with and received into his possession lawfully the personal

property of another, and thereafter with felonious intent . . . fraudulently convert[s] the property to his own use." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953). The State must present sufficient evidence of each element of the crime charged. *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). The elements of embezzlement are:

> First, that the accused was the agent of the person or corporation alleged, and . . . by the terms of his employment he was charged with receiving the money or property of his principal; second, that he did, in fact, receive such money; third, that he received it in the course of his employment; further, that he, knowing it was not his own, converted it to his own use or to the use of some third person, not the true owner.

State v. Blackley, 138 N.C. 620, 625-26, 50 S.E. 310, 312 (1905). In this case there was no evidence that Lillie McCoy had a property interest in the proceeds of the draft that defendant received from State Farm and deposited in his personal account. The State's evidence on the second element of the offense thus fails.

The majority has determined that McCoy's right to ratify defendant's act and accept the sum offered in the draft gives her a legal interest in the converted funds sufficient to support the element of ownership in another. The State may allege ownership in "the person having a 'general interest' in the stolen property—that is, the actual owner—or the person with a 'special interest' in the property—that is, the person who had possession and control of it at the time when it was stolen." *State v. Carr*, 21 N.C. App. 470, 472, 204 S.E.2d 892, 894 (1974) (citing *State v. Smith*, 266 N.C. 747, 147 S.E.2d 165 (1966); *State v. Law*, 228 N.C. 443, 45 S.E.2d 374 (1947)). We have stated that this rule, which developed in the context of larceny cases, "may properly be applied to indictments alleging embezzlement . . . of the property of another." *State v. Kornegay*, 313 N.C. 1, 27, 326 S.E.2d 881, 900 (1985).

The right to ratify defendant's act and accept the sum offered in the draft did not give McCoy a general interest in the draft because, as the majority notes, only after accepting State Farm's offer would she be entitled to the proceeds of the draft.

> It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must

> necessarily accept the burdens incident thereto or which naturally result therefrom.

Snyder v. Freeman, 300 N.C. 204, 213, 266 S.E.2d 593, 600 (1980) (quoting *Maxwell v. Proctor & Gamble Distributing Co.*, 204 N.C. 309, 318, 168 S.E. 403, 407 (1933)). Conversely, prior to ratification, the principal retains no benefit from the unauthorized contract and consequently has nothing of value from the agent's transaction. Therefore, prior to ratification and acceptance, McCoy was not the actual owner of the funds. She had not yet endorsed the draft and received the proceeds of the draft into her possession. She did not even know the draft existed. Even if defendant had delivered the draft to her, without her endorsement, her claim remained unpaid. *See Paris v. Builders Corp.*, 244 N.C. 35, 38, 92 S.E.2d 405, 407-08 (1956) ("in the absence of an agreement to the contrary, the delivery and acceptance of a check is not payment until the check is paid"). The draft was merely an offer made by State Farm to McCoy, who had yet to learn of it, much less accept it. Further, she had not signed the release, which State Farm made a condition to her receipt of the funds. The Court of Appeals was correct when it stated:

> There is no question that, had McCoy agreed to the settlement and release, and after obtaining the check defendant placed the funds in his personal account for his own use, substantial evidence would exist that defendant had "initially . . . acquired lawfully, pursuant to a trust relationship, and then wrongfully converted" the property in question.

State v. Johnson, 108 N.C. App. 550, 555, 424 S.E.2d 165, 168 (1993).

Because McCoy's right of ratification was not a general property interest, the evidence that she had that right is sufficient to establish ownership only if that right qualifies as a special property interest. In larceny cases we have held that the allegation of ownership in a bailee or a custodian of the converted property did not result in a fatal variance in an indictment because although the bailee or custodian was not the legal owner, he had a special interest in the property. In making this determination we focused on the fact that the bailee or custodian had possession or control of the stolen item. *See State v. Green*, 305 N.C. 463, 474, 290 S.E.2d 625, 632 (1982) (allegation of ownership in person having custody and control of stolen motorcycle sufficient to support element of larceny); *Smith*, 266 N.C. at 749, 147 S.E.2d at 166 (owner-

ship alleged in bailee sufficient where bailee had custody and control of stolen property); *State v. Bishop*, 98 N.C. 773, 777, 4 S.E. 357, 359 (1887) (ownership alleged in bailee sufficient where bailee had possession of property).

In *Kornegay*, we applied a special property interest analysis to the embezzlement element of ownership in another. *Kornegay*, 313 N.C. at 26-28, 326 S.E.2d at 900. In the indictment the State alleged ownership of the converted funds in Carolyn Stallings. Stallings held a power of attorney as guardian ad litem for her husband, who was incompetent. Her attorney, the defendant, negotiated a settlement of a claim with State Farm Insurance Company on behalf of Stallings as guardian ad litem for her husband, who had been in an accident with State Farm's insured. Stallings endorsed the checks from State Farm, which were paid pursuant to the medical payment and uninsured motorist provisions of the policy. She then authorized their deposit in the law firm's trust account, from which the defendant attorney later withdrew them for his personal use. On those facts we recognized that Stallings had "a special property interest in the [money] deposited in the trust account." *Id.* at 27, 326 S.E.2d at 900. In support of finding a special property interest, we relied on her endorsement of the checks, the fact that she would have a claim for reimbursement for the funds from the trust account because she had been paying her husband's medical bills, and the fact that the payments were made at a time when she had been acting pursuant to a power of attorney from her husband. *Id.* In essence, we analyzed her interest in terms of her control and possession of the funds.

Here, by contrast, McCoy never endorsed the draft, signed the release, or took control of the funds; therefore, her right to ratify defendant's act did not give her a special property interest in the funds. That right only gave her the possibility of accepting State Farm's offer and taking possession and control of the settlement funds. Under our precedents, I do not believe that such a mere possibility qualifies as a special property interest.

To determine that the right to ratify defendant's act is either a general or special property interest sufficient to support the element of ownership in another subverts our prior analyses of property interests in embezzlement and larceny cases. Defendant may, as he contends, be guilty of obtaining property by false

pretenses from State Farm, but the State has failed to prove that he is guilty of embezzlement from McCoy.

I therefore respectfully dissent and vote to affirm the result reached by the Court of Appeals.

Justice PARKER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. TONY WILLIAMS

No. 20A93

(Filed 28 January 1994)

Robbery § 117 (NCI4th)— armed robbery—appearance of firearm —instructions

The trial court did not err in a prosecution for armed robbery and attempted armed robbery by instructing the jury that it was to apply the mandatory presumption that the implement employed by defendant was a firearm where one convenience store clerk testified that defendant had used an object which was wrapped but which looked like a pistol and which she believed to be a pistol; another clerk at another store testified that she had believed that defendant had a gun because he had his hand in his pocket and kept saying that he was going to shoot her; and defendant testified that he did not own a gun and did not "mess with guns." Evidence that a defendant does not own a gun does not amount to substantial evidence contrary to State's evidence to the effect that he employed a gun during a robbery, and evidence tending to show that a defendant does not "mess with guns" is ambiguous at best and also does not amount to evidence contrary to State's evidence tending to show that the defendant used a firearm at the time he committed a robbery.

Am Jur 2d, Robbery §§ 91 et seq.

Justice FRYE dissenting.

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

Appeal of right 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. 295, 423 S.E.2d 333 (1992), finding no error in a judgment entered in the Superior Court, Sampson County, by Stevens, J., on 14 February 1991. Heard in the Supreme Court on 17 September 1993.

Michael F. Easley, Attorney General, by Donald W. Laton, Assistant Attorney General, for the State.

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

MITCHELL, Justice.

The defendant was charged in indictments proper in form with two separate counts of robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. The State's evidence at trial tended to show that on 20 November 1990, Janet Jordan was working as cashier at The Scotchman, a convenience store located in Sampson County. At approximately 7:20 p.m., the defendant entered the store and approached the counter. While looking directly at Jordan, the defendant pulled something from his pocket and said, "Give me your money." Jordan opened the cash register and the defendant reached into it and took a total of $60. Jordan testified that the object the defendant pulled from his pocket "looked like a pistol, but he had it wrapped up where I couldn't see what it was. It looked like the way he was holding it[,] it looked like a pistol that he had wrapped in something, and it stuck out." Jordan believed the object to be a real gun.

Approximately three hours later, at about 10:20 p.m., the defendant entered the Petro Mart in Sampson County. The cashier, Cathy Tew Smith, was cleaning the store at the time. The defendant approached the counter and asked for a pack of cigarettes. Smith testified that as soon as she hit the cigarette key on the cash register, the defendant demanded that she "open the drawer, b----, open the drawer b---- right now or I'll shoot you." The defendant had his right hand in his jacket pocket at that time and was pointing it toward Smith. Smith "thought he had a gun because he was pointing at me and he kept saying that he was going to shoot me." Smith became flustered and could not open the cash register. The defendant pulled the register on the floor. When it still would not open, the defendant fled without completing the

robbery. The transaction between Smith and the defendant at the Petro Mart was recorded by a security video-camera in the store.

The defendant gave testimony in the nature of alibi. He testified that at the time of the robberies in question, he was with friends and family celebrating his younger brother's birthday. The defendant further testified that he did not own a gun and did not "mess with guns."

The jury found the defendant guilty of one count of robbery with a dangerous weapon and one count of attempted robbery with a dangerous weapon. The trial court consolidated the cases for judgment and entered judgment sentencing the defendant to imprisonment for forty years.

The defendant appealed to the Court of Appeals, where a divided panel found no error in the judgment of the trial court. Judge Wynn dissented, contending that the majority had erred in its conclusion that no substantial evidence had been introduced tending to show that the defendant had not used a dangerous weapon. Therefore, Judge Wynn was of the opinion that the trial court had erred by instructing the jury as to the mandatory presumption arising where a defendant uses an implement that appears to be a deadly weapon and there is no evidence to the contrary. The defendant appealed to this Court as a matter of right by virtue of the dissent in the Court of Appeals.

The defendant contends that the trial court erred in its instructions to the jury by giving the State the benefit of a mandatory presumption that the object the defendant wielded during the robbery of The Scotchman and the later attempted robbery of the Petro Mart was a firearm. The defendant argues that the State was entitled only to an instruction giving it the benefit of a permissible inference that the object was a firearm. To establish robbery or attempted robbery with a dangerous weapon in this case, the State was required to prove beyond a reasonable doubt that the defendant possessed a firearm or other dangerous weapon at the time of the robbery or attempted robbery and that the victim's life was in danger or threatened. N.C.G.S. § 14-87 (1986). Here, substantial evidence tended to show that the defendant used what appeared to his victims to be a firearm during both the armed robbery and the attempted armed robbery in question.

This Court has explained that:

[w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the presumption that the victim's life was endangered or threatened is mandatory. *See State v. Thompson*, 297 N.C. 285, 254 S.E.2d 526 (1979). If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened). This is so because, when *no evidence* is introduced tending to show that a life was not endangered or threatened, "no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt." *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489, *rehearing den.*, 301 N.C. 107, 273 S.E.2d 443 (1980).

. . . .

The mandatory presumption under consideration here, however, is of the type which merely requires the defendant "to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. . . ." *State v. White*, 300 N.C. at 507, 268 S.E.2d at 489. Therefore, when *any evidence* is introduced tending to show that the life of the victim was not endangered or threatened, "the mandatory presumption disappears leaving only a mere permissive inference. . . ." *Id.* The permissive inference which survives permits but does not require the jury to infer the elemental fact (danger or threat to life) from the basic fact proven (robbery with what appeared to the victim to be a firearm or other dangerous weapon). *See generally State v. White*, 300 N.C. 494, 268 S.E.2d 481 (1980). *See State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982).

State v. Joyner, 312 N.C. 779, 782-83, 324 S.E.2d 841, 844 (1985).

Bearing the foregoing principles in mind, we turn to examine the contention of the defendant in the present case. Here, the trial court instructed the jury that to find the defendant guilty of attempted robbery of the Petro Mart with a dangerous weapon, the jury must find that the defendant

> used or threatened to use a dangerous weapon or purported dangerous weapon in such a way as to endanger or threaten the life of that person, or by conduct which reasonably caused her to believe that her life was being endangered or threatened at the time . . . . Now, listen well, when a person attempts or perpetrates a robbery in such a way that it purportedly and reasonably appears to the victim that a firearm or other dangerous weapon is being used by such person, *in the absence of any evidence to the contrary*, the law of this State presumes the instrument to be what his conduct represented it to be, that is, a firearm or other dangerous weapon.

(Emphasis added). The relevant portion of the trial court's instructions on robbery of The Scotchman with a dangerous weapon were essentially identical to the above-quoted instructions on attempted robbery. These instructions by the trial court directed the jury that, as to each crime charged, it was to apply the "mandatory presumption" discussed in *Joyner* to the effect that the implement employed by the defendant was what it appeared to be—a firearm.

The defendant does not contest the fact that evidence at trial tended to show that he had committed the robbery and attempted robbery in such a way that it reasonably appeared to the victims that he was using a firearm. Instead, the defendant contends that there was substantial evidence introduced at trial tending to show that the implement he employed was not a firearm and, therefore, that the lives of the victims were not endangered or threatened. The defendant argues that, accordingly, "the mandatory presumption disappears, leaving only a mere permissive inference." This being the case, the defendant contends that the jury should have been instructed that, as to each crime charged, the evidence before it would permit but not require it to infer that the victim's life had been endangered or threatened. Judge Wynn agreed and based his dissent in the Court of Appeals solely on this point.

The dispositive issue before us then is whether any substantial evidence was introduced at trial tending to show affirmatively that the instrument used by the defendant was not a firearm or deadly weapon and, as a result, that the lives of the victims were not endangered or threatened. The defendant focuses on two statements in his testimony to support his argument that there was substantial evidence tending to show that he did not possess a firearm at the time of the robbery and the attempted robbery in question. In presenting his alibi testimony, the defendant testified at one point that he did not "mess with guns" and at another point that he did not "own a gun." We conclude that evidence that a defendant does not own a gun does not amount to substantial evidence "contrary to" State's evidence to the effect that he employed a gun during a robbery. We further conclude that evidence tending to show that a defendant does not "mess with guns" is ambiguous at best and also does not amount to evidence contrary to State's evidence tending to show that the defendant used a firearm at the time he committed a robbery. Evidence in the present case would have supported a presumption by the jury that the defendant employed a firearm during both the robbery and the attempted robbery. Evidence that the defendant did not own a gun or generally did not "mess with guns" simply did not amount to substantial evidence to the contrary tending to show that he did not employ a firearm on the two specific occasions in question. Therefore, the trial court did not err by instructing only with regard to the mandatory presumption that the victims' lives were endangered or threatened and declining to instruct, instead, on a mere permissive inference. *See generally Joyner*, 312 N.C. at 782-83, 324 S.E.2d at 844.

In his brief before this Court, the defendant also addressed a constitutional issue. During oral arguments, however, the defendant conceded that the constitutional issue in question did not form a basis of the dissent in the Court of Appeals which gave rise to his right of appeal to this Court. Therefore, the constitutional question is not properly before us for consideration, and we neither reach nor decide that question. *State v. Riley*, 313 N.C. 499, 329 S.E.2d 381 (1985) (per curiam).

For the foregoing reasons, the decision of the Court of Appeals concluding that there was no error in the defendant's trial is affirmed.

Affirmed.

Justice FRYE dissenting.

Three questions were contested at trial: 1) who committed the robbery at The Scotchman, 2) who committed the attempted robbery at the Petro Mart, and 3) whether the offenses were committed with a firearm or other dangerous weapon so as to constitute armed robbery as opposed to common law robbery. The State's evidence tended to show that defendant was the person who committed both offenses and that both were committed with a firearm or other dangerous weapon. Defendant's evidence tended to show that he was not the person who committed the offenses and that he neither owned nor "messed with" firearms.

The trial judge correctly instructed the jury that the burden of proof was upon the State to satisfy the jury as to defendant's guilt beyond a reasonable doubt of the offenses charged. On the first two questions, the jury rejected defendant's alibi defense and concluded that defendant was in fact the person who committed the offenses. The trial judge, however, decided the third question as a matter of law, instructing the jury as to the mandatory presumption arising where a defendant uses an implement that appears to be a firearm or other dangerous weapon and there is no evidence to the contrary, rather than leaving the question of whether the offenses were committed with a firearm or other dangerous weapon to the jury. *See State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), and *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985).

As Chief Justice Exum wrote for a unanimous court in *Allen*:

> Neither *Thompson, Alston* nor *Joyner* stands for the proposition that the state in armed robbery cases is relieved from the burden of proving beyond a reasonable doubt that the instrument used is in fact a firearm or dangerous weapon which in fact does endanger or threaten the life of the victim. All of these cases deal with whether the evidence was sufficient to permit the jury to make these essential findings. *Joyner*, however, does permit the state to rely on a mandatory presumption that an instrument which appears to the victim to be a firearm or other dangerous weapon capable of threatening or endangering the victim's life is in law such a weapon *when and only when there is no evidence in the case to the contrary.*

Allen, 317 N.C. at 125, 343 S.E.2d at 897 (emphasis added).

There was some evidence to the contrary in the instant case, and the jury should have been permitted to consider it in determining whether the offenses committed were armed robbery and attempted armed robbery as opposed to common law robbery and attempted common law robbery. Here, as in *Allen*, "the jury should have been instructed that they could, but were not required to, infer from the instrument's appearance to the victim that it was a firearm or other dangerous weapon." *Id.* at 126, 343 S.E.2d at 897. As in *Allen*, the instructions here "effectively gave the state the benefit of a mandatory presumption when it was entitled only to the benefit of a permissive inference." *Id.*

I agree with the State that the evidence in this case was clearly sufficient to permit the jury to find defendant guilty of armed robbery and attempted armed robbery.

> However, in the subject case, the defendant in presenting an alibi defense, took the stand to testify in his own behalf that he did not "mess with guns." Moreover, on cross-examination, when the prosecutor asked the defendant, "Mr. Williams, did you testify you don't have a gun, you don't mess with guns?," the defendant replied, "Correct. I don't own a gun." This evidence, when coupled with the evidence that neither of the victims ever saw a gun, is evidence that the defendant did not have a gun. It was therefore error to give the mandatory presumption instruction in this case.

State v. Williams, 108 N.C. App. 295, 301, 423 S.E.2d 333, 337 (1992) (Wynn, J., dissenting). The evidence that defendant did not own a gun, standing alone, would not suffice, for defendant could have committed the offense with a borrowed or stolen gun. The additional evidence that he did not "mess with guns," however, was evidence from which the jury could reasonably infer that he did not use or have a gun on this occasion. Thus, I agree with Judge Wynn's dissenting opinion. The case was for the jury, not the judge.

For the reasons stated herein, I must respectfully dissent.

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

JAMES J. ANDERSEN, JR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SAUNDRA L. ANDERSEN, DECEASED, AND THE ESTATE OF JOHN LAURITS ANDERSEN, DECEASED v. MARILYN COMBS BACCUS, MURRAY ELTON BACCUS, AND AN UNKNOWN PERSON

No. 111PA93

(Filed 28 January 1994)

1. **Insurance § 1165 (NCI4th)— uninsured motorist coverage— requirement of physical contact**

The Court of Appeals correctly reversed a summary judgment for plaintiff on the uninsured motorist issue in a wrongful death action arising from an automobile collision where defendant had swerved to avoid colliding with a third automobile which did not make contact. The Supreme Court declined to change the existing judicial interpretation of the uninsured motorist statute requiring contact, especially in light of the legislature's recent revision. N.C.G.S. § 20-279.21.

Am Jur 2d, Insurance §§ 2020 et seq.

2. **Negligence § 6 (NCI4th)— automobile accident—spouse arriving after accident—negligent infliction of emotional distress—foreseeability**

Defendants were entitled to judgment as a matter of law on plaintiff's claim for negligent infliction of emotional distress, and the Court of Appeals erred in reversing the trial court's entry of summary judgment for defendants, in an action arising from an automobile collision involving defendant Marilyn Baccus and plaintiff's pregnant wife where plaintiff did not witness the accident but was brought to the scene before his wife was freed from the wreckage. The possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of defendant Marilyn Baccus's alleged negligent act is entirely too speculative to be reasonably foreseeable.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 1-12, 45, 51, 52, 55.

Relationship between victim and plaintiff-witness as affecting right to recover damages in negligence for shock or

mental anguish at witnessing victim's injury or death. 94 ALR3d 486.

Right to recover damages in negligence for fear of injury to another, or shock or mental anguish at witnessing such injury. 29 ALR3d 1337.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 109 N.C. App. 16, 426 S.E.2d 105 (1993), reversing summary judgment granted in favor of plaintiff on defendant State Farm Mutual Automobile Insurance Company's counterclaim for declaratory judgment and reversing summary judgment granted in favor of all defendants on plaintiff's claim for negligent infliction of emotional distress by orders entered 4 November and 8 November 1991 by Greeson, J., in Superior Court, Pasquotank County. Heard in the Supreme Court 11 October 1993.

D. Keith Teague, P.A., by D. Keith Teague, for plaintiff-appellant Andersen.

Baker, Jenkins, Jones & Daly, P.A., by Robert C. Jenkins and Roger A. Askew, for defendant-appellants Marilyn Combs Baccus and Murray Elton Baccus.

Hornthal, Riley, Ellis & Maland, by L.P. Hornthal, Jr., and John D. Leidy, for defendant-appellant State Farm Mutual Automobile Insurance Company.

PARKER, Justice.

This case arose out of a collision on 5 February 1988 between an automobile driven by defendant Marilyn Combs Baccus and an automobile driven by Saundra L. Andersen, wife of plaintiff James J. Andersen, Jr. The collision occurred when defendant Marilyn Baccus swerved to avoid colliding with a third automobile, a Ford station wagon driven by an unknown person. The third automobile did not stop at the scene and the driver has never been identified. Plaintiff did not witness the accident but was brought to the scene of the accident before his wife was freed from the wreckage. After being freed, Mrs. Andersen was taken to a local hospital and the next day gave birth to a stillborn son, John Laurits Andersen. On 26 March 1988 Mrs. Andersen died from injuries allegedly received in the accident.

Plaintiff's complaint alleged claims for wrongful death of his wife and son, punitive damages based thereon, negligent infliction of emotional distress, and punitive damages based thereon. The alleged liability of defendant State Farm Mutual Automobile Insurance Company ("State Farm") was based on its status as insurer of the automobile driven by plaintiff's intestate under a policy providing uninsured motorist coverage. Defendant State Farm asserted a counterclaim for declaratory judgment on the basis that there was no contact between any person or vehicle and the Ford automobile and "[i]n particular, there was no contact between said Ford station wagon or any person or vehicle insured under said policy."

Prior to trial defendant State Farm moved for summary judgment on its counterclaim. State Farm and defendants Baccus moved for summary judgment on plaintiff's claims for wrongful death and negligent infliction of emotional distress. After a hearing, the trial court (i) denied State Farm's motion for summary judgment on its counterclaim but granted summary judgment for plaintiff on the issue of uninsured motorist coverage; (ii) entered summary judgment for defendants on plaintiff's claim for negligent infliction of emotional distress; (iii) denied defendants' motions for summary judgment on the wrongful death claims; and (iv) granted defendants partial summary judgment as to plaintiff's claim for punitive damages related to the wrongful death claims.

On appeal to the Court of Appeals plaintiff did not pursue the punitive damages claims. As to the claims appealed, the Court of Appeals reversed the trial court's judgments. This Court granted all parties' petitions for discretionary review, *Andersen v. Baccus*, 333 N.C. 574, 429 S.E.2d 568-69 (1993); and for the reasons which follow, we affirm in part and reverse in part.

[1] In reversing summary judgment for plaintiff on the uninsured motorist issue, the Court of Appeals first concluded that the policy issued by defendant State Farm "clearly require[d] that the unidentified vehicle make contact with the insured or the insured's auto." *Andersen v. Baccus*, 109 N.C. App. at 19, 426 S.E.2d at 107. The court also considered whether the policy was in conflict with the uninsured motorist statute, N.C.G.S. § 20-279.21 (1993), and concluded that statute does not "provide for uninsured motorist coverage where a phantom vehicle allegedly cause[s] a collision between two other automobiles but make[s] no physical contact with either."

Andersen v. Baccus, 109 N.C. App. at 19, 426 S.E.2d at 107. The Court of Appeals also relied on its cases interpreting the statute as requiring a collision, direct or indirect, between a hit-and-run driver's car and that of the insured. *Petteway v. South Carolina Insurance Co.*, 93 N.C. App. 776, 379 S.E.2d 80 (affirming summary judgment for defendant insurance company based on lack of contact), *disc. rev. denied*, 325 N.C. 273, 384 S.E.2d 518 (1989); *McNeil v. Hartford Accident and Indemnity Co.*, 84 N.C. App. 438, 352 S.E.2d 915 (1987) (reversing summary judgment for defendant insurance company based on indirect contact); *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 167 S.E.2d 876 (1969) (affirming involuntary nonsuit for defendant insurance company based on lack of contact). The court also stated:

> Our interpretation of [section 20-279.21] is further supported by the fact that the legislature has undertaken to amend the uninsured motorist statute subsequent to this Court's first interpreting it as requiring physical contact between the insured and the hit-and-run driver. To date, it has not chosen to amend the statute to indicate that [such] physical contact is not required. When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law; and where it chooses not to amend a statutory provision that has been interpreted in a specific, consistent way by our courts, we may assume that it is satisfied with that interpretation. Thus, in consideration of the time-tested prior rulings of this Court, we are constrained to conclude that any shift away from the "physical contact" requirement must derive not from this Court, but from legislative action, or action by our Supreme Court[,] which is the final arbiter for interpreting the statutes of this state.

Andersen v. Baccus, 109 N.C. App. at 22, 426 S.E.2d at 108-109 (citations omitted).

We approve the careful reasoning of the Court of Appeals. Adhering to the principle of stare decisis, we decline to change existing judicial interpretation of the uninsured motorist statute, especially in light of the legislature's recent revision. *See* N.C.G.S. § 20-279.21 (1993).

Summary judgment is to be granted

> "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Applying these principles, we note that the forecast of evidence before the trial court showed there was no collision or contact between the automobile driven by the unknown motorist and any other automobile, including that driven by plaintiff's intestate. Therefore, defendant State Farm was entitled to judgment as a matter of law; and we conclude the Court of Appeals did not err in reversing summary judgment for plaintiff on this issue.

[2] We next consider the Court of Appeals' reversal of summary judgment for all defendants on plaintiff's claim for negligent infliction of emotional distress. Before this Court defendants contend that they were entitled to summary judgment on plaintiff's claim for negligent infliction of emotional distress and that the Court of Appeals erred in concluding it was reasonably foreseeable that plaintiff Andersen would suffer such distress. We agree. The Court of Appeals, relying on two of its recent decisions, based its analysis on the foreseeability element of a claim for negligent infliction of emotional distress. The cases relied on, however, have recently been reversed by this Court. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 108 N.C. App. 668, 424 S.E.2d 676, *rev'd*, 334 N.C. 669, 435 S.E.2d 320 (1993); *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992), *rev'd*, 334 N.C. 662, 435 S.E.2d 324 (1993). Accordingly, in the case under review, we reverse the decision of the Court of Appeals on the issue of foreseeability.

In *Sorrells* this Court reiterated that to state a claim for negligent infliction of emotional distress, a plaintiff need only allege that (i) defendant negligently engaged in conduct; (ii) it was reasonably foreseeable the conduct would cause plaintiff severe emotional distress; and (iii) the conduct in fact caused plaintiff to suffer such distress. 334 N.C. at 672, 435 S.E.2d at 321-22. Where a plaintiff seeks to recover for severe emotional distress arising from injury to another, the plaintiff must prove he suffered such distress " 'as a proximate and *foreseeable* result of the defendant's negligence.' " *Id.* at 672, 435 S.E.2d at 322 (quoting *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)). Some factors to be considered in making the foreseeability determination include (i) plaintiff's proximity to defendant's negligent act, (ii) the relationship between plaintiff and the injured person, and (iii) whether plaintiff personally observed the negligent act. These three factors "*are not* mechanistic *requirements*" whose absence will inevitably defeat plaintiff's claim. *Id. Sorrells* expressly disavowed mechanical application of any arbitrary factors, stating that the issue of reasonable foreseeability must be determined under all the facts and "resolved on a case-by-case basis." *Id.* at 673, 435 S.E.2d at 322. *Sorrells* shows that this Court will also look to other cases in which it has considered foreseeability of a plaintiff's emotional distress arising from concern for another. Holding that plaintiffs' alleged distress arising from their concern for their son was a possibility too remote to be reasonably foreseeable, the Court said:

> 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 [who might] 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 emo-

> tional 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.

Id. at 674, 435 S.E.2d at 323.

In *Gardner*, the question presented was whether a mother, not present at the scene of a car accident in which her child received injuries resulting in his death shortly thereafter, could recover for negligent infliction of emotional distress. 334 N.C. at 663, 435 S.E.2d at 325-26. The parties stipulated that two of the three elements of the claim had been established, *i.e.*, that decedent, the minor son of plaintiff and defendant, died as a result of defendant father's negligence and that plaintiff suffered severe emotional distress. *Id.* at 666, 435 S.E.2d at 327. Discussing the third element, foreseeability, this Court noted that plaintiff was not in close proximity to, nor did she observe, defendant's negligent act. This fact, while not determinative, militated against defendant's ability to foresee that plaintiff would suffer severe emotional distress. *Id.* at 667, 435 S.E.2d at 328. In view of this fact and plaintiff's "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," the Court held "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." *Id.* at 667-68, 435 S.E.2d at 328.

Viewing the present case in light of *Gardner* and *Sorrells*, we conclude that under all the facts and circumstances defendant Marilyn Baccus could not reasonably have foreseen that her negligent act, if any, would cause plaintiff to suffer severe emotional distress. While in this case plaintiff observed his wife before she was freed from the wreckage, as in *Gardner*, plaintiff was not in close proximity to and did not observe defendant Marilyn Baccus' negligent

act, if any. As in *Sorrells*, nothing suggests that Marilyn Baccus knew of plaintiff's existence. The forecast of evidence is undisputed that at the moment of impact Marilyn Baccus did not know who was in the car which her vehicle struck and had never met Saundra Andersen. Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of defendant Marilyn Baccus' alleged negligent act is entirely too speculative to be reasonably foreseeable. Since on the undisputed forecast of evidence, plaintiff could not establish the element of foreseeability, defendants were entitled to judgment as a matter of law on plaintiff's claim for negligent infliction of emotional distress. Accordingly, the Court of Appeals erred in reversing the trial court's entry of summary judgment for defendants on plaintiff's claim.

AFFIRMED IN PART, REVERSED IN PART.

GEORGE L. PROCTOR, ADMINISTRATOR OF THE ESTATE OF JOYCE BATTS PROCTOR v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND BOBBY F. JONES, ADMINISTRATOR C.T.A. OF THE ESTATE OF WILLIAM GRAY EDWARDS, JR.

No. 317A92

(Filed 28 January 1994)

1. Appeal and Error § 551 (NCI4th)— evenly divided court— decision affirmed without precedential value

Where one member of the Supreme Court recused herself and the remaining members of the Court were evenly divided, the portion of a Court of Appeals decision concerning inter-policy stacking was left undisturbed and without precedential value.

Am Jur 2d, Appeal and Error §§ 985 et seq.

2. Insurance § 532 (NCI4th)— underinsured motorist coverage—intrapolicy stacking—before 1985 amendment

A decision of the Court of Appeals allowing intrapolicy stacking was reversed where plaintiff was attempting to stack coverages for his three vehicles under the 1983 version of N.C.G.S. § 20-279.21(b)(4), which was silent on the issue of stacking. Consistent with the rationale of *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, the Supreme Court held that the 1983 version of N.C.G.S. § 20-279.21(b)(4) did not require that the UIM coverages in the same policy be aggregated or stacked. Additionally, no language was found in the policy entitling plaintiff to aggregate or stack the UIM coverages in the same policy.

Am Jur 2d, Automobile Insurance § 322.

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

Appeal by defendant North Carolina Farm Bureau Mutual Insurance Company 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. 26, 418 S.E.2d 680 (1992), affirming a judgment entered 17 May 1991 by Strickland, J., in Superior Court, Edgecombe County. Heard in the Supreme Court 14 September 1993.

Bridgers, Horton, Rountree & Boyette, by Charles S. Rountree, for plaintiff-appellee.

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

FRYE, Justice.

In this appeal based solely on the dissenting opinion in the Court of Appeals, North Carolina Farm Bureau Mutual Insurance Company [hereinafter Farm Bureau] contends that the Court of Appeals erred (1) in determining that plaintiff is entitled to stack the underinsured motorist [hereinafter UIM] coverage in the policy issued to the named plaintiff (the Proctor policy) with the UIM coverage in the policy issued to Country Manor Antiques (interpolicy stacking); and, (2) in determining that plaintiff is entitled

to stack the UIM coverages on the three vehicles insured in the Proctor policy (intrapolicy stacking).[1]

[1] Justice Parker recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided with three members voting to affirm the decision of the Court of Appeals as to interpolicy stacking and three members voting to reverse. Accordingly, that portion of the decision of the Court of Appeals which affirmed the trial court as to interpolicy stacking is left undisturbed and stands without precedential value. *See Nesbit v. Howard*, 333 N.C. 782, 429 S.E.2d 730 (1993).

[2] For the reasons stated hereinafter, we conclude that the Court of Appeals erred as to the issue of intrapolicy stacking. Accordingly, we must reverse that portion of the Court of Appeals' decision.

The circumstances giving rise to this case are as follows: Plaintiff's wife, Joyce Batts Proctor, was killed in a traffic accident on 27 September 1984 while driving a van owned by Country Manor Antiques [hereinafter Country Manor], a partnership in which she was a partner. Mrs. Proctor's death was caused by the negligence of William Gray Edwards, Jr., who was driving the other vehicle involved in the accident. Edwards also died as a result of the accident. His vehicle was covered by a liability insurance policy issued by State Farm Mutual Insurance Company [hereinafter State Farm] which provided maximum liability coverage limits of $25,000 per person and $50,000 per accident. State Farm paid one-third of its $50,000 per accident limit to plaintiff and the remaining amount was paid to other injured parties. In addition, the Edwards estate paid plaintiff one-third of its $10,000 of available assets.

Plaintiff's wife was covered by two automobile insurance policies, both of which were issued by defendant Farm Bureau. One was a business policy issued to Country Manor which provided liability insurance at limits for wrongful death of $100,000 per person and $300,000 per accident, as well as uninsured motorist coverage [hereinafter UM]. The other policy was a personal policy issued to George L. Proctor. The Proctor policy listed Joyce Proctor as

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1. The decision in this case involves automobile insurance policies issued prior to the 1985 amendment to N.C.G.S. § 20-279.21(b)(4) which was interpreted by this Court to require interpolicy stacking and intrapolicy stacking of UIM coverages. *See Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

an insured driver and provided coverage for three vehicles belonging to the Proctors. For each of plaintiff's three vehicles, the Proctor policy provided liability insurance at limits of $100,000 per person and $300,000 per accident as well as UM coverage. Both the Country Manor policy and the Proctor policy recited that UIM coverage would not be provided unless the insured specifically requested it. However, this provision of both policies was contrary to N.C.G.S. § 20-279.21(b)(4) which required that UIM coverage be provided unless it was specifically rejected. Neither plaintiff, plaintiff's decedent, nor Country Manor rejected UIM coverage; therefore, Farm Bureau conceded that UIM coverage was provided in both policies pursuant to subdivision (b)(4).

The parties disagreed as to the appropriate amount of UIM coverage; consequently, plaintiff filed an action on 18 September 1986 asserting a claim against Farm Bureau pursuant to both the Country Manor and Proctor policies. The parties treated the claim as a declaratory judgment action to determine the amount of UIM coverage and filed cross-motions for summary judgment. The motions at that point dealt solely with the Country Manor policy and made no mention of the Proctor policy. The issue before the court was whether the UIM coverage limit was the minimum UIM coverage offered by the insurer ($50,000) or the $100,000 per person limit for liability insurance contained in the Country Manor policy. The trial court granted summary judgment for plaintiff holding that the UIM coverage was equal to the $100,000 per person limit for liability insurance contained in the policy. Farm Bureau appealed to the Court of Appeals which affirmed the trial court by a divided panel. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 90 N.C. App. 746, 370 S.E.2d 258 (1988). This Court affirmed, with Justice Meyer dissenting. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.* [hereinafter *Proctor I*], 324 N.C. 221, 376 S.E.2d 761 (1989).

After our decision in *Proctor I* was certified to the trial court, plaintiff filed a motion for partial summary judgment in which he contended he was permitted to stack the UIM coverages for the three vehicles listed in the Proctor policy for a total of $300,000 UIM coverage under that policy. Farm Bureau filed a cross-motion for partial summary judgment, contending that plaintiff could not engage in either interpolicy stacking or intrapolicy stacking of UIM coverages. For purposes of the motion hearing only, the parties stipulated that the damages to the estate of Mrs. Proctor exceeded $400,000. The trial court granted plaintiff's motion and denied Farm

Bureau's motion, holding that plaintiff was entitled to stack the coverage from the Proctor policy in both an interpolicy and intrapolicy manner, thus providing an additional $300,000 in total UIM coverage. The Court of Appeals affirmed by a divided panel. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 107 N.C. App. 26, 418 S.E.2d 680 (1992). On the issue of intrapolicy stacking, we now reverse.

Both parties acknowledge that the 1983 version of N.C.G.S. § 20-279.21(b)(4) of the Motor Vehicle Safety and Financial Responsibility Act of 1953 is applicable to this issue. Subdivision (b)(4) as written at the time of the accident was silent on the issue of intrapolicy stacking of UIM coverages.

When deciding this issue, the Court of Appeals did not have the benefit of this Court's decision in *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992), which makes it clear that *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), is not controlling on the issue of stacking of coverages where the applicable statutory language is silent on the issue. In *Lanning*, which dealt with UM rather than UIM coverage, this Court was faced with the question of whether N.C.G.S. § 20-279.21(b)(3) (1985), which was silent on the issue of stacking, required that the UM coverage limits on each of three vehicles insured in a single policy be aggregated or stacked. *Lanning*, 332 N.C. 309, 420 S.E.2d 180. The Court held that it did not. The Court then examined the nature and language of the policy and concluded that intrapolicy stacking of UM coverages was not required.

We conclude that the rationale of *Lanning* requires the same result in the instant case involving statutorily mandated UIM insurance under the 1983 version of N.C.G.S. § 20-279.21(b)(4). We have carefully examined the 1983 version of subdivision (b)(4) and we do not find any language mandating intrapolicy stacking of UIM coverages. In fact, the 1983 version of subdivision (b)(4), like the 1985 version of subdivision (b)(3) examined in *Lanning*, is silent on the issue of stacking. Subdivision (b)(4) provides that "[t]he provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision." However, subdivision (3) of subsection (b) of the 1983 version of N.C.G.S. § 20-279.21, like the 1985 version of subdivision (b)(3) at issue in *Lanning*, is also silent on the issue of stacking. Consistent with the rationale of *Lanning*,

we now hold that the 1983 version of subdivision (b)(4) did not require that the UIM coverages in the same policy be aggregated or stacked.

Additionally, as in *Lanning*, we have examined the nature and language of the Proctor policy and we find no language which entitles plaintiff to aggregate or stack the UIM coverages in the same policy. "Part C—Uninsured/Underinsured Motorists Coverage" of the Proctor policy amends "Part C—Uninsured Motorists Coverage" by adding a provision which includes an underinsured vehicle under the definition of "Uninsured Motor Vehicle." Thus, absent other controlling language in the UM/UIM section of the Proctor policy, the "Limit of Liability" provision in "Part C—Uninsured Motorists Coverage" of the policy is applicable and, in the instant case, controlling. That provision is as follows: "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 accident." While the amount shown in the Declarations for UM coverage for each person for bodily injury in the Proctor policy is $25,000, the amount shown in the Declarations for purposes of UIM coverage is effectively amended to $100,000 by virtue of our decision in *Proctor I*. 324 N.C. 221, 226, 376 S.E.2d 761, 764. Thus, $100,000 is the maximum limit of liability of UIM coverage under the Proctor policy for all damages for bodily injury sustained by Mrs. Proctor in the accident in question.

For the reasons stated herein, we conclude that neither the 1983 version of subdivision (b)(4) of N.C.G.S. § 20-279.21 nor the language in the Proctor policy entitles plaintiff to aggregate or stack the UIM coverages on the three vehicles insured in the Proctor policy. Therefore, plaintiff's total UIM coverage under the Proctor policy is limited to $100,000. Accordingly, the decision of the Court of Appeals as to intrapolicy stacking is reversed.

The decision of the Court of Appeals as to interpolicy stacking is affirmed without precedential value by an equally divided Court.

AFFIRMED IN PART; REVERSED IN PART.

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

STATE OF NORTH CAROLINA v. ROLAND DOUGLAS SMITH

No. 247A92

(Filed 28 January 1994)

1. Criminal Law § 454 (NCI4th)— murder—closing argument—severity of sentence—argument not allowed—error

The trial court erred in a murder prosecution by not allowing defendant's attorney to argue to the jury the severity of the sentence where the argument did not question the appropriateness of the punishment or suggest that the defendant should be acquitted because of the severity of the punishment, but did encourage the jury to give careful consideration to the case. Although the State argued that any error was harmless because of the overwhelming evidence of guilt, the Supreme Court could not hold that this error, combined with not allowing defendant's attorney to argue the defendant was not guilty, was harmless.

Am Jur 2d, Trial § 229.

2. Criminal Law § 444 (NCI4th)— murder—closing argument by defendant—objections erroneously sustained

The trial court erred in a murder prosecution by sustaining the State's objections to portions of defense counsel's argument in which the State contended that the attorney was personally vouching for the credibility of a witness and misstating the law. The State did not say why the defense attorney was vouching for the witness or how he was misstating the law and the Supreme Court could not see how he did so. Although the State argued that any error was harmless because of the overwhelming evidence of guilt, the Supreme Court could not hold that this error, combined with not allowing the defense attorney to argue the severity of the sentence, was harmless.

Am Jur 2d, Trial §§ 225 et seq.

Propriety and prejudicial effect of comments by counsel vouching for credibility of witnesses—state cases. 45 ALR4th 602.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Fulton, J., at the 1 June 1992 Criminal Session of Superior Court, Burke County. The defendant's motion to bypass the Court of Appeals as to an additional conviction as a habitual felon was allowed 28 September 1993. Heard in the Supreme Court 13 October 1993.

The defendant has previously been convicted of first degree murder in this case and has received the death penalty. He was granted a new trial. *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). The defendant was retried and found guilty of first degree murder, felonious breaking or entering, and being an habitual felon. The jury recommended the death penalty. The court arrested judgment on the charge of breaking or entering, sentenced the defendant to death on the murder charge, and sentenced him to life in prison for being an habitual felon. The defendant appealed.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

The defendant first assigns error to the court's refusal to let his attorney make certain arguments to the jury. We believe this assignment of error has merit. The following occurred during the closing argument by the defendant's attorney:

> What does it mean to sit in this man's chair right here and be innocent? You didn't do it. Take the next step. What does it mean to spend the rest of your life in a cage?
>
> MR. DELLINGER: Objection.
>
> THE COURT: Sustained. Ladies and gentlemen, I would instruct you at this point that, in the event the defendant is convicted of murder in the first degree, the Court will conduct a separate sentencing proceeding to determine punishment. And it will be conducted as soon as possible following any return of a verdict.
>
> If that time comes you will receive separate sentencing instructions. However, at this time, your only concern is to

determine whether defendant is guilty of the crime charged, or not guilty. You may proceed.

MR. LYLES: What does it mean to be punished for something you didn't do? What does it mean to go to jail for life for something you didn't do? What does it mean to go to the gas chamber—

MR. DELLINGER: Objection.

MR. LYLES: —for something you didn't do.

THE COURT: Sustained. Mr. Lyles, you will not pursue that line of argument.

. . . .

How do you choose between two—two competing theories or explanations of the evidence? You don't. Proof beyond a reasonable doubt means the State must exclude every reasonable explanation of the evidence except that Mr. Smith is guilty. Before you're allowed to go back to the jury room and decide whether he goes to jail for life or whether he goes to the gas chamber, before you go back to decide that, you have to decide that there's only one reasonable explanation for the evidence.

MR. DELLINGER: Objection.

THE COURT: Sustained. Mr. Lyles, you will not argue punishment in this part of the proceeding.

Ladies and gentlemen, you will not consider any arguments regarding punishment. You will only reach that stage if you return a verdict of guilty of first degree murder.

MR. LYLES: In order to be convinced beyond a reasonable doubt, you must—you must exclude every reasonable explanation except that he is guilty.

Now, ladies and gentlemen, I contend that you cannot—you cannot say beyond a reasonable doubt that when Sheila Young says that Gary Rudisill told her he killed R. C. Johnson, you cannot say beyond a reasonable doubt—you cannot exclude the possibility that that is the truth.

MR. DELLINGER: Objection.

THE COURT: Sustained. Members of the jury, I will instruct you on the law.

. . . .

It is a reasonable conclusion from this evidence, ladies and gentlemen, as long as you live you cannot ignore the facts and you cannot exclude the possibility that Roland Smith is wholly and 100% innocent—

MR. DELLINGER: Objection.

. . . .

THE COURT: Sustained. Ladies and gentlemen, I will instruct you on the law in this case.

It is apparent from the above that at certain places in the closing argument of the defendant's counsel, the court refused to let him argue to the jury the severity of the sentence for a conviction of first degree murder and to argue that the defendant was not guilty. A defendant's attorney in a jury trial may argue "the whole case as well of law as of fact[.]" N.C.G.S. § 84-14 (1985). He may also "on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (1988). N.C.G.S. § 15-176.5 provides that in a capital case "either party in its argument to the jury may indicate the consequences of a verdict of guilty[.]"

[1] It was error not to allow the defendant's attorney to argue these two parts of the case. The State contends it was not error to deny the defendant's attorney the right to argue the punishment that would result from a conviction, because the jury had been informed of the punishment by the court during jury selection and by the defendant's attorney in other parts of his argument. The State says the argument "was clearly an attempt by the defense to suggest to the jury that they should return a verdict of not guilty because the potential punishment was so severe." In *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976), we said that a defendant's attorney should not be permitted to argue that a defendant should be acquitted because of the severity of the punishment or to question the appropriateness of the punishment. We said it is proper for a defendant's attorney to advise the jury of the possible consequences following conviction "to encourage the jury to give the matter its close attention and to decide it

only after due and careful consideration." *Id.* at 288, 225 S.E.2d at 554. We believe the argument of the defendant's counsel is in the latter category. It does not question the appropriateness of the punishment or suggest that the defendant should be acquitted because of the severity of the punishment. It does encourage the jury to give careful consideration to the case because of the severity of the punishment. It was error not to let the defendant's attorney make the argument. *See State v. Walters*, 294 N.C. 311, 240 S.E.2d 628 (1978).

[2] The State argues that the objection to the argument that a witness should be believed was sustained because the attorney was personally vouching for the credibility of the witness contrary to N.C.G.S. § 15A-1230(a). *See also State v. Riddle*, 311 N.C. 734, 319 S.E.2d 250 (1984). The State does not say why the defendant's attorney was vouching for the witness and we cannot see how he did so. The State also contends that the court did not err in sustaining the objections to this portion of the argument because the defendant's counsel misstated the law. Again, the State does not say how the attorney misstated the law and we do not see how he did so.

The State argues that if there was error in preventing the defendant's attorney from arguing these matters, the error was harmless because of the overwhelming evidence of the defendant's guilt. *State v. Walters*, 294 N.C. 311, 240 S.E.2d 628. We cannot hold that not allowing the defendant's attorney to argue that the defendant was not guilty in combination with the refusal to allow him to argue the severity of the punishment was harmless.

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

NEW TRIAL.

LAURA G. BALDWIN v. GTE SOUTH, INCORPORATED

No. 220A93

(Filed 28 January 1994)

Negligence § 5 (NCI4th); Highways, Streets, and Roads § 2 (NCI4th) — telephone booth placed in highway right-of-way — negligence per se

The trial court correctly denied defendant's motion for a directed verdict, and the Court of Appeals erred by reversing that denial, where plaintiff was injured when she was struck by one of the vehicles in an automobile accident as she was using a telephone booth which was inside the public right-of-way in violation of DOT regulations. When the violation of an administrative regulation enacted for safety purposes is criminal, as here, that violation is negligence *per se*, unless otherwise provided, and a member of the class intended to be protected who suffers harm proximately caused by the violation has a claim against the violator. Plaintiff was a member of the class the regulation was intended to protect because the regulation controls the placement of telephone booths within rights-of-way which often encompass more than the area occupied by the road used by motorists; logic dictates that the purpose of the regulation was to protect the safety of the motorist who might leave the road and strike the booth while simultaneously protecting the pedestrian who might be using the booth. N.C.G.S. § 136-18(2).

Am Jur 2d, Negligence §§ 716 et seq.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 54, 428 S.E.2d 857 (1993), reversing a judgment for plaintiff entered on 10 December 1991 by Brewer, J., in Superior Court, Durham County. Heard in the Supreme Court 6 December 1993.

Wallace, Creech, Sarda & Zaytoun, by Robert E. Zaytoun and Patricia L. Wilson, for plaintiff-appellant.

Faison & Fletcher, by O. William Faison and Gary R. Poole, for defendant-appellee.

WHICHARD, Justice.

On 19 November 1988, at the intersection of Hillsborough Road and Sparger Road in Durham County, Linda Taylor apparently ran a stop sign while driving south on Sparger Road. She collided with a dump truck owned by Earl J. Latta, Inc., which Essell Day was driving west on Hillsborough Road. Day crossed the center line and struck the plaintiff, Laura Baldwin, as she was using a telephone booth located approximately one hundred and seventy-seven feet from the collision site. The booth, which was owned by GTE South (defendant), was approximately twenty-five feet from the edge of Hillsborough Road and was inside the public right-of-way. The right-of-way extended fifty feet from the center line on each side of Hillsborough Road. A North Carolina Department of Transportation (DOT) regulation prohibited the placement of telephone booths within public rights-of-way.

Plaintiff sued Taylor, Day, Latta, GTE Corporation and GTE South. After receiving settlements totaling $450,000.00, plaintiff voluntarily dismissed with prejudice her claims against Taylor, Day and Latta. She also voluntarily dismissed without prejudice her claim against GTE Corporation. Plaintiff and defendant proceeded to trial.

The trial court ruled *in limine* that the regulation prohibiting the placement of telephone booths within rights-of-way was a safety regulation and that plaintiff was within the protected class of persons. At the close of plaintiff's evidence and at the close of all the evidence, defendant moved for a directed verdict. The trial court denied these motions. The court instructed the jury that violation of the safety regulation in question was negligence *per se*, but that plaintiff still had the burden of proving that such negligence was a proximate cause of her injuries. The jury awarded plaintiff $482,670.00, from which the amount of plaintiff's previous settlements was subtracted.

On appeal, the Court of Appeals determined that the regulation prohibiting the placement of telephone booths within rights-of-way had safety implications but that plaintiff, as a pedestrian, was not within the class of protected persons. It therefore reversed the trial court's denial of defendant's motion for a directed verdict. Judge Orr dissented. Plaintiff appealed to this Court as a matter of right based on the dissent. N.C.G.S. § 7A-30(2) (1989). We now hold that plaintiff, as a pedestrian, is within the class protected

by the regulation, and we accordingly reverse the decision of the Court of Appeals.

Pursuant to the enabling authority of N.C.G.S. § 136-18(2), DOT has power "to locate and acquire rights-of-way for any new roads that may be necessary for a State highway system." N.C.G.S. § 136-18(2) (1993). In addition, it has power

> [t]o make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph, electric and other lines, above or below ground, signboards, fences, . . . pipelines, and other similar obstructions that may, in the opinion of [DOT], contribute to the hazard upon any of the said highways or in any way interfere with the same, and to make reasonable rules and regulations for the proper control thereof.

N.C.G.S. § 136-18(10) (1993). The statute further provides that "[a]ny violation of such rules and regulations . . . shall constitute a misdemeanor." *Id.*

Pursuant to N.C.G.S. § 136-18(10), DOT enacted a regulation controlling the placement of telephone booths within rights-of-way: "Telephone pay-station booths or other commercial telephone installations are not permitted on highway rights-of-way, except in rest areas or truck weigh stations." N.C. Dep't of Transp., Division of Highways, *Policies and Procedures for Accommodating Utilities on Highway Rights of Way* 69 (1976). Defendant, which was legally obligated to follow the regulation, violated this prohibition when it installed the Hillsborough Road telephone booth within the public right-of-way.

When the violation of an administrative regulation enacted for safety purposes is criminal, as here, that violation is negligence *per se* in a civil trial unless otherwise provided. *Swaney v. Steel Co.*, 259 N.C. 531, 542, 131 S.E.2d 601, 609 (1963). A safety statute or a safety regulation having the force and effect of a statute creates a specific duty for the protection of others. *Ratliff v. Power Co.*, 268 N.C. 605, 610, 151 S.E.2d 641, 645 (1966) (statute); *Drum v. Bisaner*, 252 N.C. 305, 309-10, 113 S.E.2d 560, 564 (1960) (regulation). A member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator. *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992); *see Drum*, 252 N.C. at 309-10, 113 S.E.2d

at 563-64 (applying negligence *per se* analysis used for statutes to regulation having the force and effect of a statute).

To determine whether plaintiff is a member of the class protected by the regulation, we must examine its purpose, which it does not expressly state. If the implied purpose is to protect both motorists and pedestrians, plaintiff is within the class intended to be protected.

We previously have interpreted a statute that was silent as to its purpose in *Byers v. Products Co.*, 268 N.C. 518, 151 S.E.2d 38 (1966), a case analogous to the one before us. There, we construed a statute that gave the State Highway Commission the power to determine the maximum weight allowed on bridges within the state highway system and required the posting of warning signs indicating the maximum weight allowed. 1931 N.C. Public Laws ch. 145, § 16. The statute provided that it was unlawful for any entity to transport any vehicle over a bridge while carrying a load weighing in excess of the allowed amount. In contravention of a weight limit warning sign, an agent of the defendant drove the defendant's truck onto a bridge. A construction worker standing on the bridge died when the bridge collapsed due to the truck's weight. We held that the regulation's protected class included not only the driving public but also the pedestrian who was standing on the bridge. *Byers*, 268 N.C. at 521-22, 151 S.E.2d at 40-41. We explained that the purpose of the statute "was to prevent injury to roads and bridges *and to promote the safety of persons traveling over the highways by prohibiting the use on the public highways of vehicles of excessive weight.*" *Id.* at 521, 151 S.E.2d at 40 (quoting *Tiller v. Commonwealth*, 193 Va. 418, 420-21, 69 S.E.2d 441, 443 (1952)). The defendant's violation of the statute was therefore negligence *per se*.

In *Byers* the statute at issue did not expressly protect pedestrians. We nonetheless concluded that pedestrians were members of the protected class because the weight limit statute promoted the safety of both motorists and pedestrians by attempting to prevent the collapse of a bridge at a time when a member of either class was using it. Similarly, the telephone booth regulation here, which does not state an express purpose, concurrently promotes the safety of both motorists and pedestrians who travel within public rights-of-way. One implied purpose is to protect the safety of motorists by eliminating an obstruction a motorist other-

wise might strike after leaving the road. The DOT's concerns in enacting this regulation, however, necessarily included more than the safety of motorists because the regulation controls the placement of telephone booths within rights-of-way which often encompass more than the area occupied by the road used by motorists. Here, the telephone booth, which naturally attracts pedestrians, was twenty-five feet from the edge of the road, yet within the right-of-way. Logic dictates that the purpose of this regulation was to protect the safety of the motorist who might leave the road and strike the booth while simultaneously protecting the pedestrian who might be using the booth. Therefore, plaintiff, as a pedestrian lawfully and properly using the booth, was a member of the class the regulation was intended to protect.

Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Durham County, for reinstatement of the judgment for plaintiff.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. JACK GORDON GREENE

No. 405A92

(Filed 28 January 1994)

Indigent Persons § 19 (NCI4th)— murder—request for psychological expert—ex parte hearing denied

A defendant convicted of first-degree murder, second-degree kidnapping, larceny of a motor vehicle, breaking or entering, and larceny was entitled to a new trial where the trial judge denied defendant's request for an *ex parte* hearing on his request for a psychological or psychiatric expert to aid in his defense. If a hearing in which an indigent defendant seeks the assistance of a psychiatric expert is held in the presence of the State, the defendant's insanity or other defense

strategy is impermissibly exposed; furthermore, the defendant's inclination to reveal all relevant evidence may be stymied.

Am Jur 2d, Criminal Law §§ 733, 750.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Rousseau, J., at the 5 March 1992 Criminal Session of Superior Court, Guilford County, on a jury verdict finding defendant guilty of first-degree murder. On jury verdicts convicting defendant of second-degree kidnapping, larceny of a motor vehicle, two counts of breaking or entering, and two counts of larceny, defendant received a thirty-year sentence and five ten-year sentences respectively, all to run consecutively. On 9 March 1993 this Court allowed defendant's motion to bypass the Court of Appeals on the charges other than first-degree murder. Heard in the Supreme Court 16 November 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was tried capitally and convicted of the first-degree murder of his brother, Turner Buette Greene, Jr. Defendant, who was indigent, moved pre-trial for an *ex parte* hearing at which to present evidence to support his request for a psychological or psychiatric expert to aid in his defense. The trial court denied the motion. We hold that this ruling violated defendant's rights under the United States Constitution based on our prior holdings in *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, *cert. denied*, --- U.S. ---, 62 U.S.L.W. 3346 (1993), and *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693, *cert. denied*, --- U.S. ---, 62 U.S.L.W. 3349 (1993). The United States Supreme Court denied certiorari in both *Ballard* and *Bates* on 15 November 1993.

On 19 December 1991 defendant moved for an *ex parte* hearing at which he would apply for funds to obtain expert witnesses for his defense. The trial court denied the motion. On 24 February 1992 defendant moved for a psychological evaluation by a psychologist or psychiatrist and requested that the motion be heard *ex parte*.

In support of his motion, defendant cited his past treatment for alcoholism, his hospitalization for emotional behavior, and his increased use of alcohol and drugs during the year of the offense. Defendant also noted his troubled family history, including his father's suicide when defendant was less than two years old and his mother's death from an overdose of medication. Defendant previously had stated that Turner Greene, Jr., the victim here, caused their mother's death. Defendant's trial counsel argued that the *ex parte* hearing was necessary because defendant would divulge important defense tactics in support of his motion. The trial court denied his request for an *ex parte* hearing and his motion for funds for a psychological or psychiatric expert.

We agree with defendant that an *ex parte* hearing on his Motion for Psychological Evaluation was required. We addressed a similar situation in *Ballard*. There the non-capital defendant moved for an *ex parte* hearing at which to present evidence *in camera* to support his request for the appointment of a psychiatric expert. We held that the denial of the defendant's motion was constitutional error that entitled him to a new trial. *Ballard*, 333 N.C. at 516, 428 S.E.2d at 179. Though the defendant in *Ballard* was tried non-capitally, the same reasoning applies to capital defendants. *See Bates*, 333 N.C. at 527-28, 428 S.E.2d at 695 (awarding capital defendant a new trial based on denial of motion for *ex parte* hearing for appointment of forensic psychologist). In *Ballard* we stated that if a hearing in which an indigent defendant seeks the assistance of a psychiatric expert is held in the presence of the State, the defendant's insanity or other defense strategy is impermissibly exposed. *Ballard*, 333 N.C. at 519, 428 S.E.2d at 180. Further, when the State is present at a hearing that focuses on the defendant's lack of mental stability, the defendant's inclination to reveal all relevant evidence may be stymied. Such a hearing violates defendant's right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution because to obtain psychiatric assistance defendant is compelled to make statements that he would not otherwise voluntarily make before the State. *Id.* at 520-21, 428 S.E.2d at 181-82. A hearing for funds for a psychiatric expert held in the presence of the State also violates defendant's right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. *Id.* at 521-22, 428 S.E.2d at 181-82. For these reasons, the trial court erred in denying defendant's motion for an *ex parte* hearing.

We note that *Ballard* and *Bates* had not been decided when this case was tried. The trial court thus could not have taken their holdings into account when making its ruling here.

We cannot know what evidence defendant would have presented at an *ex parte* hearing. Without that knowledge, we cannot deem the error here harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *see Ballard*, 333 N.C. at 523, 428 S.E.2d at 183; *Bates*, 333 N.C. at 527-28, 428 S.E.2d at 695. Accordingly, defendant is entitled to a new trial.

Defendant's remaining assignments of error are unlikely to recur upon retrial. We therefore need not consider them.

NEW TRIAL.

STATE OF NORTH CAROLINA v. ALTON EARL MORGAN

No. 51PA93

(Filed 28 January 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 108 N.C. App. 673, 425 S.E.2d 1 (1993), reversing in part and affirming in part orders entered by Turner, J., on 16 November 1990 in the District Court, Guilford County. Submitted on 8 December 1993 without oral argument, by motion of the parties, pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Mark B. Campbell for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

BARDOLPH v. ARNOLD

No. 442P93

Case below: 112 N.C.App. 190

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

BERKELEY FEDERAL SAVINGS AND LOAN ASSN. v. TERRA DEL SOL

No. 494P93

Case below: 111 N.C.App. 692

Motion by plaintiff to dismiss appeal for lack of constitutional issue allowed 27 January 1994. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

BOWDEN v. LATTA

No. 541PA93

Case below: 112 N.C.App. 543

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

BREWINGTON v. N.C. DEPT. OF CORRECTION

No. 421P93

Case below: 111 N.C.App. 833

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

BRYANT v. STATE BD. OF EXAMINERS OF ELECTRICAL CONTRACTORS

No. 504PA93

Case below: 111 N.C.App. 875

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

BUFORD v. GENERAL MOTORS CORP.

No. 526PA93

Case below: 112 N.C.App. 437

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

CAGE v. COLONIAL BUILDING CO.

No. 416PA93

Case below: 111 N.C.App. 828

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

CITY OF NEW BERN v. NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION

No. 5P94

Case below: 113 N.C.App. 98

Motion by several defendants for temporary stay allowed 10 January 1994 pending receipt and determination of defendants' petition for discretionary review.

CLAY v. EMPLOYMENT SECURITY COMM.

No. 480PA93

Case below: 111 N.C.App. 599

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

CRAWFORD v. FAYEZ

No. 503P93

Case below: 112 N.C.App. 328

Petition by plaintiff-appellants for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

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

DAVIS v. SENCO PRODUCTS, INC.

No. 289PA93

Case below: 109 N.C.App. 700

Motion by defendant to dismiss appeal for failure to comply with the Rules of Appellate Procedure denied 27 January 1994.

DOVER v. DOVER

No. 415P93

Case below: 111 N.C.App. 690

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

EDWARDS v. EDWARDS

No. 521P93

Case below: 112 N.C.App. 135

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

EVANS v. EVANS

No. 432P93

Case below: 111 N.C.App. 792

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

FRUGARD v. PRITCHARD

No. 479PA93

Case below: 112 N.C.App. 84

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

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

GOLDEN RULE INS. CO. v. LONG

No. 443P93

Case below: 111 N.C.App. 456

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 2 December 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

HOLDEN v. TRANSYLVANIA COUNTY HUMANE SOCIETY

No. 534P93

Case below: 112 N.C.App. 543

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

HOUSE OF RAEFORD FARMS v. STATE ex rel. ENVIR. MGMT. COMM.

No. 481PA93

Case below: 112 N.C.App. 228

Motion by the defendants to dismiss the appeal for lack of substantial constitutional question denied 27 January 1994. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

IN RE APPEAL OF CONE MILLS CORP.

No. 538P93

Case below: 112 N.C.App. 539

Petition by Cone Mills Corporation for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

IN RE WARD

No. 476PA93

Case below: 112 N.C.App. 202

Petition by petitioner (Imperial Trucking Co., Inc.) for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

IRT PROPERTY CO. v. PAPAGAYO, INC.

No. 499PA93

Case below: 112 N.C.App. 318

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

KAPP v. KAPP

No. 273PA93

Case below: 334 N.C. 688

110 N.C.App. 490

Upon further consideration, the Court has determined that plaintiffs' petition for discretionary review pursuant to G.S. 7A-31 was improvidently denied; accordingly, the order heretofore entered 7 October 1993 denying plaintiffs' petition for discretionary review is vacated, and said petition is hereby allowed 4 February 1994.

LATHAM v. CHERRY

No. 474P93

Case below: 111 N.C.App. 871

Petition by plaintiff for writ of certiorari to review decision of the North Carolina Court of Appeals denied 27 January 1994.

LEE v. LEE

No. 484P93

Case below: 112 N.C.App. 365

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

LEMONS v. LEMONS

No. 457P93

Case below: 112 N.C.App. 110

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

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

LOCUS v. FAYETTEVILLE STATE UNIVERSITY

No. 472P93

Case below: 111 N.C.App. 929

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

LOHR v. LOHR

No. 540P93

Case below: 112 N.C.App. 543

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

MARTIN v. PIEDMONT ASPHALT & PAVING CO.

No. 6P94

Case below: 113 N.C.App. 121

Petition by Industrial Commission for temporary stay allowed 11 January 1994 pending receipt and determination of Industrial Commission's petition for discretionary review.

MCNEILL v. HICKS

No. 354P93

Case below: 111 N.C.App. 262

Petition by defendant (Allstate Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

N.C. DEPT. OF LABOR v. CASEBOLT

No. 459PA93

Case below: 112 N.C.App. 135

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 December 1993. The 2 December 1992 order allowing plaintiff's petition for discretionary review is vacated and plaintiff's motion to withdraw its petition for discretionary review is allowed 27 January 1994.

NORTH BUNCOMBE ASSOC. OF CONCERNED CITIZENS v. N.C. DEPT. OF E.H.N.R.

No. 506PA93

Case below: 112 N.C.App. 366

Petition by appellant (Dept. of Environment, Health and Natural Resources) for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994. Petition by appellant (Vulcan Materials Company) for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994 as to issues 1,2,3,4, and 5 as stated on pages 16 and 17 of its petition and is denied as to issues 6 through 12 on pages 17 and 18 of its petition.

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM v. CALHOUN

No. 514P93

Case below: 112 N.C.App. 366

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994. Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 January 1994.

PARKER v. PINEWOOD MANOR HOMES

No. 495P93

Case below: 112 N.C.App. 544

Petition by defendant (Pinewood Manor Homes, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

PINNIX v. CITY OF HIGH POINT

No. 531P93

Case below: 112 N.C.App. 544

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

RAY v. ATLANTIC CASUALTY INS. CO.

No. 439P93

Case below: 112 N.C.App. 259

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

RC ASSOCIATES v. REGENCY VENTURES, INC.

No. 373P93

Case below: 111 N.C.App. 367

Motion by defendants to withdraw their petition for discretionary review allowed 7 December 1993.

REID v. ROBERTS

No. 438P93

Case below: 112 N.C.App. 222

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

ROBINSON v. ROBINSON

No. 35P94

Case below: 113 N.C.App. 422

Petition by defendant for temporary stay denied 21 January 1994; ruling on petition for writ of supersedeas delayed until receipt and determination of petition for writ of certiorari or petition for discretionary review.

SAMONAS v. CRUMLEY

No. 539P93

Case below: 112 N.C.App. 544

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

SMITH v. UNDERWOOD

No. 4A94

Case below: 113 N.C.App. 45

Petition by defendant-appellant (Sam B. Underwood, Jr.) for temporary stay allowed 14 January 1994 pending receipt of petitioners' response. Petition filed by defendant for writ of supersedeas allowed 27 January 1994.

STATE v. BAKER

No. 546P93

Case below: 112 N.C.App. 410

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 January 1994.

STATE v. BENNETT

No. 563P93

Case below: 112 N.C.App. 643

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. BEST

No. 558P93

Case below: 112 N.C.App. 544

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 27 January 1994.

STATE v. BEVERIDGE

No. 1A94

Case below: 112 N.C.App. 688

Petition by Attorney General for writ of supersedeas and temporary stay denied 5 January 1994.

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

STATE v. BROWN

No. 528A93

Case below: 112 N.C.App. 390

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 27 January 1994.

STATE v. CHAMBERS

No. 488P93

Case below: 112 N.C.App. 545

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 January 1994. The temporary stay is dissolved 3 January 1994.

STATE v. CHEEK

No. 3P94

Case below: 113 N.C.App. 203

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 31 January 1994.

STATE v. EVANS

No. 535P93

Case below: 112 N.C.App. 545

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. GUNTER

No. 392P93

Case below: 111 N.C.App. 621

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 December 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE v. HAMMOND

No. 523P93

Case below: 112 N.C.App. 454

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. HAYES

No. 536P93

Case below: 112 N.C.App. 644

Petition by Gene Hayes for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. HORTON

No. 513P93

Case below: 112 N.C.App. 545

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 January 1994.

STATE v. KENNEDY

No. 417P93

Case below: 111 N.C.App. 930

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. MCNEIL

No. 37A87-3

Case below: Superior Court

Petition by Attorney General for writ of certiorari to review the decision of the Superior Court, Wake County, denied 2 December 1993.

STATE v. NAJEWICZ

No. 515P93

Case below: 112 N.C.App. 280

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. PEDERSEN

No. 562P93

Case below: 112 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. PENDLETON

No. 478A93

Case below: 112 N.C.App. 171

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question denied 27 January 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. PHIPPS

No. 527PA93

Case below: 112 N.C.App. 626

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994.

STATE v. RICHARDSON

No. 460P93

Case below: 112 N.C.App. 58

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. SMITH

No. 463P93

Case below: 112 N.C.App. 136

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. SPEED

No. 428P93

Case below: 111 N.C.App. 932

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

STATE v. TUCKER

No. 452P93

Case below: 111 N.C.App. 907

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 2 December 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

STATE EX REL. ART MUSEUM BLDG. COMM. v. TRAVELERS INDEM. CO.

No. 375A93

Case below: 111 N.C.App. 330

Motion by defendant to withdraw its appeal allowed 27 January 1994.

STATE EX REL. UTILITIES COMM. v. EMPIRE POWER CO.

No. 473P93

Case below: 112 N.C.App. 265

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

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

STATE OF N.C. v. T. A. LOVING CO.

No. 502P93

Case below: 112 N.C.App. 367

Petition by plaintiff-appellant for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

TRUE v. T & W TEXTILE MACHINERY

No. 524PA93

Case below: 112 N.C.App. 358

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 27 January 1994 and the parties are directed to brief the Rule 68 issues and the issue of discretion arising under N.C.G.S. Section 6-20.

VICK v. THOMAS GIBSON & CO.

No. 441P93

Case below: 111 N.C.App. 459

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

VULCAN MATERIALS CO. v. FOWLER CONTRACTING CORP.

No. 411P93

Case below: 111 N.C.App. 919

Motion by defendant (Marketplace) to dismiss the appeal for lack of substantial constitutional question allowed 2 December 1993. Petition by plaintiff (Vulcan Materials) for discretionary review pursuant to G.S. 7A-31 denied 2 December 1993.

WHITECO INDUSTRIES, INC. v. HARRINGTON

No. 470P93

Case below: 111 N.C.App. 839

Motion by defendant to dismiss the appeal for lack of significant public interest allowed 27 January 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

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

WHITECO INDUSTRIES, INC. v. HARRINGTON

No. 471P93

Case below: 111 N.C.App. 815

Motion by defendant to dismiss the appeal for lack of significant public interest allowed 27 January 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 27 January 1994.

WIGGINS v. NATIONWIDE MUTUAL INSURANCE CO.

No. 458P93

Case below: 112 N.C.App. 26

Motion by defendant-appellant (Nationwide Mut. Ins. Co.) to be allowed to withdraw petition for discretionary review allowed 13 January 1994.

PETITIONS TO REHEAR

IN RE APPEAL OF PHILIP MORRIS U.S.A.

No. 49PA93

Case below: 335 N.C. 227

Petition by Philip Morris to rehear pursuant to Rule 31 denied 27 January 1994.

WORLEY v. WORLEY

No. 128PA93

Case below: 335 N.C. 166

Petition by defendant to rehear pursuant to Rule 31 denied 27 January 1994.

STATE OF NORTH CAROLINA v. BLANCHE KISER TAYLOR MOORE

No. 556A90

(Filed 4 March 1994)

1. Criminal Law § 78 (NCI4th)— murder—pretrial publicity—change of venue denied—no error

The trial court did not err by denying defendant's motions for a change of venue in a first-degree murder prosecution where three of the thirty-three articles submitted contained potentially exculpatory information; only one was potentially inflammatory and defendant made no showing concerning the extent of its circulation; the remaining twenty-nine articles were primarily factually based; and each of the twelve jurors who ultimately served on the jury stated unequivocally during the initial screening process and again during *voir dire* that they had formed no opinions about the case, could be fair and impartial, and would base their decisions solely on the evidence presented at trial. N.C.G.S. § 15A-957.

Am Jur 2d, Criminal Law § 378.

2. Indictment, Information, and Criminal Pleadings § 41 (NCI4th)—first-degree murder—poisoning—motion for a bill of particulars denied—no error

The trial court did not err in a first-degree murder prosecution involving poisoning by denying defendant's motions for a bill of particulars where the State provided defense counsel with copies of the victim's entire medical record along with the autopsy report and reports detailing the results of hair analysis, which enabled defendant to determine the time frame when the victim's body contained elevated levels of arsenic; the State at trial did not attempt to adduce any evidence indicating the timing of the poisonings with any greater particularity than reflected in the documentation furnished to defendant covering the period from "December 31, 1985 through October 7, 1986"; defendant does not suggest surprise or specify the manner in which the denial of her motions affected her trial strategy; the State introduced nothing at trial which could have come as a surprise to the defendant pertaining to the dates of the poisonings; and defendant had full knowledge

of the specific occurrences to be investigated at trial. N.C.G.S. § 15A-925.

Am Jur 2d, Indictments and Informations §§ 159 et seq.

3. Criminal Law § 107 (NCI4th)— first-degree murder—open file policy—case transferred—not applicable

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to compel the Forsyth County District Attorney to abide by the prior agreement between defendant and the Alamance County District Attorney for an open file policy. While the prosecutor may proceed under an open file policy, he or she may not be forced to do so and the District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. Furthermore, defendant did not show any prejudice resulting from the Forsyth District Attorney's refusal to follow an open file policy. N.C.G.S. § 15A-904.

Am Jur 2d, Depositions and Discovery §§ 428 et seq.

4. Jury § 113 (NCI4th)— first-degree murder—jury selection—individual voir dire denied—no error

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for individual sequestered *voir dire* of prospective jurors. Defendant's argument that collective *voir dire* inhibited the candor of the jurors and permitted prospective jurors to become educated concerning responses which would enable them to be excused from the panel is speculative, without merit, and not supported by the record.

Am Jur 2d, Jury § 197.

5. Jury § 141 (NCI4th)— first-degree murder—jury selection—eligibility for parole—questions not allowed—no error

The trial court did not err in a first-degree murder prosecution by denying defendant's motion that prospective jurors be examined on their opinions concerning defendant's eligibility for parole upon conviction.

Am Jur 2d, Jury § 197.

6. Jury § 96 (NCI4th)— first-degree murder—jury selection—initial screening by judge—no abuse of discretion

The trial court did not abuse its discretion in a first-degree murder prosecution by conducting the *voir dire* during the initial screening process where the court initially allowed the State and the defendant to screen the first thirteen prospective jurors concerning pretrial publicity but then took over and conducted the remainder of the screening process after several admonitions to counsel to speed up the questioning; the judge directed four questions concerning pretrial publicity and the presumption of innocence to each prospective juror; the prospective juror was either excused for cause upon motion by defendant or asked to return the following day for the continuation of the standard *voir dire*; and defense counsel was permitted on several occasions to follow up on the questions previously asked by the court. N.C.G.S. § 15A-1214(c).

Am Jur 2d, Jury §§ 195 et seq.

7. Evidence and Witnesses § 365 (NCI4th)— first-degree murder—poisoning—other occurrences—admissible

The trial court did not err in a first-degree murder prosecution involving poisoning by denying defendant's motion *in limine* to restrict introduction by the State of evidence concerning the deaths of defendant's father and first husband and the illness of her last husband where three different men either married to or intimately involved with defendant died or barely escaped death from arsenic poisoning, an unusual cause of death; defendant had motive (financial), opportunity (close relationship), and means (knowledge of and access to Anti-Ant) in each case; in each case medical evidence suggests that multiple doses of arsenic were administered to the victim over a long period of time, as opposed to one large fatal dose; defendant was frequently alone with the victim in the hospital in each case, and medical testimony suggests that certain of defendant's visits in which she fed the victim corresponded with an onset of symptoms characteristic of arsenic poisoning; defendant was heard to say in each case that she hated the victim or that the victim was cruel or evil; and, in the cases of this victim and her first husband, defendant was already seeing her next victim at the time of the arsenic assaults. Given the similarities between the crime charged and the other

crimes presented by the State, the evidence of the other offenses was relevant under N.C.G.S. § 8C-1, Rule 404(b) as evidence tending to prove *modus operandi*, motive, opportunity, intent and identity of defendant as the perpetrator.

Am Jur 2d, Homicide § 310.

8. **Evidence and Witnesses § 223 (NCI4th)— first-degree murder—medical techniques and equipment for victim—admissible**

The trial court did not err in a first-degree murder prosecution involving poisoning by allowing the State to introduce testimony from a registered nurse who had cared for the victim during his final illness concerning medical techniques and medical equipment used to treat the victim. Although defendant contended that the sole purpose of the testimony was to generate sympathy for the victim's family, the testimony was probative to show that defendant had access to the victim in the hospital, that a correlation existed between defendant's feeding the victim and the onset of his symptoms, that the victim manifested symptoms associated with multiple system failure incident to arsenic poisoning, that the victim could swallow food notwithstanding the tubes, that arsenic could have been introduced into the victim's body via the feeding tubes, and that the victim suffered inordinate pain over an extended period of time. The probative value of the testimony outweighed any unfair prejudice to defendant; furthermore, the record discloses that similar evidence from other witnesses was admitted without objection.

Am Jur 2d, Evidence §§ 280 et seq.

9. **Criminal Law § 473 (NCI4th)— first-degree murder—emotional display by prosecutor—no mistrial—no error**

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for a mistrial where the prosecutor burst into tears and after some 30 seconds fled the courtroom, but the prosecutor removed herself from the courtroom quickly and quietly, the jury was immediately removed from the courtroom, and, in response to questions by the court, not one juror answered that the incident would prevent him or her from being able to give defendant a completely fair and impartial verdict based solely on the evidence.

The Assistant District Attorney's brief emotional display was not prejudicial to defendant.

Am Jur 2d, Trial § 194.

10. Criminal Law § 107 (NCI4th)— first-degree murder—discovery—review of files to determine compliance—no ex mero motu obligation

The trial court did not err in a first-degree murder prosecution by failing to conduct a *voir dire* examination of the District Attorney's files to determine whether the State had complied with discovery where defendant asked for an *in camera* inspection of a disputed report to determine if it was a discoverable statement rather than an *in camera* examination of the prosecutor's file to determine if the District Attorney had provided discovery as required. The trial court is under no obligation *ex mero motu* to examine the prosecutor's investigative files for discovery compliance.

Am Jur 2d, Depositions and Discovery §§ 428 et seq.

11. Evidence and Witnesses § 1497 (NCI4th)— first-degree murder—poisoning—Anti-Ant—not same bottle used in poisoning—admissible

The trial court did not err in a first-degree murder prosecution involving poisoning by admitting into evidence a bottle of Anti-Ant even though it was not the bottle used to poison the victim. The identification of the bottle of Anti-Ant was not irrelevant; the State's evidence tended to prove that defendant was familiar with the product as early as the 1970's; that the product was available in the Burlington area at all relevant times; and that defendant actually had a bottle of Anti-Ant in her possession during the summer of 1985, which she showed to her current husband with the request that he purchase another bottle.

Am Jur 2d, Homicide § 414.

12. Evidence and Witnesses § 1548 (NCI4th)— first-degree murder—poisoning—medical devices—admissible

The trial court did not err during a first-degree murder prosecution involving poisoning by admitting into evidence medical devices which defendant contended were used merely to inflame the passions of the jury. The medical devices were

identified and introduced solely to illustrate the testimony of a registered nurse involved in the victim's primary care and treatment, the pieces of equipment were not excessively displayed and were not presented separately to the jury for a closer inspection, and the probative value of the evidence substantially outweighed the possibility of any unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 771 et seq.

13. Homicide § 259 (NCI4th)— first-degree murder—poisoning—evidence sufficient

There was sufficient evidence to submit first-degree murder by poisoning to the jury even though no poison was ever positively placed in defendant's hands where there was sufficient competent evidence from which a reasonable juror could find beyond a reasonable doubt that the victim, Reid, died from arsenic poisoning administered by defendant through a series of repeated doses; defendant had possessed, attempted to purchase, or asked someone else to purchase an arsenic based ant killer on at least three occasions; all three of the men who were either married to or romantically involved with defendant died or nearly died as a result of arsenic poisoning; defendant expressed negative feelings about Reid to her psychiatrist and stated that her feelings toward Reid had turned to hate; the State presented evidence that defendant had taken food to Reid in the hospital; and the medical evidence demonstrated a correlation between defendant's visits and the renewed onset of Reid's symptoms.

Am Jur 2d, Homicide § 443.

14. Criminal Law § 762 (NCI4th)— first-degree murder—instructions—reasonable doubt

The trial court did not err in refusing to give defendant's requested instruction on reasonable doubt in a first-degree murder prosecution where the pattern instruction given by the trial court contained none of the offending phrases under *Cage v. Louisiana*, 498 U.S. 39, namely, "grave uncertainty," "actual substantial doubt," and "moral certainty," or terms of similar import. Furthermore, this instruction correctly informed the jury that the standard for conviction beyond a

reasonable doubt was certainty based upon the sufficiency of the evidence.

Am Jur 2d, Trial § 832.

15. Criminal Law § 763 (NCI4th)— first-degree murder—instructions—identity of perpetrator—circumstantial evidence—no error

The trial court did not err in a first-degree murder prosecution by refusing to instruct the jury on the identity of the individual responsible for the victim's death as requested by defendant where the court met the requirement of giving the requested instruction in substance in that the instruction as given, when read in conjunction with the entire charge to the jury, adequately linked the State's burden to prove defendant's identity as the perpetrator of the crime with the quantum of proof beyond a reasonable doubt.

Am Jur 2d, Trial §§ 843 et seq.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases. 36 ALR4th 1046.

16. Evidence and Witnesses § 983 (NCI4th)— first-degree murder—instructions—dying declarations

The trial court did not err in a first-degree murder prosecution by not giving defendant's requested instruction on dying declarations where the State contended that there was no evidence showing that the letter was even written by the purported author, Garvin Thomas; defendant's own expert refused to opine that Thomas authored the letter while the State's expert, a questioned documents examiner and forensic chemist, ruled out Thomas as the author to a ninety-nine percent degree of certainty; and the letter was offered into evidence by the State not as the dying declaration of Garvin Thomas but as evidence of defendant's "deceptive plan to throw suspicion away from herself." The court properly instructed the jury on the issue of credibility of the evidence.

Am Jur 2d, Homicide §§ 347 et seq.

Admissibility in criminal trial of dying declarations involving an asserted opinion or conclusion. 86 ALR2d 905.

17. Criminal Law § 687 (NCI4th)— first-degree murder—requested instructions denied—given essentially verbatim

There was no error in a first-degree murder prosecution where the trial court denied defendant's requested instruction pertaining to uncontradicted evidence but gave the requested charge essentially verbatim.

Am Jur 2d, Trial §§ 588 et seq.

18. Homicide § 557 (NCI4th)— first-degree murder—poisoning—instruction on second-degree murder refused—no error

The trial court did not err in a first-degree murder prosecution arising from a poisoning by refusing to submit the lesser included offense of second-degree murder to the jury. Although defendant argued that the court, in effect, allowed the jury to presume premeditation and deliberation and relieved the State of its burden of proof, any murder committed by means of poison is automatically first-degree murder. The evidence here supported every element of first-degree murder by poisoning.

Am Jur 2d, Homicide §§ 525 et seq.

19. Criminal Law § 1318 (NCI4th)— first-degree murder—sentencing—requested instruction on reasonable doubt—not given in guilt stage—no error in sentencing stage

There was no error in the sentencing stage of a first-degree murder prosecution where the court had failed to give defendant's requested instruction on reasonable doubt in the guilt-innocence phase of the trial. This assignment of error would be without merit even if defendant had properly preserved it for appellate review.

Am Jur 2d, Trial §§ 888 et seq.

20. Criminal Law § 1326 (NCI4th)— first-degree murder—sentencing—instructions—reasonable doubt—application to mitigating circumstances

The trial court did not err during a sentencing proceeding for first-degree murder by not explaining to the jury that the standard of beyond a reasonable doubt applies to mitigating circumstances as well as to aggravating circumstances. Defendant's contention is an incorrect statement of law.

Am Jur 2d, Trial §§ 888 et seq.

21. Criminal Law § 1341 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—pecuniary gain

The trial court did not err in the sentencing portion of a first-degree murder prosecution by submitting the aggravating circumstance of pecuniary gain where the evidence would permit a rational juror to find beyond a reasonable doubt that the murder was committed for the purpose of pecuniary gain. Although defendant contended that this circumstance should be submitted only when the primary motivation is financial gain, that assertion is not supported by the law. N.C.G.S. § 15A-2000(e)(6).

Am Jur 2d, Criminal Law §§ 598 et seq.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-Gregg cases. 66 ALR4th 417.

22. Criminal Law § 1344 (NCI4th)— first-degree murder—poisoning—sentencing—aggravating circumstances—especially heinous, atrocious, or cruel

The trial court properly submitted the aggravating circumstance that a poisoning death was especially heinous, atrocious, or cruel where defendant contended that the circumstance should not have been submitted since arsenic has an inherent propensity to inflict a prolonged and painful period of suffering prior to death. The fact that the poison is administered in small doses over an extended period of time thereby causing excruciating and prolonged pain and suffering is not essential to prove the offense, nor is the type poison chosen, be it a slow acting or fast acting agent, an element of the offense. The holding in *State v. Cherry*, 298 N.C. 86, is specifically confined to felony-murder cases and the rationale of the case is not applicable to poisoning deaths. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598 et seq.

23. Criminal Law § 1373 (NCI4th)— first-degree murder—death sentence—not disproportionate

There was no proportionality error in a death sentence for a first-degree murder by poisoning where the record sup-

ports the jury's finding of the aggravating circumstances on which the sentence was based; the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary fact; and the sentence was not disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

Am Jur 2d, Criminal Law § 628.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Freeman, J., at the 15 October 1990 Criminal Session of Superior Court, Forsyth 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 Barry S. McNeill, Special Deputy Attorney General, for the State.

David F. Tamer and Lisa S. Costner for defendant-appellant.

PARKER, Justice.

Defendant, Blanche Kiser Taylor Moore, was indicted for the 7 October 1986 first-degree murder of Raymond C. Reid, Sr. (herein "Reid"). She was tried capitally at the 15 October 1990 Criminal Session of Superior Court, Forsyth County, and was found guilty as charged. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended defendant be sentenced to death. Judgment of death was entered on 16 November 1990. An order staying execution of the death sentence was entered on 26 November 1990 pending the conclusion of this appeal.

In May of 1989, defendant's then husband, the Reverend Dwight D. Moore (herein "Moore"), while being treated at North Carolina Memorial Hospital in Chapel Hill, North Carolina, was diagnosed with arsenic poisoning. An investigation was begun which led to the eventual exhumation of the bodies of P.D. Kiser, Sr., defendant's father; James N. Taylor, defendant's first husband; and Reid, a previous boyfriend. All of the bodies tested positively for the presence of arsenic. Defendant was indicted in Alamance County for the murders of Kiser and Taylor and the felonious assault on Moore; she was indicted in Forsyth County for the murder of Reid. The Alamance County cases were subsequently transferred

to Forsyth County. This opinion reviews defendant's capital trial for the murder by arsenic poisoning of Reid.

The State's evidence at trial tended to show that defendant met Reid while working at Kroger supermarket in Burlington, North Carolina, in 1962. They did not start going out together, however, until 1979. According to the testimony of a Kroger risk management investigator, Reid had said he and defendant "probably would have been married, except she wanted to be there next to her family." Reid was transferred several times in 1979 and 1980 until he became manager of a store in Winston-Salem, North Carolina. Defendant worked the entire time in Burlington except for a brief period in 1979 when she was at a store in Durham. Defendant last worked at Kroger 17 October 1985, when she left her employment on account of sexual harassment.

Reid initially became ill on 1 January 1986. After having spent New Year's Eve with defendant and having eaten some of her homemade potato soup, Reid began experiencing severe symptoms of nausea, vomiting, and diarrhea. Reid, who had never been known to miss work, was absent from work more than four weeks over the next few months. His last day at work was 29 May 1986. Reid's condition became progressively worse; and he was admitted to Wesley Long Hospital in Greensboro, North Carolina, on 30 May 1986 by his physician, Dr. Norman H. Garrett, Jr. On admission, Reid reported to Dr. Garrett that while eating supper seven days earlier, he had experienced nausea, vomiting, and dehydration, that he had become violently ill, and that he had been unable to keep down any solid foods since that time. Dr. Garrett's admission diagnosis was acute gastroenteritis based on "his profound dehydration, nausea and vomiting."

While hospitalized, Reid's condition continued to deteriorate; and Dr. Garrett revised his diagnosis to multiple systems failure based on Reid's symptoms including excessive nausea and vomiting, loose stools, skin rash, edema, dehydration, bone marrow damage, blood cell abnormalities, electrolyte abnormality, tachypnea (progressive shortness of breath), respiratory failure, tachycardia (fast heartbeat), low blood pressure, kidney malfunction and shutdown, and numbness and tingling in his hands and feet. Each of these symptoms is characteristic of arsenic poisoning.

By the morning of 5 June 1986, Reid's condition had stabilized. Dr. Garrett informed Reid, in defendant's presence, that he need

only remain in the hospital for three to five more days following his circumcision (the procedure was the result of an infection and was not related to Reid's other symptoms). However, Reid's condition worsened so much over the next week that it became "life threatening," and Dr. Garrett transferred him to North Carolina Baptist Hospital in Winston-Salem on 13 June 1986. Dr. Garrett was never able to make a satisfactory diagnosis of the cause of Reid's multi-system failures.

Dr. Robert Hamilton, a specialist in internal medicine and nephrology who treated Reid at Baptist Hospital, testified that Reid was admitted with a number of symptoms, including a raspy voice, severe swelling in his lower extremities, anemia, low white blood cell count, a rash over his lower extremities, white patches in his mouth, very poor bowel sounds, difficulty breathing, and signs of kidney failure. Reid's condition continued to deteriorate, resulting in a "Code Blue" on 21 June 1986. Emergency measures were taken and Reid was intubated so that he could be mechanically ventilated. Over the next few days, Reid became nearly paralyzed.

Dr. Hamilton began with a preliminary diagnosis of Guillain-Barre syndrome. Reid showed some slight improvement following a procedure called "plasmapheresis." In this procedure, the patient's blood is removed from the body, the red blood cells are separated from the plasma, and the red blood cells are returned to the body. The lab report from a urine sample obtained from Reid between 27 June 1986 and 28 June 1986 showed "quite elevated" levels of arsenic in the urine. Dr. Hamilton, however, never saw the results of this test. Reid further improved during July of 1986 but continued to have difficulty breathing and needed to be on a respirator. Reid gradually recovered use of his extremities and was able to breathe on his own. During this time, defendant asked Dr. Hamilton if she could bring food from home for Reid and was given permission to do so. At the end of September, Reid suffered another serious setback.

Lisa Hutchens, the head nurse in the Intensive Care Unit (ICU), testified that the last time she saw Reid looking well was on 1 October 1986 when she visited him in the intermediate care unit. Defendant was with Reid and was feeding him banana pudding. Hutchens again visited Reid on 3 October 1986 in his room in the intermediate ward. Reid was in "acute respiratory distress" and was very frightened. He pleaded with her to "[p]lease help

me or I'm going to die." Reid was returned to the ICU on 4 October 1986. Nurse Hutchens recalled defendant often bringing Reid food items from home such as iced tea, frozen yogurt, milk shakes, and soups during this time.

Steven Reid, one of Reid's sons, testified that he visited his father on 4 October 1986 and found he had eaten a breakfast prepared by defendant. He stayed until late that afternoon and visited again on the fifth before returning to East Carolina University in Greenville, North Carolina. When Steve called on Monday, 6 October 1986, defendant informed him he should return to the hospital as soon as possible. When he arrived on the evening of the sixth, he hardly recognized his father. He looked as if he had gained almost one hundred pounds and "[h]is eyeballs were even starting to swell and his skin was splitting."

Dr. Kyle Jackson testified that Reid became "progressively weaker and unable to continue his breathing on his own well enough to sustain life." By 7 October 1986, Reid was on inotropic drugs and mechanical ventilation. He was able to communicate only with his eyes. In the early afternoon, Reid "coded" and the responding medical personnel began to administer CPR and to perfuse his heart in order to give him emergency drugs. Dr. Jackson pronounced Reid dead from complications which he thought were attributable to Guillain-Barre syndrome. Several witnesses recalled that moments after Reid passed away defendant stated: "We cannot have an autopsy. He has been through too much. He wouldn't want to be cut on like this. We just—we cannot have one."

Several hospital employees, family members, and visitors testified that they recalled defendant bringing Reid milk shakes from McDonald's while he was hospitalized at Wesley Long Hospital. Gloria Head, a fellow Kroger employee, recalled visiting Reid and observing a container of red Jello in defendant's purse. Dr. Garrett had previously testified that Reid had informed him on 30 May 1986 that he began vomiting after eating Jello the previous night.

Wanda B. Moss, a registered nurse in the ICU at North Carolina Baptist Hospital, described the treatment Reid underwent in the hospital. On some occasions Reid was fed with a Dobhoff feeding tube inserted into him. The tube is very narrow and becomes easily clogged. Nurse Moss stated that Coca-Cola is inserted by syringe into the tube and is effective in unclogging it. Defendant was frequently in the room when Nurse Moss used the syringe and the

Coke to clear Reid's Dobhoff tube. The Coke was often left unattended in the patient's room, and the syringes were kept in an unlocked closet in Reid's room. Nurse Moss further recalled defendant bringing peanut butter milk shakes, banana pudding, tomato pudding, corn bread, and milk from home for Reid and feeding him herself. The ICU nursing notes reflect repeated instances where Reid complained later in the day of being nauseated after having been fed by defendant. Nurse Moss never saw anyone other than defendant bring food to Reid or feed him.

Pursuant to a court order, Reid's body was exhumed on 13 June 1989 in Alamance County. The body was taken to the medical examiner's office in Chapel Hill, North Carolina, and an autopsy was performed. The autopsy revealed "clearly recognizable" Mees lines across the fingernails of both hands and the toxicology report indicated a concentration of arsenic in Reid's liver tissue "30 times higher than one might see in an average individual who is not having a significant exposure to arsenic." The arsenic in Reid's brain tissue was approximately sixty-seven times higher than that expected in a normal individual. As a result of these findings, Dr. John D. Butts, Chief Medical Examiner for the State of North Carolina, concluded that "Reid died as a result of the complications of arsenic poisoning." Furthermore, based on an analysis of hair samples from the exhumed body of Reid, Dr. Vincent Guinn, a professor of chemistry at the University of California-Irvine and an expert in the field of nuclear chemistry, concluded that the arsenic levels found in Reid's hair correspond "to a long period of ingestion of arsenic, multiple ingestions." Dr. Guinn noted that on 24 June 1986, the arsenic level peaked at 70 parts per million, which is "roughly 70 times the normal level."

The State presented testimony from several witnesses to link defendant with the product Anti-Ant. Brenda Green, a Kroger co-worker, recalled hearing defendant recommend Anti-Ant to a customer as a good ant-killer. Moore testified that, during the summer of 1985, defendant showed him a bottle of Anti-Ant and asked him to purchase some for her from Byrd's Food Center in the Glen Raven section of Burlington. Moore further testified that he purchased the Anti-Ant at Byrd's, gave the bottle of Anti-Ant to defendant, and told defendant that he had purchased it at Byrd's. Leonard Wolfe, a former co-worker, who owned a small, community convenience store called Ken's Quickie Mart recalled defendant

coming into the store in early April 1989 and asking if he "had any Anti-Ant in stock."

Peggy Vaughn, owner and operator of Atla Chemical Company in McLeansville [North Carolina], testified that her company had manufactured Anti-Ant for over ten years, including the years 1985-1988. The main active ingredient in the product Anti-Ant is arsenic. She further stated that State's Exhibit #30 was identical in appearance to other bottles of Anti-Ant manufactured by her company. Other testimony showed the availability of Anti-Ant to customers in the Burlington area.

Special Agent Thomas J. Currin of the North Carolina State Bureau of Investigation testified concerning the investigation into a letter received by defendant in the Alamance County jail purportedly written by a man named Garvin Thomas. In the letter, Thomas allegedly confessed to the murder of Reid and the attempted murder of Moore. Based on his examinations and comparisons of defendant's handwriting samples and those of Garvin Thomas, Agent Currin, a questioned document examiner, concluded that, in his opinion, defendant was the person who wrote the confession letter attributed to Garvin Thomas.

The State presented extensive evidence concerning the deaths of defendant's father and her first husband and Moore's illness. Recitation of this evidence as necessary will be included in the Court's discussion of defendant's assignment of error related to the admission of this evidence.

Once the State rested, W.A. Shulenberger, testifying as an expert witness for the defendant, opined that defendant could not have written the confession letter. Shulenberger's examination revealed no evidence of an attempt to disguise or alter the handwriting. He stopped short, however, of stating that Garvin Thomas actually wrote the confession letter.

Carolyn Hinshaw, a jailer with the Alamance County Sheriff's Department, testified that a man, carrying a teddy bear and signing his name as "Garvin Thomas," attempted to visit defendant in jail saying "he had done so much wrong in his life and hurt so many people that he wanted to start doing some good to right the wrongs." Deputy Hinshaw testified this incident occurred two to four months before 19 May 1990—the date on the alleged confession letter. Carol DiLelo, a secretary for defense counsel, Mitchell

M. McEntire, testified that, when her employer learned of the "teddy bear" incident, she was told to arrange a meeting with Garvin Thomas. At that meeting, Mr. Thomas stated that "he knew he was going to die and that he knew Blanche Moore had not done the things she was accused of doing and he knew that he had hurt her and he had hurt her family and he was sorry about all that."

Defendant also called as a witness her lawyer in her sexual harassment suit who testified that at defendant's request, he referred her to Mr. Robert Hinshaw, an attorney in Winston-Salem, about preparing a will for Reid. Hinshaw then testified that defendant gave him some notes which defendant said had been prepared by a nurse and asked if he could draft a proposed will. Hinshaw drafted a proposed will and power of attorney and then visited Reid in the hospital. At the time Reid could not speak, but Reid could communicate by nodding his head and squeezing a person's hand. The nurses present assisted Hinshaw in interpreting Reid's communications and Hinshaw was satisfied that Reid understood what was being read and what he was doing. The next day Hinshaw returned to the hospital and in the presence of a notary public and two nurses again went over the will with Reid. Since Reid could not sign his name, Hinshaw signed for him in the presence of Reid, the notary, and the two nurses who witnessed the will. Hinshaw testified that he inquired whether Reid understood that by leaving his property to defendant, his sons would be left out and whether Reid wanted defendant to share in the insurance proceeds. Reid responded affirmatively to both these questions. The same procedure was followed in executing the power of attorney.

Defendant took the stand on her own behalf and testified that while Reid was in the ICU at Baptist Hospital, she recalled him being fed only with a tube. She denied seeing Reid "have any food at all during that time" or having ever taken food to Reid while he was in the hospital. She specifically denied taking banana pudding or peanut butter milk shakes to Reid in the hospital. Defendant did not recall conversing with anyone about Reid's autopsy and told the jury she would not have been opposed to an autopsy to determine the cause of his death.

As to Reid's will, defendant denied having anything whatsoever to do with his will, even though Reid gave her his power of attorney. While acknowledging she had heard of Anti-Ant, defendant

denied ever having purchased, attempted to purchase, or directed anyone else to purchase the product. Defendant denied administering arsenic to James N. Taylor, Reid, or Moore.

Additional facts, when necessary, will be set forth with respect to the various issues.

The jury found defendant guilty of the first-degree murder of Reid. During the capital sentencing phase, the jury found as aggravating circumstances that (i) the murder was committed for pecuniary gain and (ii) the murder was especially heinous, atrocious, or cruel. As mitigating circumstances, the jury found that defendant (i) "provided well for the needs of her children while they were growing up"; (ii) "upon being informed of the warrant for her arrest, peacefully submitted herself in accordance with her duty"; and (iii) "demonstrated concern and kindness for others in her community." Based upon findings that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances, the jury recommended that defendant be sentenced to death.

PRETRIAL ISSUES

[1] In her first assignment of error, defendant argues the trial court erred in denying her motions for change of venue. Defendant contends she could not obtain a fair and impartial trial in Forsyth County on account of the extensive pretrial publicity resulting in great prejudice against her in violation of her state and federal constitutional rights. For the reasons discussed herein, we find this assignment of error to be without merit.

To support her initial motion, defendant introduced evidence to show that the local media provided regular coverage of her case, including detailed newspaper articles regarding the deaths of Kiser and Taylor and the illness of Moore; that WKRR-FM, an Asheboro, North Carolina, radio station with a market in Forsyth County, repeatedly played a song which implied defendant was guilty and called her a "black widow spider"; and that the results of a random survey compiled by defendant's investigator showed the community held preconceptions prejudicial to her case. Random survey results showed that forty-nine of the fifty respondents had heard of and/or followed defendant's case with interest. Of those

forty-nine, thirty-six indicated they had reached an opinion as to defendant's guilt or innocence. Thirty-one of those individuals believed defendant to be guilty while five believed her to be innocent. At least two people polled said "that they felt she was guilty and that they should fry the woman." However, in her brief, defendant concedes that the media coverage was largely factually based.

In denying defendant's motion for change of venue, the trial court made the following findings of fact: (i) Forsyth County is a large, urban county with approximately 260,000 in population; (ii) defendant was not a resident of Forsyth County and, in fact, lived in Alamance County; (iii) the majority of individuals involved in the case also resided in Alamance County; and (iv) there had been extensive publicity in Forsyth County and the surrounding areas but the publicity was not inflammatory and, in fact, some was exculpatory. The trial court concluded as a matter of law "that defendant has failed to establish a reasonable likelihood that she would not get a fair trial in Forsyth County and the Court in its discretion" denied defendant's motion for change of venue.

Defendant later renewed her motion but presented no additional supporting evidence at the motion hearing. The trial court deferred ruling on this motion pending the filing of any additional affidavits, articles, or recordings for consideration. Prior to trial, the court denied the renewed motion for change of venue as well.

The statute pertaining to change of venue motions provides:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.
>
> The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue.

N.C.G.S. § 15A-957 (1988). In the recent case of *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), this Court stated:

> 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." [*State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983).] 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).

Id. at 539-40, 434 S.E.2d at 187.

From our review of the materials submitted by both defendant and the State, we are satisfied the trial court did not err in concluding that defendant failed to meet her burden of proving that pretrial publicity tainted her chances of receiving a fair and impartial trial. Of the thirty-three articles submitted, at least three contain potentially exculpatory information. Only one of the thirty-three is potentially inflammatory—an article entitled, "The Men In Her Life Keep Dropping Like Flies," published in *True Police Cases*, and as to this one defendant made no showing concerning the extent of its circulation. The remaining twenty-nine articles which defendant contends caused undue pretrial publicity are primari-

ly factually based. The articles submitted begin in September of 1989 and continue through August of 1990 and address the sequence of events including the initial investigation, the indictments, all pretrial motions, the psychiatric testing of defendant, the behavior of defendant while in prison awaiting trial, and the later investigation focusing on the alleged confession letter and handwriting analyses related thereto. "This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

This Court has also noted that the potential jurors' responses to questions on *voir dire* conducted to select the jury are the best evidence of whether pretrial publicity was prejudicial or inflammatory. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). "Where, as here, a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of *a juror who heard his case* that will raise a presumption of partiality." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 35 (1991). If each juror states unequivocally that he can set aside what he has heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue. *State v. Soyars*, 332 N.C. 47, 54, 418 S.E.2d 480, 484-85 (1992).

In the present case, to assure a fair and impartial venire, the trial court conducted an initial screening to eliminate potential jurors who had already formed biases about defendant. Of the 110 potential jurors initially screened on an individual basis by the court concerning pretrial publicity, forty-six were excused for cause on account of preconceived opinions of defendant's guilt or innocence determined from media coverage. The remaining sixty-four potential jurors stated that, notwithstanding the publicity, they could be fair and impartial and decide the case solely on the evidence presented in court. These sixty-four prospective jurors, having passed the initial screening process, were subsequently questioned by the State and defendant in a standard *voir dire*. Each of the twelve jurors who ultimately served on the jury during defendant's trial stated unequivocally during the initial screening process and again during *voir dire* that they had formed no opinions about the case, that they could be fair and impartial, and that

they would base their decisions solely on the evidence presented at trial.

Considering the entire record before us, we conclude that defendant has not established a reasonable likelihood that pretrial publicity prevented her from receiving a fair and impartial trial in Forsyth County. We hold, therefore, that the trial court did not err in denying defendant's motions for a change of venue.

[2] In her next assignment of error, defendant contends the trial court erred in denying her motions for a bill of particulars with regard to the circumstances surrounding the death of Reid. The record discloses that on 9 October 1989, defendant filed a motion for a bill of particulars requesting the State provide various information, including the alleged motive for Reid's murder, the date or dates of Reid's poisoning and the means thereof, the State's version of the facts concerning any poisonings and any and all other information within the possession of the District Attorney, his agents and investigators. Subsequently, on 31 October 1989, defendant filed a supplemental motion for a bill of particulars seeking information as to (i) the exact cause of death, (ii) the exact date or dates as well as the time on said dates when Reid was poisoned, (iii) the exact geographic locations where the poison was introduced into Reid's body, (iv) the type poison introduced into Reid's body, (v) the identity of any persons present during the poisonings, (vi) the identity of any persons who supplied the poison used, (vii) the specifics as to dates, times, locations of each instance where defendant acquired any poison, including substances containing arsenic, (viii) the identity of any persons present when defendant acquired the poison, and (ix) a list of aggravating circumstances on which the State would rely in seeking the death penalty.

At the hearing on defendant's motions the State noted that it had turned over to defendant all Reid's medical records including the autopsy report and was in no better position to state the cause of death other than "complications from arsenic poisoning." The State further responded that "[t]he victim, Raymond Carlton Reid, received numerous doses of arsenic poisoning during the period of time from December 31, 1985 through October 7, 1986." The State further asserted that the specific time of the poisoning was not essential since the case involved "chronic poisoning" and not "one particular act against Raymond Reid on a particular day at a certain time." The trial court denied the motion except as to

items four and nine, namely, the type poison and the aggravating circumstances to be submitted.

The purpose of a bill of particulars pursuant to N.C.G.S. § 15A-925 "is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry." *State v. Young*, 312 N.C. 669, 676, 325 S.E.2d 181, 186 (1985).

> Whether to allow or deny a motion for a bill of particulars is generally within the discretion of the trial court and is not subject to review "except for palpable and gross abuse thereof." *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E.2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903 (1976). The court *must* order the State to respond to a request for a bill of particulars only when the defendant shows that the information requested is *necessary* to enable him to prepare an adequate defense. G.S. 15A-925(c). Stated otherwise, a denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case.

State v. Easterling, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980).

During discovery, the State provided defense counsel with copies of Reid's entire medical record along with the autopsy report and reports detailing the results of the hair analyses. This information enabled defendant to determine the time frame when Reid's body contained elevated levels of arsenic and to analyze the victim's medical condition at these times. At trial, the State did not attempt to adduce any evidence indicating the timing of the poisonings with any greater particularity than reflected in the documentation furnished to defendant covering the period from "December 31, 1985 through October 7, 1986." The State confirmed that arsenic was the poison used, and defendant had obtained through discovery statements allegedly made by defendant linking her to the purchase of Anti-Ant, an arsenic-based ant killer.

Defendant does not suggest surprise or specify in what manner the denial of her motions for a bill of particulars affected her trial strategy. The State introduced nothing at trial which could have come as a surprise to the defendant pertaining to the dates of the poisonings. She had full knowledge of the specific occurrences

to be investigated at trial, *State v. Detter*, 298 N.C. 604, 612, 260 S.E.2d 567, 575 (1979). On the record before this Court, defendant has failed to show that lack of access to information "significantly impaired [her] preparation and conduct of the case." *Easterling*, 300 N.C. at 601, 268 S.E.2d at 805. We hold, therefore, that the trial court did not err in denying defendant's motions for a bill of particulars.

[3] Defendant next contends the trial court erred in failing to compel the Forsyth County District Attorney to comply with a prior agreement between defense counsel and the Alamance County District Attorney establishing an open file policy. While the trial for the murder of Reid was pending in Forsyth County, charges were also pending against defendant in Alamance County for the murder of James N. Taylor and for the assault with a deadly weapon with intent to kill inflicting serious injury on Moore. For judicial economy and to avoid possible prejudice created by extensive pretrial publicity in Alamance County, Judge J.B. Allen, Jr. entered an order transferring venue in the Alamance County cases to Forsyth County.

Prior to the order, the Alamance County District Attorney's office agreed to an open file policy to afford "the defense the benefit of every document and every matter and thing in the file." However, when defendant's motion for a change of venue was granted, the District Attorney in Forsyth County refused to comply with the previous arrangement. Defendant argues in her brief that access to the Alamance County District Attorney's files was

> of material importance to the Defendant, particularly in light of the expressed intention on the part of the Forsyth County District Attorney to rely . . . upon evidence pertaining to the facts and circumstances surrounding the deaths of the Defendant's father and first husband, as well as the illnesses suffered by Rev. Moore.

The statute governing disclosure of evidence by the State provides:

> (a) Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of reports, memoranda, or other internal documents made by the prosecutor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of

> the case, or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State.
>
> (b) Nothing in this section prohibits a prosecutor from making voluntary disclosures in the interest of justice.

N.C.G.S. § 15A-904 (1988). Defendant has made no allegations that the State failed to provide appropriate discovery pursuant to N.C.G.S. § 15A-903. Defendant also has failed to provide any authority for her conclusion that the prosecutor of one district should be bound by the open file discovery policy of a prosecutor in another district.

The general rule is that "the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in preparation of the case are not open to discovery." *State v. Brewer*, 325 N.C. 550, 574, 386 S.E.2d 569, 582 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). While the prosecutor may, in his or her discretion, proceed under an open file policy, he or she may not be forced to do so. Similarly, the District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. Furthermore, defendant has not shown any prejudice resulting from the Forsyth District Attorney's refusal to follow an open file policy. We conclude, therefore, that the trial court did not err in denying defendant's motion to compel the State to abide by the prior agreement between defendant and the Alamance County District Attorney. This assignment of error is without merit.

[4] Defendant next contends the trial court erred in denying her motion for individual sequestered *voir dire* of prospective jurors. In denying the motion for individual *voir dire* throughout the entire selection process, the trial court ruled it would

> allow the motion to conduct an individual voir dire on the preliminary matters of pretrial publicity and whether or not a juror has formed an opinion about the case. . . . [W]e'll screen a pool of jurors for publicity; and then once we get an acceptable number, we'll bring them in twelve at a time and go through the regular voir dire process.

Following the initial screening process, twelve prospective jurors were seated in the jury box while the remaining members of the venire were sequestered outside the courtroom until they were called to replace an excused venireperson.

A motion for individual *voir dire* is addressed to the sound discretion of the trial court whose ruling will not be disturbed except for an abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981), *appeal after remand*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). Defendant argues that collective *voir dire* on the issues other than pretrial publicity inhibited the candor of the jurors and permitted the prospective jurors to become educated concerning responses which would enable them to be excused from the panel. Thus, a "domino effect" is produced as each juror expresses his or her aversion to the death penalty in order to be relieved of jury duty.

As we have previously held in *Oliver* and *Barfield*, this argument is speculative and without merit. The record does not support defendant's contentions. The assignment of error is overruled.

[5] Defendant next argues that the trial court erred in denying her pretrial motion that prospective jurors be examined on their opinions concerning defendant's eligibility for parole upon conviction. This issue has previously been decided against defendant. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated on other grounds in light of McKoy*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

[6] In her next assignment of error, defendant argues the trial court erred in conducting the *voir dire* during the initial screening process, thus denying counsel the opportunity to make a full and complete inquiry into the fitness of the prospective jurors for service. The trial court initially allowed the State and the defendant to screen the first thirteen prospective jurors concerning pretrial publicity but then took over and conducted the remainder of the screening process after several admonitions to counsel to speed up the questioning.

In an effort to expedite this initial screening process, the trial court directed the following questions to each prospective juror:

THE COURT: Could you as best you can put out of your mind what you might have read or heard and base your decision solely on the evidence that you hear in the courtroom?

. . . .

THE COURT: Could you be fair and impartial to this defendant and not let anything you might have read or heard affect your decision in this case?

. . . .

THE COURT: The law requires that a juror presume a defendant to be innocent until proven guilty beyond a reasonable doubt. Could you do that regardless of what you've already read or heard?

. . . .

THE COURT: And as a result of what you've read or heard, you haven't already made up your mind or formed or expressed an opinion about the guilt or innocence of this defendant, have you?

Based on the responses to these questions, the prospective juror was either excused for cause upon motion by defendant or asked to return the following day for the continuation of the standard *voir dire*. A review of the entire *voir dire* reveals that, even after the trial court took over the screening process, defense counsel was permitted on several occasions to follow up on the questions previously asked by the court. During the standard *voir dire*, defense counsel was allowed to question prospective jurors further concerning any preconceived opinions attributable to the pretrial publicity surrounding this case. Two prospective jurors who had passed the initial screening process were excused for cause when additional questioning disclosed they each had formed an opinion concerning defendant's guilt.

N.C.G.S. § 15A-1214 provides, in pertinent part:

(c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not

foreclosed from asking a question merely because the court has previously asked the same or similar question.

Defendant has failed to show a violation of N.C.G.S. § 15A-1214(c). The record discloses that the trial court acted merely to expedite the initial screening process by asking questions designed to eliminate prospective jurors with obvious opinions regarding defendant's guilt. Once the standard *voir dire* was commenced, defense counsel was given latitude to examine the prospective jurors for any latent ideas or beliefs formed as a result of the pretrial publicity pertaining to defendant's case. While both the State and the defendant indisputably have the right to question prospective jurors to determine their fitness and competency to serve, "the extent and manner of counsel's inquiry rests within the trial court's discretion." *State v. Soyars*, 332 N.C. at 56, 418 S.E.2d at 486. This assignment of error is without merit.

GUILT-INNOCENCE PHASE

[7] Defendant next contends the trial court erred in denying defendant's motion *in limine* to restrict introduction by the State of evidence concerning Kiser and Taylor's deaths and Moore's illness. Defendant also contends admission of this evidence was error and that the prosecutor's closing argument based thereon should have been disallowed and the State's requested jury instruction on similar acts or crimes denied. On 14 September 1990, the District Attorney filed a motion for an order allowing the admission into evidence of other similar crimes and offenses, charged and uncharged, against the defendant which tend to prove one or more of the purposes set forth in Rule 404(b) of the North Carolina Rules of Evidence. Following an extensive pretrial hearing on 5 October 1990, the trial court ruled that the State would be allowed to present evidence of similar crimes. The court noted it would rule at a later time on what preliminary showing the State would be required to make for the evidence to be admitted.

Prior to the impanelment of the jury, the trial court heard arguments on defendant's related motion *in limine* to restrict the State from commenting during its opening statement upon the evidence of similar crimes committed by defendant against Kiser, Taylor, and Moore. The trial court allowed defendant's motion as to arguments concerning the arsenic poisoning of Kiser but denied the motion, and over defendant's continuing objection, allowed opening statements and evidence concerning the arsenic poisoning death

of Taylor and the near death of Moore. The court did not allow evidence of the levels of arsenic found in Kiser's body.

N.C.G.S. § 8C-1, Rule 404(b) provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Relying on *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986), and *State v. Breeden*, 306 N.C. 533, 293 S.E.2d 788 (1982), defendant contends that evidence of the prior death of Taylor and the arsenic-related illness of Moore was not admissible under Rule 404(b) because the State did not present direct evidence linking defendant as a participant in the prior crimes. This Court, however, rejected the requirement of a "direct evidence link" for purposes of Rule 404(b) in *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). Distinguishing *Breeden* the Court noted:

> *Breeden*, however, preceded the codification of N.C.R. Evid. 404(b). That rule includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence, exclusively. Neither the rule nor its application indicates that examples of other provisions—such as admissibility of evidence of other offenses to prove motive, opportunity, intent, preparation, or plan—rest solely upon direct evidence. *E.g.*, *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (circumstantial evidence of defendant's perpetration of "virtually identical" strangulation, proximate in time, showing preparation, plan, knowledge or identity). Under the statutory scheme of Rules 403 and 404, the concern that anything other than direct evidence of a defendant's identity in a similar offense might "mislead [the jury] and raise a legally spurious presumption of guilt" is met instead by the balancing test required by Rule 403: the critical inquiry regarding evidence of other offenses introduced for purposes of showing defendant's identity as the perpetrator of the offense for which he is being tried is not whether it is direct or circumstantial, but whether its tendency to prove identity in the charged

offense substantially outweighs any tendency unfairly to prejudice the defendant.

Id. at 459, 389 S.E.2d at 807.

Rule 404(b) is a rule of inclusion of relevant evidence with but one exception, that is, the evidence must be excluded if its only probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged. *State v. Stager*, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991). In *Stager*, this Court held that the proper test under Rule 404(b) is whether there was "substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged." 329 N.C. at 303-304, 406 S.E.2d at 890 (adopting the rationale of *Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771 (1988) (construing Fed. R. Evid. 404(b))). "[E]vidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986).

Murder by poisoning is inherently a surreptitious crime. Rarely are there eyewitnesses, thus, circumstantial evidence is often the only evidence to prove the State's case against an accused. In the present case, the State presented extensive circumstantial evidence marking the similarities between Reid's death and the arsenic poisoning death of Taylor and the arsenic poisoning of Moore. Three different men either married to or intimately involved with defendant died, or barely escaped death, from arsenic poisoning, an unusual cause of death. In each case defendant had motive (financial), opportunity (close relationship), and means (knowledge of and access to Anti-Ant). In each case medical evidence suggests that multiple doses of arsenic were administered to the victim over a long period of time, as opposed to one large fatal dose. In each case defendant was frequently alone with the victim in the hospital, and medical testimony suggests that certain of defendant's visits in which she fed the victim corresponded with an onset of symptoms characteristic of arsenic poisoning. In each case defendant was heard to say that she hated the victim or that the victim was cruel or evil. In the cases of Reid and Taylor, defendant was already seeing her next victim at the time of the arsenic assaults.

Under Rule 404(b) a prior crime is similar to the one charged if some unusual facts or particularly similar acts are present in both which would indicate that both crimes were committed by the same person. *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91. While these similarities need not be unique or bizarre, they must "tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* at 304, 406 S.E.2d at 891. Given the similarities between the crime charged and the other crimes presented by the State, we conclude that the evidence of the other offenses was relevant under Rule 404(b) as evidence tending to prove *modus operandi*, motive, opportunity, intent and identity of defendant as the perpetrator. Accordingly, the trial court did not err in admitting the evidence and in denying defendant's motion. This assignment of error is, also, overruled.

[8] Defendant next contends the trial court erred in allowing the State to introduce testimony for the sole purpose of generating sympathy for Reid's family. The trial court overruled defendant's objections to the testimony of Wanda B. Moss, a registered nurse in the ICU at North Carolina Baptist Hospital, who had cared for Reid during his final illness. Defendant argues that Nurse Moss' testimony concerning medical techniques and medical equipment used to treat Reid served merely to inflame the passions of the jury and elicit feelings of sympathy for the Reid family. Defendant also argues the testimony of Reid's son concerning his father's appearance and mental state reinforced the inflammatory affect of Nurse Moss' testimony. These contentions are meritless.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). "All relevant evidence is admissible" unless it is excluded by some other constitutional or statutory exclusionary rule. N.C.G.S. § 8C-1, Rule 402 (1992). Relevant evidence may, however, be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992).

The testimony of Nurse Moss was probative to show (i) that defendant had access to Reid in the hospital, (ii) that a correlation existed between defendant's feeding Reid and the onset of Reid's

symptoms, (iii) that Reid manifested symptoms associated with multiple system failure incident to arsenic poisoning, namely, swelling, rashes, skin splitting and acute paralysis, (iv) that Reid could swallow food notwithstanding the tubes, (v) that arsenic could have been introduced into Reid's body via the feeding tubes and (vi) finally, that Reid suffered inordinate pain over an extended period of time. The probative value of Nurse Moss' testimony outweighed any unfair prejudice to defendant. "[R]elevant evidence will not be excluded simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it as evidence." *State v. Eason*, 328 N.C. 409, 421, 402 S.E.2d 809, 814 (1991). Furthermore, the record discloses that similar evidence from other witnesses was admitted without objection. "[W]here evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost." *State v. Murray*, 310 N.C. 541, 551, 313 S.E.2d 523, 530 (1984). This assignment of error is without merit.

[9] Defendant next argues that the trial court erred in denying her motion for mistrial following an emotional display by Assistant District Attorney Janet Branch during questioning of Moore as a State's witness. Defendant asserts that Branch, after the first several questions, "burst into tears and after some 30 seconds fled the courtroom" and that such an emotional outburst by one of the prosecuting attorneys made it virtually impossible for defendant to receive a fair and impartial trial.

N.C.G.S. § 15A-1061 provides, in relevant part:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

The resolution of this issue lies within the sound discretion of the trial court. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985); *State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982); *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976).

> When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively

> to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. "Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial," and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

Blackstock, 314 N.C. at 244, 333 S.E.2d at 253 (quoting *State v. McGuire*, 297 N.C. 69, 75, 254 S.E.2d 165, 169-70, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979) (quoting *State v. Sorrells*, 33 N.C. App. 374, 376-77, 235 S.E.2d 70, 72, *cert. denied*, 293 N.C. 257, 237 S.E.2d 539 (1977))).

Although the transcript is silent as to what actually transpired, it appears from arguments of counsel that once Ms. Branch became unable to continue questioning the witness and before her tears became apparent to the court, she immediately excused herself from the courtroom. The trial court, upon request by the State, promptly called for a short recess and removed the jury from the courtroom. No further proceedings took place until the next morning when defense counsel moved for mistrial. Following arguments from both parties, the trial court denied defendant's motion for mistrial pursuant to N.C.G.S. § 15A-1061. In so ruling, the trial judge noted that

> while Ms. Branch was questioning the juror—excuse me—the witness that she did apparently become somewhat emotional and unable to ask further questions. There was no audible outburst. It was not clearly apparent to me whether she was crying or sick or what the problem was, but she did become unable to continue her questioning and did get up and leave

the courtroom. A recess was immediately called and the jury sent out.

When the jurors returned to the courtroom, the trial judge inquired whether Ms. Branch's inability to continue her questions for a brief period of time would in any way affect their decision in the case or their ability to be fair and impartial. No juror responded to these questions. Then by a show of hands, the jurors each affirmatively acknowledged that they could still base their "decision solely on the evidence that [they heard] from the witness stand and that nothing that happened or transpired would in any way prevent [them] from giving this defendant a completely fair and impartial verdict based solely on the evidence."

From our review of the transcript, the findings by the trial court and the responses of the jury members, we are satisfied the Assistant District Attorney's brief emotional display was not prejudicial to defendant. Ms. Branch removed herself from the courtroom quickly and quietly. The jury was immediately removed from the courtroom. In response to questions by the court, not one juror answered that the incident would prevent him or her from being able to give defendant a completely fair and impartial verdict based solely on the evidence. We conclude, therefore, that the trial court did not err in denying defendant's motion for mistrial. This assignment of error is overruled.

[10] Defendant next contends the trial court erred in failing to conduct a *"voir dire"* examination of the District Attorney's files to determine whether the State had provided defendant with required discovery pursuant to N.C.G.S. § 15A-903. During cross-examination of defendant's witness, Jean Leath, a jailer with the Alamance County Sheriff's Department, the prosecutor questioned her recollection of an interview between a former inmate, Terri Michelle Edwards, and Detective Benny Bradley, an investigator with the Burlington police department who was assigned to the case. In an effort to refresh her recollection, the prosecutor handed Ms. Leath a written report of the interview compiled by Detective Bradley. Defendant objected, arguing she had not been supplied a copy of the "statement" pursuant to N.C.G.S. § 15A-903(f)(5)(b) and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Defendant argued the report was *Brady* material because it tended to show that the State's witness, Terri Michelle Edwards, had committed perjury during her testimony the previous week. The court,

believing the document to be a "statement," ruled that the prosecutor should provide defendant with a copy of the report. Court was recessed until the following day.

When court convened the next morning, the prosecutor, relying on *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), declined to produce the report because it was not a "statement" of Terri Michelle Edwards. The term "statement" found in N.C.G.S. § 15A-903 includes "statements signed or otherwise adopted by the witness and 'substantially verbatim' recitals or oral statements which are contemporaneously recorded." *Vandiver*, 321 N.C. at 573, 364 S.E.2d at 375. The State argued that this document contains merely "a narrative [written by Detective Bradley at a later time] of what the witness had said. . . . It is not a transcription. It is not—has never been adopted, has never been subscribed to." Defendant then moved for the court to examine the document *in camera* to make the "determination of whether [the document] is a transcription or a field report" pursuant to *Vandiver*. The trial court sustained defendant's objection to the State's line of questioning about Detective Bradley's notes. At this point, the prosecutor agreed to produce the document but the trial court stated: "Well, I think it's probably too late now. We're ready for the jury and we're ready to get on with this trial." Defendant then renewed her earlier motion to strike Terri Edwards' testimony and instruct the jury to disregard it. The court denied the motion to strike.

Contrary to defendant's assertion on appeal, defendant did not request the court to conduct an *in camera* examination of the prosecutor's file to determine if the District Attorney had provided discovery as required. Rather defendant asked for an *in camera* inspection of Detective Bradley's report to determine if it was a statement or field report. The discovery statutes do not alter the general rule that the work product or investigative files of the District Attorney, law enforcement agencies, and others assisting in the preparation of the case are not subject to discovery. *State v. Brewer*, 325 N.C. 550, 574, 386 S.E.2d 569, 582 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). The trial court is under no obligation to *ex mero motu* examine the prosecutor's investigative files for discovery compliance. This assignment of error is without merit.

[11] In her next assignment of error, defendant argues that the trial court erred in allowing the State to introduce items of physical

evidence which had no conceivable bearing upon the question of defendant's guilt and served merely to inflame the passions of the jury. The objectionable items were a bottle of Anti-Ant introduced during the testimony of Peggy Vaughn and several medical appliances introduced during Nurse Wanda Moss' testimony.

The State called Ms. Peggy Vaughn to testify that she owned and operated the Atla Chemical Company in McLeansville which had manufactured the product Anti-Ant for over ten years. The active ingredient in Anti-Ant is arsenic. When the State asked her to identify State's Exhibit 30 as a bottle of Anti-Ant produced by her company, defense counsel objected and argued the lack of relevance of the bottle of Anti-Ant to this case. The trial court overruled the objection.

Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986). The evidence may be excluded if the trial court determines that an unfair prejudicial effect of the evidence substantially outweighs its probative value. N.C.G.S. § 8C-1, Rule 403 (1992). The identification of the bottle of Anti-Ant was not irrelevant in this case. The State's evidence tended to prove that defendant was familiar with the product as early as the 1970s; that the product was available in the Burlington area at all relevant times; and that defendant actually had a bottle of Anti-Ant in her possession during the summer of 1985, which she showed to Moore with the request that he purchase another bottle. The fact that the bottle of Anti-Ant was not the exact bottle used by defendant to poison Reid is immaterial. *See State v. Hunt*, 297 N.C. 258, 261-62, 254 S.E.2d 591, 594-95 (1979) (holding that trial court properly admitted bottles of rat poison purchased by the Sheriff of Anson County from the same drugstore where nine months before defendant had purchased the same product to show availability of the poison at all times relevant to the murder investigation). The trial court did not err in admitting the bottle of Anti-Ant into evidence.

[12] During her testimony, Nurse Wanda Moss[1] identified the following medical devices:

1. In a previous assignment of error we have found Nurse Moss' testimony concerning Reid's physical appearance, his symptoms, the medical procedures used in his care and treatment, and the timing of defendant's visits with a renewed onset of symptoms to be relevant in establishing the causal link between Reid's illness and defendant's actions.

Exhibit 58—Nasogastric tube
Exhibit 59—Endotracheal tube
Exhibit 60—Dobhoff tube
Exhibit 63—Swan-Ganz catheter
Exhibit 64—IV fluid bag
Exhibit 65—Syringe
Exhibit 67—Suction catheter

The court allowed each of the exhibits to be introduced into evidence for illustrative purposes only. Defendant now argues that the admission of these medical devices, together with detailed explanations concerning their use and purpose, served merely to inflame the passions of the jury and had no reasonable bearing on proving any issue in controversy. Relying on *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988), defendant argues that the inflammatory nature of the devices prejudiced the jury and eclipsed any probative value the items may have had.

Defendant's reliance on *Hennis* is misplaced. In *Hennis* after defendant stipulated the cause of the victim's death, the forensic pathologist projected on the wall directly above defendant's head twenty-six slides of the bodies taken during the autopsies and nine taken at the scene of the crime. Thereafter, eight- by ten-inch color photographs of the crime scene and the autopsy were presented one by one to the members of the jury. In ruling that the "thirty-five duplicative photographs published to the jury . . . were excessive in both their redundancy and in the slow, silent manner of their presentation," *Hennis*, 323 N.C. at 286, 372 S.E.2d at 528, the Court found the photographic evidence more prejudicial than probative and granted the defendant a new trial. However, we have not extended the rationale of *Hennis* to include other forms of physical evidence.[2]

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2. *See State v. Kyle*, 333 N.C. 687, 430 S.E.2d 412 (1993) (autopsy photographs); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993) (photographs taken during medical treatment), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994); *State v. Locke*, 333 N.C. 118, 423 S.E.2d 467 (1992) (photographs of decomposed bodies); *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992) (photographs of the graves and autopsies); *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992) (color photographs of crime scene and body); *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992) (autopsy photographs); *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991) (photographs of decomposed body); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (photographs of body); *State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991) (autopsy photographs); *State*

In the present case the medical devices were identified and introduced solely to illustrate the testimony of a registered nurse involved in Reid's primary care and treatment. The pieces of equipment were not excessively displayed and were not presented separately to the jury for a closer inspection. Defendant has failed to show how the single presentation of medical devices used in the daily attempts to save Reid's life rises to the level of excessive and repetitious use of the highly disturbing photographs found in *Hennis*. The medical equipment was introduced merely to illustrate the types of treatment received and the physical condition of Reid while at North Carolina Baptist Hospital. As discussed earlier, the probative value of this evidence substantially outweighs the possibility of any unfair prejudice to defendant. N.C.G.S. § 8C-1, Rule 403 (1992). This assignment of error is without merit.

[13] Defendant next contends the trial court erred in denying her motion to dismiss all the charges on the ground that the evidence was insufficient to warrant submission of the case to the jury. Defendant argues that since no poison was ever positively placed in her hands, it is mere speculation and conjecture that she was responsible for Reid's death; and a rational trier of fact could not justifiably find defendant guilty beyond a reasonable doubt. We disagree.

We have previously stated the standard for determining a motion to dismiss thusly:

> 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. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v.*

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v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991) (photographs of victims' bodies), *habeas corpus denied*, 794 F. Supp. 173 (E.D.N.C. 1992), *aff'd*, 987 F. 2d 1038 (4th Cir. 1993); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990) (photographs of crime scene); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (autopsy photographs); *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (photographs of crime scene, body, and hands of victim), *sentence vacated on other grounds in light of McKoy*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990); *State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989) (photographs of defendant and his accomplice).

> *Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In passing upon a defendant's 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. *Id.* at 237, 400 S.E.2d at 61. "The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both." *Id.* When the sufficiency of circumstantial evidence is questioned by a motion to dismiss, the issue for the trial court is "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *Id.*

When a murder is committed by means of poison, premeditation and deliberation are not elements of the crime of first-degree murder and premeditation and deliberation are hence irrelevant. Similarly, a specific intent to kill is not relevant to the crime of first-degree murder perpetrated by means of poison. *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986).

> A murder which is perpetrated by means of poison is deemed to be murder in the first degree. G.S. 14-17. And when the State undertakes to prosecute for such a murder, it has the burden of producing sufficient evidence to prove beyond a reasonable doubt (1) that the deceased died by virtue of a criminal act, and (2) that such criminal act was committed by the accused. *S. v. Palmer*, 230 N.C. 205, 52 S.E.2d 908, and cases cited. In other words, the State, in such case, and in this case, has the burden of producing sufficient evidence to prove beyond a reasonable doubt that the deceased died from poison, administered with criminal intent by the person charged.

State v. Hendrick, 232 N.C. 447, 453, 61 S.E.2d 349, 354 (1950).

Applying these principles to the evidence before us, we find that there is sufficient, competent evidence to show, and from which a reasonable juror could find beyond a reasonable doubt, that Reid died from arsenic poisoning administered by defendant through a series of repeated doses. The evidence showed that defendant had on at least three occasions possessed, attempted to

purchase or asked someone else to purchase an arsenic-based ant killer. All three of the men who were either married to or romantically involved with defendant died or nearly died as a result of arsenic poisoning. Defendant expressed negative feelings about Reid to her psychiatrist and in November 1985 stated that her feelings toward him "had turned to hate." Defendant denied taking food to Reid in the hospital, but the State presented evidence that she did. Further the medical evidence demonstrated a correlation between defendant's visits and the renewed onset of Reid's symptoms. Given this evidence and the infrequency of death by arsenic poisoning, we are satisfied "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979), *quoted in State v. Earnhardt*, 307 N.C. 62, 66-67 n.1, 296 S.E.2d 649, 652 n.1 (1982). This assignment of error is overruled.

[14] Defendant next assigns error to the trial court's refusal to give particular jury instructions which she contends were supported by the evidence and in conformity with the law. We find no error in the court's failure to give the requested instructions on reasonable doubt, identity of the perpetrator, dying declarations, and uncontroverted evidence.

Reasonable doubt. Defendant requested the following instruction on reasonable doubt:

> 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. 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.

The trial court declined to give the requested instruction, but advised it would use the reasonable doubt instruction in the Pattern Jury Instruction, which in substance covered everything defendant requested. The judge gave the following instruction from the Pattern Jury Instruction:

> Now, a reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence,

as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

As defendant correctly notes, trial courts are not required to use the exact language of a requested instruction; but if the request is a correct statement of the law, and supported by the evidence, the court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). The court is not required to define reasonable doubt absent a request, but if the court does so, the instruction must be a correct statement of the law. *State v. Wells*, 290 N.C. 485, 226 S.E.2d 325 (1976).

In light of this Court's recent decision in *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), finding error under *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), defendant's requested instruction arguably was not an accurate statement of the law. In *Bryant* we said, "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." 334 N.C. at 343, 432 S.E.2d at 297. The instruction in *Bryant* also contained the term, "honest substantial misgiving," which was not contained in defendant's requested instruction. However, recognizing that this Court recently declined to find error under *Cage* in *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994), where the trial court instructed in part that "[p]roof beyond a reasonable doubt means that you must be fully satisfied, entirely convinced or satisfied to a moral certainty of the Defendant's guilt," *id.* at 443-44, 439 S.E.2d at 582, we cannot say that the trial court erred in the present case.

The pattern instruction given by the trial court contained none of the offending *Cage* phrases, namely, "grave uncertainty," "actual substantial doubt," and "moral certainty," *Cage*, 498 U.S. at 40, 112 L. Ed. 2d at 341-42, or terms of similar import. Furthermore, this instruction correctly informed the jury that the standard for conviction beyond a reasonable doubt was certainty based upon the sufficiency of the evidence. Accordingly, the trial court did not err in refusing to give defendant's requested instruction on reasonable doubt.

[15] Identity of Perpetrator. Arguing that the State's evidence raised only a suspicion of defendant's guilt which was insufficient to convict, defendant requested the following instruction:

> Where all of the evidence in a case only engenders or raises the question, if Defendant did not commit the killing, then who did?, it is not sufficient evidence to sustain a conviction. Evidence which merely shows that Defendant had the opportunity to commit a criminal offense and which raises a suspicion that she did so is not sufficient evidence on which the jury may convict.

The court denied the motion, noting that it would give an instruction on circumstantial evidence which would be in substance what defendant requested. The trial court then instructed on direct and circumstantial evidence as follows:

> Now, there are two types of evidence from which you may find the truth as to the facts of a case, direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain or group of facts and circumstances indicating the guilt or the innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find her not guilty.

Defendant contends on appeal that her requested instruction taken in conjunction with her requested instruction on reasonable doubt would have focused the issue to be answered by the jury, namely, the identity of the individual responsible for Reid's death.

"[I]f a party requests an instruction which is a correct statement of the law and is supported by the evidence, the court must give the instruction at least in substance." *State v. Warren*, 327 N.C. 364, 371, 395 S.E.2d 116, 121 (1990). In this case the instruction as given, when read in conjunction with the entire charge to the jury, adequately links the State's burden to prove defendant's identity as the perpetrator of the crime with the quantum of proof

beyond a reasonable doubt. The trial court did not err in refusing to instruct the jury as requested by defendant.

[16] Dying Declarations. Defendant also requested the trial court to instruct the jury that "[t]he law recognizes that persons who believe themselves to be in danger of imminent death are highly unlikely to lie." During the charge conference, defense counsel argued this instruction was appropriate since there was conflicting evidence that Garvin Thomas had written a letter shortly before he died in which he confessed to the poisonings of Reid and Moore. The State responded there was no evidence showing that the letter was even written by Garvin Thomas. Defendant's own expert refused to opine that Thomas authored the letter while the State's expert, SBI Agent Currin, a questioned documents examiner and forensic chemist, ruled out Thomas as the author to a ninety-nine percent degree of certainty. Furthermore, the letter was offered into evidence by the State not as the dying declaration of Garvin Thomas but as evidence of defendant's "deceptive plan to throw suspicion away from herself."

Following this exchange, the trial court denied the request to instruct the jury on the inherent reliability of dying declarations but noted it would "certainly let both sides argue those positions." The court then instructed the jurors that they were the "sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all the other believable evidence in the case." Therefore, we find that the jury was properly instructed on the issue of credibility of the evidence and it was not error for the trial court to refuse to instruct on dying declarations.

[17] Uncontroverted Evidence. Lastly, defendant contends the trial court erred in failing to give the following instruction pertaining to uncontradicted evidence:

> You are not required to accept testimony, even when uncontradicted, and even if the witness is not impeached. You may decide, because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

Although the court denied defendant's request, our review of the jury charge reveals that the court gave the requested charge essentially verbatim. This assignment of error is without merit.

[18] In her next assignment of error, defendant contends the trial court erred in refusing to submit the lesser included offense of second-degree murder to the jury. Defendant argues that in not submitting second-degree murder, the court, in effect, allowed the jury to presume premeditation and deliberation. As a result, the trial court relieved the State of its burden of proof beyond a reasonable doubt. We disagree.

"[A]n intent to kill is not necessary to constitute the crime of first-degree murder when the murder was allegedly committed by means of poison. Any murder committed by means of poison is automatically first-degree murder." *State v. Johnson*, 317 N.C. 193, 204, 344 S.E.2d 775, 782 (1986). As noted earlier premeditation and deliberation are not elements of the crime and are, hence, irrelevant. *Id.* The evidence in this case supported each and every element of first-degree murder by poisoning. As in *Johnson*, the only evidence to the contrary was defendant's denial that she had committed the offense.

> If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate these elements other than the defendant's denial that he [or she] committed the offense, the defendant is not entitled to an instruction on a lesser offense.

317 N.C. at 205, 344 S.E.2d at 782. This assignment of error is overruled.

SENTENCING PROCEEDING

[19] In her next assignment of error, defendant contends the trial court erred in denying her motion to strike the death penalty from consideration by the jury and to impose a life sentence. At the hearing on the motion, defense counsel argued that the death penalty in our state is unconstitutional for a number of reasons—none of which included the reasonable doubt instruction requested by defendant during the guilt-innocence phase. The trial court denied the motion.

Now, for the first time, defendant focuses her argument on the court's failure to give her requested instruction on reasonable

doubt during the guilt-innocence phase of the trial as the basis of her contention that the court should strike the death penalty from the jury's consideration. Without citing any authority, defendant asserts the trial court's failure to give her requested reasonable doubt instruction contributed substantially to the action of the jury in returning a death recommendation and exposed defendant to an arbitrary and capricious sentencing proceeding. Even had defendant properly preserved this issue for appellate review, this assignment of error is without merit. As we have discussed above, the trial court did not err in failing to give defendant's requested instruction on reasonable doubt.

[20] Defendant further contends under this same assignment of error that the trial court erred in failing to explain to the jury that the standard of beyond a reasonable doubt applies to mitigating circumstances as well as to aggravating circumstances. This contention is an incorrect statement of law. "The burden of proof on the existence of any mitigating circumstance is on the defendant, and the standard of proof is by a preponderance of the evidence." *State v. Holden*, 321 N.C. 125, 158, 362 S.E.2d 513, 534 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). For the foregoing reasons, we overrule this assignment of error.

[21] Defendant next contends the trial court erred in submitting to the jury the aggravating circumstance that Reid's murder was committed for pecuniary gain. In support of her motion to dismiss pecuniary gain as an aggravating circumstance, defendant argued this circumstance should be submitted only when the *primary* motivation of defendant is financial gain. This assertion is not supported by the law. Our research reveals no authority and the cases cited by defendant fail to support such an argument.

Rather, "[t]he gravamen of the pecuniary gain aggravating circumstance is that 'the killing was for the purpose of getting money or something of value.' " *State v. Jennings*, 333 N.C. 579, 621, 430 S.E.2d 188, 210 (1993) (quoting *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)). This aggravating circumstance considers defendant's motive and is appropriate where the impetus for the murder was the expectation of pecuniary gain. *State v. Taylor*, 304 N.C. 249, 288-89, 283 S.E.2d 761, 785 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983). For purposes of determining the sufficiency

of the evidence, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bonney*, 329 N.C. 61, 80, 405 S.E.2d 145, 156 (1991).

The evidence presented at trial tending to show that defendant killed for financial gain includes, but is not limited to, the following: (i) in April of 1986, Reid visited his oldest son, Ray, and stated he had given defendant $10,000 because she was unemployed; (ii) Reid also informed Ray he wanted defendant to receive one-third of his estate should he die; (iii) defendant began telling others she was Reid's fiancee and displayed a family heirloom as an engagement ring; (iv) defendant, during a brief period of improvement in Reid's condition, commented to a nurse that she wanted to take care of Reid's interests and felt his will should be changed naming her as the executrix; (v) defendant contacted an attorney about coming to the hospital to have Reid execute a will; (vi) defendant asked a nurse to recopy a scrap of paper containing notes for the will; (vii) on 2 September 1986, an attorney came to the hospital, reviewed the new will, and executed the will for Reid since, due to his continuing state of paralysis, he was unable to sign his name; (viii) the new will named defendant as the executrix, gave her power of attorney and left her a one-third share of the estate; (ix) after Reid's death, defendant took Reid's sons to the bank to close out his account and told bank personnel that Reid was "doing fine"; (x) defendant told Reid's sons that since she was the executrix of their father's estate, she was entitled to one-third of the insurance proceeds; (xi) each of Reid's sons paid her a portion of their proceeds from the life insurance, representing her alleged one-third share, even though Reid had never changed the beneficiary designation to include her; (xii) Reid's sons later contacted the attorney for the estate and learned they were not obligated to share the insurance proceeds with defendant; (xiii) defendant refused to return the money the boys had shared with her; and (xiv) defendant received $45,384 from the insurance policy plus her distribution from the estate, all as a direct result of Reid's death. In our view, this evidence would permit a rational juror to find beyond a reasonable doubt that Reid's murder was committed for the purpose of pecuniary gain. *Cf., e.g., State v. Barfield*, 298 N.C. 306, 311-12, 259 S.E.2d 510, 519-20 (1979) (holding that evidence that defendant feared her boyfriend would learn she had forged his name on checks and turn her in to the law was sufficient

to support the jury's finding that defendant poisoned her boyfriend for pecuniary gain), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). This assignment of error is without merit.

[22] Defendant next contends the trial court erred in submitting to the jury the aggravating circumstance that the murder of Reid was "especially heinous, atrocious or cruel." Defendant asserts that the rationale underlying this Court's decision in *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980), should be applied. In *Cherry* we held that in felony-murder cases, the underlying felony could not be submitted as an aggravating circumstance to aggravate a defendant's sentence for first-degree murder. The reasoning of the decision is that the underlying felony becomes an element of the capital murder; and since a defendant convicted of felony murder would always have an aggravating circumstance pending under N.C.G.S. § 15A-2000(e)(5), the possibility exists that a defendant convicted of felony murder would be more likely to be sentenced to death than a defendant convicted on the basis of premeditation and deliberation.

In the present case defendant argues that since arsenic has an inherent propensity to inflict a prolonged and painful period of suffering prior to death, the jury should not be allowed to consider the especially heinous, atrocious, or cruel aggravating circumstance when poison was the method used to murder. At trial defendant did not argue this basis for not submitting the especially heinous, atrocious, or cruel aggravating circumstance and has, therefore, failed to preserve this issue for appeal. *See State v. Robbins*, 319 N.C. 465, 495-96, 356 S.E.2d 279, 297-98 (holding that where the theory had not been presented to the trial court and was being raised for the first time on appeal, it was not properly before the appellate court), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Nevertheless, in light of our inherent authority to suspend the rules in order "to prevent manifest injustice to a party," N.C. R. App. P. 2, we have elected to review defendant's argument.

The holding in *Cherry* is specifically confined to felony-murder cases and the rationale of the case is not applicable to poisoning deaths. Poisoning is the element of the offense of first-degree murder perpetrated by means of poisoning. N.C.G.S. § 14-17 (1993). The act of poisoning itself makes the killing first-degree murder. *Id.*

The fact that the poison is administered in small doses over an extended period of time thereby causing excruciating and prolonged pain and suffering is not essential to prove the offense. Nor is the type poison chosen, be it a slow acting or fast acting agent, an element of the offense. Accordingly, we decline to extend the holding in *Cherry* to murder by poisoning.

Having so held, we conclude that this aggravating circumstance was properly submitted.

> "While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word 'especially' the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection."

State v. Oliver, 302 N.C. 28, 59, 274 S.E.2d 183, 203 (1981) (quoting *State v. Goodman*, 298 N.C. 1, 24-26, 257 S.E.2d 569, 585 (1979)). The evidence heretofore summarized depicts a pitiless murder perpetrated over a period of ten months during which the deceased suffered prolonged physical agony including swelling, paralysis, skin splitting, loss of speech, and multiple systems failure necessitating intrusion into his body with tubes and paraphernalia. As defendant stated in her brief, "Reid was subjected to a debilitating, lingering and painful illness before he finally died in North Carolina Baptist Hospital." Based on the evidence in the record before this Court, we are satisfied this aggravating circumstance was properly submitted to the jury. This assignment of error is overruled.

Next, defendant contends the trial court erred by imposing a sentence of death not supported by the evidence. Defendant's argument is based on a contention that one or both of the aggravating circumstances were improperly submitted to the jury. However, as we have noted, the trial court properly submitted the aggravating circumstances that the murder was committed for pecuniary gain and was especially heinous, atrocious, or cruel. This assignment of error is overruled.

PROPORTIONALITY

[23] Having found no error in defendant's trial and capital sentencing proceeding, we are next required by statute to review the entire record and determine (i) whether the record supports the

jury's finding the aggravating circumstances on which the court based its sentence of death; (ii) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (iii) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993); *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).

The jury found in aggravation (i) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), and (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). We have held the evidence supports the jury's finding both of these aggravating circumstances. Having thoroughly reviewed the record, transcripts, and briefs submitted by the parties, we also find nothing to suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally we must 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. 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). In conducting this proportionality review, 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.

Id. Only cases found to be free of error in both the guilt-innocence and penalty phases are included in the pool, but the Court is not bound to give a citation to every case in the pool of similar cases. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (1993), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994).

> 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. McCollum, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (1993) (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)). When our review reveals that juries have consistently returned death sentences in those similar cases, a strong basis exists for concluding that the death sentence under consideration is not excessive or disproportionate. However, when juries have consistently returned life sentences in the similar cases, a strong basis exists for concluding that the sentence under consideration is excessive or disproportionate. *State v. Syriani*, 333 N.C. 350, 401, 428 S.E.2d 118, 146.

Significant characteristics of defendant's case include (i) the murder of her fiance which the jury found to be for pecuniary gain; (ii) skillful execution of a systematic plan, requiring advance preparation, to poison the victim repeatedly; (iii) substantial evidence that defendant used the same means and method to murder her first husband and to attempt to murder her second husband; (iv) the conscienceless and pitiless vigil of Reid's indescribable physical agony for the ten months leading to his death which the jury found to be especially heinous, atrocious, or cruel; and (v) knowledge that she, and she alone, could prevent her victim's death.

No statutory mitigating circumstances were submitted to the jury. In mitigation, the jury considered fifteen nonstatutory mitigating circumstances but deemed only three to exist and have mitigating value. These three included (i) upon being informed of the warrant for her arrest, defendant peacefully submitted herself in conformance with her duty; (ii) defendant demonstrated concern and kindness for others in her community; and (iii) defendant provided well for the needs of her children while they were growing up. The value of these mitigating circumstances in assessing defendant's culpability for the crime is minimal.

This Court has found the death penalty to be disproportionate on seven occasions.[3] Only two of these seven cases involved the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). These two cases are not similar to the instant case. Of the remaining five cases, in only one, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find multiple aggravating circumstances. In finding the death sentence in *Young* to be disproportionate, this Court focused on the jury's failure to find either that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons or that the crime was especially heinous, atrocious, or cruel. *McCollum*, 334 N.C. at 241, 433 S.E.2d at 162.

Significant dissimilarities between this case and *Stokes* include that (i) defendant Stokes was convicted on a felony-murder theory; defendant Moore was convicted of murder by poisoning; (ii) defendant Stokes was seventeen years old; defendant Moore was fifty-three years old; and (iii) in *Stokes* there was substantial mitigating evidence that defendant suffered from impaired capacity to appreciate the criminality of his conduct and that he was under the influence of a mental or emotional disturbance at the time of the murder; in the present case the jury found no statutory mitigating circumstances and only three nonstatutory mitigating circumstances.

Significant dissimilarities between this case and *Bondurant* include that (i) the jury in *Bondurant* found in aggravation of the murder only that the crime was especially heinous, atrocious, or cruel; in this case the jury also found that the murder was committed for pecuniary gain; and (ii) defendant Bondurant immediately exhibited remorse and concern for the victim's life by helping him get medical treatment; whereas, defendant Moore showed no sign of remorse or regret as she watched and anticipated the effects of the deadly poison she had administered to the man whom she was engaged to marry. Moreover, the facts in *Bondurant*

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3. *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 by 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); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

"demonstrate that defendant did not coldly calculate the commission of this crime for a long period of time as did the defendant in *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh'g denied*, 448 U.S. 918 (1980)." *State v. Bondurant*, 309 N.C. at 693, 309 S.E.2d at 182.

The most analogous case for comparison to this case in terms of the crime committed is *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).[4] In *Barfield*, the defendant, a middle-aged woman, poisoned her boyfriend, Stewart Taylor, by placing arsenic in his tea and beer out of fear he would "turn her in" to law enforcement officials for forging checks to herself on his checking account. Evidence was introduced showing that Barfield also poisoned others to death. In aggravation, the jury found that (i) the murder of Stewart Taylor was committed for pecuniary gain; (ii) the murder of Stewart Taylor was committed to hinder the enforcement of the law; and (iii) the murder was especially heinous, atrocious, or cruel. During defendant Moore's sentencing hearing, the jury found two of these same aggravating circumstances to exist. In *Barfield*, the jury rejected the two statutory mitigating circumstances that (i) the murder was committed while Barfield was under the influence of mental or emotional disturbance; and (ii) Barfield's capacity to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was impaired. In defendant Moore's sentencing hearing, no statutory mitigating circumstances were even submitted to the jury. The jury found only three nonstatutory mitigating circumstances with minimal mitigating effect.

In reviewing *Barfield*, this Court stated:

> The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant.

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4. In *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979), this Court concluded that the dates of the murderous acts rather than the date of death were determinative of when the murder was committed. As a result, Rebecca Detter's death sentence was set aside and a life sentence imposed since Detter, in all instances, had administered arsenic poisoning to her husband prior to 1 June 1977, the effective date of N.C.G.S. § 15A-2000 (1978).

State v. Barfield, 298 N.C. at 355, 259 S.E.2d at 544. From our comparison of this holding with the instant case, we, likewise, cannot say that the death sentence given defendant Moore was excessive or disproportionate, considering both the crimes and the defendant.

CONCLUSION

We hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. The death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The death sentence imposed is not disproportionate to the penalty imposed in similar cases.

NO ERROR.

STATE OF NORTH CAROLINA v. JERRY WAYNE CONNER

No. 219A91

(Filed 4 March 1994)

1. Jury § 235 (NCI4th)— capital trial—death qualification of jury

The trial court properly denied defendant's motion to prohibit the State from death qualifying the jury during the guilt phase of a capital trial.

Am Jur 2d, Jury § 290.

2. Jury § 96 (NCI4th)— capital trial—jury voir dire—order prohibiting questions previously asked by court—statutory violation—harmless error

The trial court's pretrial order in a capital trial forbidding defense counsel, under penalty of contempt, to repeat on *voir dire* any questions previously asked by the court unless the answer given made further questioning relevant violated N.C.G.S. § 15A-1214(c). However, this error did not constitute the denial of a constitutional right and did not result in prejudice entitling defendant to a new trial where the scope of the questions propounded by the court was so general as to allow defense counsel ample opportunity for further inquiry to determine whether any prospective juror harbored preconceived ideas

or beliefs; the record reveals numerous occasions when defense counsel was allowed to probe further into each potential juror's understanding of the burden of proof and the juror's ability to follow the law as explained by the court in determining guilt or innocence and, if necessary, the penalty to be imposed; and the record contains no questions not related to sentencing which defendant was prohibited from asking a person ultimately impaneled as a juror.

Am Jur 2d, Jury §§ 195 et seq.

3. Jury § 139 (NCI4th)— jury voir dire—fairness of burden of proof—question properly excluded

The trial court did not err in sustaining the State's objection to defense counsel's question as to whether potential jurors believed it was fair for the law to place a higher burden of proof on the State than on defendant since the role of a juror is not to weigh and make policy decisions concerning the fairness of the law, and an answer to the question thus would not reveal pertinent information bearing upon a potential juror's qualifications to serve as an impartial juror. Even if the trial court erred in sustaining the objection, the error was not prejudicial where each prospective juror had just answered that he or she understood that defendant did not have the State's burden of proof and would not hold defendant to the State's burden of proof, and the court immediately thereafter inquired about the jurors' ability to follow carefully the court's instructions on the parties' burden of proof.

Am Jur 2d, Jury § 197.

4. Jury § 132 (NCI4th)— jury voir dire—exclusion of question about election not to testify—use of peremptory challenge

Defendant was not prejudiced by any error in the trial court's refusal to permit defense counsel to ask a potential juror whether she would "hold it against" defendant if defendant elected not to testify where the juror was peremptorily challenged by defendant.

Am Jur 2d, Jury § 197.

5. Jury § 243 (NCI4th)— capital trial—peremptory challenges—pretrial increase not allowed

The trial court had no authority to allow defendant additional peremptory challenges at the pretrial stage of a capital

trial. Even if the trial court had such authority, defendant was not prejudiced by the denial of his pretrial motion for additional challenges where defendant had three unused peremptory challenges when the jury, including the alternates, was impaneled. N.C.G.S. § 15A-1217.

Am Jur 2d, Jury §§ 242 et seq.

6. Jury § 190 (NCI4th) — denial of challenge for cause — exhaustion of peremptory challenges

A defendant cannot show prejudice by the denial of a challenge for cause until he has exhausted his peremptory challenges, has made a renewed challenge for cause which was denied, and has requested and been denied an additional peremptory challenge. N.C.G.S. § 15A-1214(h).

Am Jur 2d, Jury § 218.

7. Homicide § 552 (NCI4th) — first-degree murder — second-degree instruction not required

There was no evidence of a lack of premeditation and deliberation in a prosecution for two first-degree murders which would require the trial court to instruct the jury on second-degree murder where the evidence tended to show that defendant drove from his home in Ahoskie to a store outside Gatesville with the intention of killing the store owner for money; he entered the store on at least one earlier occasion hoping to find the store empty of customers; he devised a scheme posing as a DEA agent to clear the parking lot; he then entered the store carrying a 12-gauge sawed-off shotgun; as he approached the owner, he told her he was going to kill her; he forced her onto a lounge chair behind the counter and shot her from a very short distance; and when startled by the appearance of the owner's daughter entering the main room of the store, he held her at gunpoint, raped her, and then shot and killed her also.

Am Jur 2d, Homicide § 526.

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

The trial court's instruction defining reasonable doubt as "an honest substantial misgiving based upon the jury's reason and common sense and reasonably arising out of some or all

of the evidence that has been presented or the lack or insufficiency of that evidence" did not reduce the State's burden of proof in violation of defendant's constitutional right to due process.

Am Jur 2d, Trial §§ 829 et seq.

9. **Homicide § 489 (NCI4th)— lack of provocation—consideration on question of premeditation and deliberation—propriety of instruction**

The trial court's instruction that lack of provocation on the part of the victim is one of the circumstances which may be considered by the jury on the question of whether defendant acted with premeditation and deliberation did not impose upon defendant the burden to produce evidence of provocation in order to avoid conviction and thus did not relieve the State of its burden of proving every element of the crime charged beyond a reasonable doubt. Additionally, the instruction was justified because the evidence failed to show legal provocation sufficient to negate premeditation and deliberation where the only possible evidence of provocation was defendant's statement to an officer that he had been drinking when he entered a store; a white male taunted him and the store owner called him a troublemaker; defendant challenged the white male to fight outside, but the white male left the premises; and defendant obtained a shotgun from his car, reentered the store, shot and killed the owner, and then raped and killed her daughter.

Am Jur 2d, Homicide § 500.

10. **Criminal Law § 751 (NCI4th)— instructions—ascertainment of truth as aim of trial—reasonable doubt standard**

The trial court's instruction that the highest aim of every legal contest is the ascertainment of the truth could not have misled a reasonable juror concerning the reasonable doubt standard and was not improper.

Am Jur 2d, Trial § 827 et seq.

11. **Jury § 148 (NCI4th)— capital trial—automatic vote for death penalty—voir dire questions not allowed—due process violation—prejudicial error**

Defendant's due process right to a capital sentencing proceeding by a qualified, impartial jury was violated by the

trial court's refusal to permit defense counsel to ask some of the prospective jurors whether their support for the death penalty was such that they would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder and whether their belief in the death penalty would make it difficult for them to follow the law and consider life imprisonment for first-degree murder. Although defense counsel did not use the words "automatically" or "always," the gist of the questions was an attempt by counsel to determine whether each prospective juror was willing to consider life imprisonment in the appropriate circumstances or would automatically vote for death upon conviction. General "follow the law" questions by the trial court were insufficient to determine any predilection of a juror toward imposing the death penalty, and the trial court's failure to allow defendant to "life qualify" all of the jurors who sat on the jury in defendant's trial constituted prejudicial error entitling defendant to a new sentencing hearing.

Am Jur 2d, Jury § 197.

12. Jury § 148 (NCI4th) — capital trial — voir dire — appropriateness of death penalty — improper question

The trial court did not err by refusing to permit defense counsel to ask prospective jurors in a capital trial whether they felt that the death penalty is the appropriate penalty for someone convicted of first-degree murder since this question was overly broad and called for a legislative, policy decision.

Am Jur 2d, Jury § 197.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing death sentences entered by Watts, J., at the 15 April 1991 Criminal Session of Superior Court, Gates County. Defendant's motion to bypass the Court of Appeals and to review the judgments entered on the additional felony convictions for first-degree rape and robbery with a dangerous weapon was allowed by the Supreme Court on 6 August 1992. Heard in the Supreme Court 16 March 1993.

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

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

PARKER, Justice.

Defendant, Jerry Wayne Conner, was indicted for the 18 August 1990 first-degree rape and first-degree murder of Linda Minh Rogers ("Linda"), the first-degree murder of her mother, Minh Linda Luong Rogers ("Minh"), and robbery with a dangerous weapon. He was tried capitally at the 15 April 1991 Criminal Session of Superior Court, Gates County. The jury found him guilty as charged and, following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, recommended defendant be sentenced to death for both first-degree murder convictions. Judgments of death on the two murder convictions were entered on 30 April 1991; defendant was also sentenced to life imprisonment for the first-degree rape and to forty years' imprisonment for robbery with a firearm. An order staying execution of the death sentences was entered on 7 May 1991 pending the conclusion of this appeal.

The State's evidence at trial tended to show that on the evening of 18 August 1990, Harold Lowe, his girlfriend, Kathy Winslow, and Chris Bailey stopped at Rogers' Grocery outside Gatesville, North Carolina, at approximately 9:30 p.m. They parked in the lot under a streetlight facing the highway waiting for a friend, Will Harrell, to arrive. After a few minutes, Harold Lowe saw Minh Rogers and an unknown white male leave the store. Minh and the man talked for a few minutes and then Minh Rogers reentered the building. Chris Bailey testified that he first noticed the white male walking from the store toward a white car parked in the lot. A few moments later, that same white male was carrying a shotgun and walking toward the vehicle in which Bailey was sitting.

Not having paid further attention after Minh Rogers reentered the store, Mr. Lowe testified he was startled when that same man appeared at the passenger window of his truck holding "some kind of identification with a picture." The man stated he was an agent with DEA and that undercover officers were preparing to execute a drug bust in the immediate vicinity in an effort to seize over $1.5 million worth of cocaine. He further informed Mr. Lowe

that if he did not want to be an accessory to the crime, he and his friends should leave the premises immediately. Lowe, Bailey, and Winslow each positively identified defendant at trial as the man who approached their car and warned them to leave the parking lot.

Will Harrell testified that he stopped by Rogers' Grocery at approximately 9:50 p.m. on the evening of 18 August 1990. As he entered the store, he recognized the owner of the establishment talking to a white male he did not know. The white male was of medium build, was approximately five-feet ten inches tall, and was wearing a plaid shirt and a baseball cap. At trial, Mr. Harrell positively identified defendant as the man he saw in Rogers' Grocery on the night of 18 August 1990.

SBI Agent Eric A. Hooks testified to statements made by Daniel Oliver Croy in a series of interviews beginning on the morning of 19 August 1990. In essence, Mr. Croy told various investigating officers that he stopped by Rogers' Grocery on the evening of 18 August 1990 after dinner. He "drank some beer, sat around, and talked with Linda [sic] Rogers, [and] her daughter." During this time, a white stocky male of medium height, thirty to thirty-five years of age, entered the store, made some purchases, chatted for a while with Minh and then left. Mr. Croy noted that the individual had a moustache and was wearing a baseball cap. Mr. Croy left the grocery store around 8:45 p.m.; and as he was backing out of his parking space, the same man he had seen inside Rogers' Grocery drove up beside him on the driver's side of the car. The man told Mr. Croy that he was an "SBI agent working with DEA on a big drug deal that was going down in the area." At one point during the conversation, the man asked Mr. Croy if he would like to see his credentials. He then held up a pump shotgun and said "there's my credentials." Mr. Croy left shortly thereafter but recalls that the lights in the store were on and the store was apparently still open.

John Lambert, a part-time employee of Rogers' Grocery, testified that on the morning of 19 August 1990, he arrived at the store at 9:00 a.m. only to find he had left his key at home. After retracing his steps, he returned to the store with the key and noted that the door lock didn't make the usual clicking sound. He then realized the door had apparently been left open overnight. When he entered the store, Mr. Lambert found the bodies of Minh and Linda Rogers.

Deputy George M. Ryan of the Gates County Sheriff's Department described the crime scene. The nude body of Linda Rogers was lying on her back in a large pool of blood concentrated around her neck, shoulders, and abdomen. He noted a gaping gunshot wound in her upper chest and that the teeth in her mouth were "just shattered." Minh Rogers' body was found on a lounge chair behind the counter. Although she was fully clothed, her pullover sweater had been pulled up just below her breasts and her shorts had been unzipped and pulled down. She was covered in blood. After securing the scene, Deputy Ryan notified the SBI.

Dr. Page Hudson, former Chief Medical Examiner for the State of North Carolina, performed the autopsies on 20 August 1990. He stated that the cause of death for Minh Rogers was a gunshot wound to the head causing massive destruction of the skull and brain. He further opined that the shot was fired from a very short distance—two to four feet. Spermatozoa were present in the vaginal cavity of Linda Rogers indicating that she had been sexually active just prior to her death. The younger woman died from a "shotgun wound to the under surface of chin and neck."

On the morning of 31 August 1990, SBI Special Agent Malcolm McLeod, Gates County Deputy Sheriff George Ryan, and Hertford County Deputy Sheriff Ronnie Stallings questioned defendant concerning the murders at Rogers' Grocery on the night of 18 August. After an initial attempt to mislead the officers, defendant related the following sequence of events. On the day defendant was fired from his job as a truck driver with Rose Brothers (either the thirteenth or fourteenth of August 1990), he stopped at the Fast Fare in Murfreesboro. He engaged in an extensive conversation with a black male whom he did not know personally but had seen on numerous occasions. The man was approximately six-feet tall, weighed 240 pounds, and was in his thirties with slightly graying hair. The conversation centered upon whether defendant was interested in making some quick, "illegal money." Even after being offered $7000 to kill a "Japanese woman who ran a store in Gates County," defendant informed the man he was not interested and left. However, as financial problems began to arise, defendant drove back to Murfreesboro to locate the black male. When he was unable to find him, defendant decided to kill the woman and try to collect the money afterwards.

Defendant further informed the officers that on Saturday, 18 August, he drove to Gates County, located Rogers' Grocery, and went inside. He left shortly thereafter since there were several customers inside. On the next several times he drove by, there were vehicles in the parking lot. When he finally found the lot relatively empty, he parked his car and entered the store carrying his 12-gauge pump, sawed-off shotgun with pistol grips. When he walked in, defendant told Minh Rogers he was going to shoot her. She laughed. He then forced her to lie down upon a lounge chair located behind the counter. When she attempted to rise, he shot her in the upper chest area from a distance of approximately eight (8) inches. Upon being startled by the victim's teenage daughter entering the main room of the store, defendant held her at gunpoint. After searching her for a weapon, he ordered her to take off her clothes. He then raped Linda Rogers and shot her in the upper chest. Defendant remembered talking with some people in the parking lot of Rogers' Grocery but does not recall identifying himself as a law enforcement officer. Before fleeing the scene, defendant picked up a dark colored briefcase, a bank bag, and the money from the cash register.

Defendant modified this version of his confession to state that, on 18 August 1990, he had stopped in Rogers' Grocery to get something to drink. An older white male and the woman who owned the store started to tease him—calling him "cowgirl" or "cowboy". He became angry, left the store, and went to Alvin Riddick's home where he stayed until after dark. While drinking two bottles of George Dickel whiskey, defendant became more and more upset about his treatment at the store earlier in the day. He returned to the store finding only Minh Rogers and the white male present. As he entered the store, the white male called him a "dickhead." Defendant suggested the two men go outside and fight. Outside, however, the unidentified white male indicated he was not interested in fighting and left. Defendant then proceeded to kill the two women as he previously indicated.

The State produced extensive physical evidence through numerous witnesses including SBI agents, FBI agents, and deputies of the Gates and Hertford County Sheriffs' Departments which corroborated the testimony of the prosecution witnesses and the main elements of defendant's confession. However, a recital of these facts is unnecessary for a full understanding of this opinion. Addi-

tional facts, when needed, will be set forth with respect to the various issues.

Defendant presented no evidence during the guilt-innocence phase of the trial. The jury found defendant guilty of two counts of first-degree murder based on both premeditation and deliberation and the felony-murder rule, one count of first-degree rape, and one count of robbery with a firearm.

During the capital sentencing proceeding, on both counts of first-degree murder, the jury found as aggravating circumstances that the murder was committed while defendant was engaged (i) in the commission of a felony and (ii) in a course of conduct which included the commission by defendant of other crimes of violence against another person. In mitigation of the murder of Linda Rogers, the jury found the statutory mitigating circumstance that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and the nonstatutory mitigating circumstance that defendant suffers from a psychosexual disorder. In mitigation of the murder of Minh Rogers, the jury found the nonstatutory mitigating circumstances that defendant voluntarily waived his constitutional rights to remain silent and to have the assistance of an attorney on the morning of 31 August 1990 and that he cooperated with law enforcement officers in addition to confessing guilt. Based upon a finding on both counts that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, the jury recommended that defendant be sentenced to death for the murders of Minh and Linda Rogers.

On appeal defendant has brought forward numerous assignments of error. We find no error meriting reversal of defendant's convictions; however, for error in jury selection as discussed herein, defendant is entitled to a new capital sentencing proceeding.

I.

PRETRIAL AND JURY SELECTION

[1] Defendant first contends that he is entitled to a new trial because the trial court erred in overruling his motion for a nondeath qualified jury. Prior to trial, defense counsel moved the court to prevent the State from death-qualifying the jury. While acknowledging "that the law is against us," counsel argued that "death qualify-

ing" a jury prior to a determination of guilt or innocence enhances the odds of impaneling a jury prone to convict. This issue was settled by the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). *See State v. Taylor*, 304 N.C. 249, 259, 283 S.E.2d 761, 769 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). This assignment of error is overruled.

[2] Defendant also contends the trial court erred in entering a pretrial order forbidding defendant, "under penalty of contempt," to repeat on *voir dire* any questions previously asked by the court unless the answer given made further questioning relevant. The order set forth, in pertinent part:

> 2. VOIR DIRE
>
> . . . .
>
> E. Counsel will be required to observe the limits of jury voir dire set out in *State vs. Phillips*, 300 N.C. 678 (1980) and *State vs. Vinson*, 287 N.C. 326 (1972); in this regard, counsel are specifically admonished (under penalty of contempt) that they shall not:
>
> . . . .
>
> 7. Repeat questions previously asked by the Court unless the answer given makes further questioning relevant.

During a pretrial conference, out of the presence of the venire, defense counsel raised concerns about the impact of this restriction, among others, on defendant's ability to question each juror and directed the court's attention to N.C.G.S. § 15A-1214(c). Thereafter, defendant entered a general exception to entry of the order. Thus, contrary to the State's contention, this assignment of error is subject to harmless error, not plain error, analysis.

The statute applicable to *voir dire* provides:

> (c) The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge. The prosecution or defense is not

> foreclosed from asking a question merely because the court has previously asked the same or similar question.

N.C.G.S. § 15A-1214(c) (1988). Defendant contends that the provision of the pretrial order prohibiting counsel, under penalty of contempt, from taking advantage of a right expressly given by the statute constitutes error. We agree.

"The purpose of the *voir dire* examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial." *State v. Honeycutt*, 285 N.C. 174, 179, 203 S.E.2d 844, 848 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976) (quoting *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759 (1965)).

This Court has held that "counsel's examination into the fitness of the jurors is subject to the trial judge's close supervision. The regulation of the manner and extent of the inquiry rests largely in the trial judge's discretion." *State v. Bracey*, 303 N.C. 112, 119, 277 S.E.2d 390, 395 (1981); *State v. Jackson*, 284 N.C. 321, 325, 200 S.E.2d 626, 629 (1973). Nevertheless, "part of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. ---, ---, 119 L. Ed. 2d 492, 503 (1992). In order to probe any such specific concerns, a defendant on trial for his life should be given great latitude in examining potential jurors. *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975), *judgment vacated in part*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976).

Our legislature acknowledged the significance of an adequate *voir dire* in enacting N.C.G.S. § 15A-1214(c). The trial court's pretrial order is in direct contravention of the language and meaning of the statute. We find, therefore, that the restriction prohibiting defendant from asking questions previously asked by the court violated N.C.G.S. § 15A-1214(c) and was error.

We next must determine the prejudicial effect, if any, of the error. Defendant contends the error requires a new trial because the nature of the error made preservation of a record to demonstrate prejudice impossible. To support his argument defendant cites *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1984) (holding prejudicial

error to preclude second counsel from arguing to jury in capital case in violation of N.C.G.S. § 84-14); *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988) (holding prejudicial error to try defendant in capital case without appointing second counsel in violation of N.C.G.S. § 7A-450(b1)); and *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) (holding prejudicial error not to return the jury to the courtroom and to exercise discretion when jury had a question or request during deliberations in violation of N.C.G.S. § 15A-1233(a)). These cases are distinguishable from the present case, however. Unlike *Mitchell*, *Hucks*, and *Ashe*, the statutory violation in this case does not circumvent a substantial right and the prejudicial effect of the violation is not a matter of speculation. To the contrary, the questions propounded by the trial judge and by counsel are readily reviewable in the record. The only questions not permitted by the offending order were ones asked and answered. The error does not constitute denial of a constitutional right but rather a right granted by statute. The standard for determining prejudicial error is, therefore, governed by N.C.G.S. § 15A-1443(a), and the determinative issue is whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1988).

The transcript discloses that the court asked every potential juror slight variations of the following litany of questions before turning the *voir dire* over to the prosecutor and defense counsel:

> [Name], if you are selected to serve as a juror in this case, can and will you follow the law as it will be explained to you by the Court in deciding whether defendant is guilty or not guilty of either-or both of these charges of first degree murder or any lesser homicide which the Court might submit to you?
>
> . . . .
>
> Secondly, if you are satisfied beyond a reasonable doubt of those things necessary to constitute first degree murder upon either-or both of the charges, can and will you vote to return a verdict of guilty of first degree murder even though you know that death is one of the possible penalties that can be accrued from such a verdict?
>
> . . . .

> Considering your personal beliefs about the death penalty, [Name], state whether you would be able or unable to vote for a recommendation of the death penalty even though you are satisfied beyond a reasonable doubt the State has met its burden of proving the three things required by law concerning the aggravating and mitigating circumstances?
>
> . . . .
>
> And if the defendant is convicted of first degree murder, can and will you follow the law of North Carolina as to sentence recommendation to be made by the jury as the Court explains it to you at the appropriate time?

The scope of the questions propounded by the court was so general as to allow defense counsel ample opportunity for further inquiry to determine whether any prospective juror harbored preconceived ideas or beliefs. Our review of the transcript reveals numerous occasions when defense counsel was allowed to probe further into each potential juror's understanding of the burden of proof and their ability to follow the law as explained by the court in determining the guilt or innocence of defendant and, if necessary, the penalty to be imposed.

The record also demonstrates that defendant was freely permitted to expand upon and repeat questions previously propounded by the court. Except for the question concerning burden of proof discussed in a later assignment of error, the record is devoid of any questions not related to sentencing which defendant was prohibited from asking a person ultimately impaneled as a juror. Defendant has preserved no other questions in the record. For these reasons, on the record before this Court in this case, we hold that defendant has failed to demonstrate that the error resulted in prejudice entitling him to a new trial.

[3] Defendant next assigns error to the trial court's failure to allow defense counsel to question potential jurors concerning their feelings about the law of burden of proof and defendant's right not to testify during the trial.

Defendant lists six instances where he contends the trial court improperly sustained the State's objections to questions propounded to a juror concerning whether or not he or she believed it was "fair" for the State to be burdened with the "reasonable doubt" standard. A review of the record reveals that four of the objections

were made and sustained based on the form of the question propounded to the potential juror on the State's burden of proof. The trial court noted the problem and defense counsel rephrased the question. In one of the two remaining instances where objections were made and sustained to questions attempting to ask the juror if he or she felt it was fair for the law to place a higher burden of proof on the State than on defendant, the juror was peremptorily challenged by defendant, and as will be discussed later, defendant did not exhaust his peremptory challenges.

In the remaining instance, the following colloquy occurred:

> MR. WARMACK: And what I want to ask you is this. Will you hold us to our burden of proof and not require—not hold us to the State's burden of proof? We do not have to prove as much to you as the State does. Do you understand that?
>
> THE JURORS: Yes.
>
> MR. WARMACK: Do any of you have any problems with that? Does anybody think that's not fair or that's not the way it ought to be?
>
> MR. PARRISH: Objection.
>
> THE COURT: Sustained. I think the ultimate question, members of the jury, will you be able to follow the Court's instructions if we reach that point in the trial? Will you follow the instructions which I have to give you with regard to burdens that would be upon both sides and follow those instructions carefully and closely?
>
> THE JURORS: Yes, sir.

We note first that of the five potential jurors being questioned at that time, only one was not peremptorily removed by defendant. Even giving defendant wide latitude in examining potential jurors, the question to which the objection was sustained has no reasonable expectation of revealing pertinent information bearing upon the potential juror's qualifications to serve as an impartial juror. The role of the juror is not to weigh and make policy decisions concerning the fairness of the law. Each prospective juror had just answered that he or she understood that defendant did not have the State's burden of proof and would not hold defendant to the State's burden of proof. In view of this question and answer, assuming arguendo that sustaining the objection to the next question was error, the

court's specific inquiry concerning the jurors' ability to follow carefully the court's instructions on the parties' burden of proof adequately addressed the issue.

[4] As to defendant's argument concerning questions relating to defendant's right not to testify, defense counsel repeatedly attempted to ask a potential juror whether or not she would "hold it against" defendant if defendant elected not to testify. The person being examined was peremptorily challenged by defendant; therefore, defendant, not having exhausted his peremptory challenges, the error, if any, could not have been prejudicial to defendant. This assignment of error is without merit and is overruled.

[5] Defendant next argues that the trial court erred in not allowing defense counsel to question a potential juror regarding a prior relationship with one of the victims and in not granting defendant's pretrial motion for additional peremptory challenges. At the pretrial motion hearing on 15 February 1991, the trial court, relying on N.C.G.S. § 15A-1217, denied defendant's motion for additional peremptory challenges. This action was not error. The statute specifically states that, in capital cases, the defendant is allowed fourteen challenges. N.C.G.S. § 15A-1217(a) (1988). Nothing in this statute or any other statute authorizes the trial judge to allow defendant additional challenges at the pretrial stage. *See State v. Brown*, 306 N.C. 151, 173-74, 293 S.E.2d 569, 584, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).

"Even if the trial judge had authority to increase the number of peremptory challenges, a power which is precluded by G.S. 15A-1217," *Johnson*, 289 N.C. at 363, 259 S.E.2d at 758, defendant was not prejudiced by the denial of his motion. The record reflects that prior to the selection of the alternate jurors, defendant had used eleven of his fourteen peremptory challenges in selecting the original twelve. These remaining three challenges were added to the additional one for each of the two alternate jurors as required by the statute. Defendant exercised one peremptory challenge during the selection of the two alternates, and had four challenges left at the conclusion of the *voir dire*. When one of the original jurors was hospitalized prior to the jury being impaneled, the court reopened the *voir dire* to select another alternate juror. Each party was given an additional peremptory challenge to add to any remaining challenges. Defendant exercised two of his five available peremp-

tory challenges in choosing the final alternate juror. Thus, when the jury, including alternates, was impaneled, defendant had three unused peremptory challenges.

[6] During the *voir dire*, one prospective juror indicated that she had occasionally substituted as a teacher at the school where Linda Rogers was a student. Defendant contends that he was entitled to question this prospective juror fully to determine if grounds existed for a challenge for cause. Since the court restricted his questioning, defendant argues he was forced to use one of his limited challenges to excuse a juror who may well have been excusable for cause.

This argument is meritless for the reason that a defendant cannot show prejudice by the denial of a challenge for cause until such time as he has exhausted his peremptory challenges, has made a renewed challenge for cause which has been denied, and has requested and been denied an additional peremptory challenge. N.C.G.S. § 15A-1214(h) (1988).

II.

GUILT PHASE

[7] In his next assignment of error, defendant contends that the trial court erroneously failed to instruct the jury on second-degree murder. Defendant maintains there was evidence from which the jury could reasonably have found that defendant killed the two women with malice, but without premeditation and deliberation, and, therefore, it was error not to have instructed on the lesser-included offense. The State counters that the record is devoid of any evidence of provocation or of any other testimony which would support the charge of second-degree murder. We agree with the State.

The test for determining whether an instruction on second-degree murder is required is as follows:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the

trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). "It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976).

Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

The evidence in this case supports each and every element of first-degree murder, including premeditation and deliberation. The State's evidence showed that defendant drove to the store outside Gatesville from his home in Ahoskie, North Carolina, with the intention of killing Minh Rogers for money; he entered the premises on at least one earlier occasion hoping to find the store empty of customers; he devised a scheme posing as a DEA agent to clear the parking lot; he then entered Rogers' Grocery carrying a 12-gauge, sawed-off shotgun; as he approached Minh Rogers, he told her he was going to kill her; he forced her onto a lounge chair behind the counter and then shot her from a very short distance; when startled by the appearance of Linda Rogers entering the main room of the store, he held her at gunpoint, raped and then shot and killed her also. These facts indicate two coldly, calculated murders, not killings "occurring on the 'spur of the moment' in response to some unanticipated provocation." *State v. Cummings*, 326 N.C. 298, 317, 389 S.E.2d 66, 77 (1990) (*Cummings I*). The trial court did not err by refusing to instruct the jury on second-degree murder.

[8] Defendant next asserts that the trial court's instruction on reasonable doubt reduced the State's burden of proof below the "beyond a reasonable doubt" standard informed by *Cage v. Louisiana*,

498 U.S. 39, 112 L. Ed. 2d 339 (1990) (per curiam). The trial court gave the following instruction:

> Now, you've heard counsel in the course of their speeches to you refer to the term "Reasonable doubt" or the phrase "Beyond a reasonable doubt." The question quite naturally arises what kind of a doubt is a reasonable doubt? A reasonable doubt, ladies and gentlemen, means just exactly what the very words themselves would say and would imply to you.
>
> It's a doubt based upon your reason and your common sense. It has been said that a reasonable doubt is not a mere vain, fanciful, academic or forced doubt because there are few things in human experience which are beyond all doubt or which can even be said to fall beyond a shadow of a doubt. Nor is a reasonable doubt a doubt suggested by the ingenuity of counsel or even one raised by your own ingenuity of mind unless legitimately warranted by the testimony and by the evidence in this case.
>
> Your reason and common sense ought to tell you that a doubt would not be reasonable if it was founded upon or based upon that type of consideration. A reasonable doubt is used in the administration of the criminal law in North Carolina for more than 200 years, ladies and gentlemen, and has been defined by our State Supreme Court as a sane and sensible doubt, an honest substantial misgiving based upon the jury's reason and common sense and reasonably arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence. That is to say some lack or some insufficiency in the evidence that fails to convince your mind and satisfy your reasoning of the guilt of an accused.
>
> Most simply put, ladies and gentlemen, proof beyond a reasonable doubt is that proof that fully satisfies or entirely convinces you of the defendant's guilt.

No objection was made during the charge conference when the judge indicated he intended to use his standard instruction on "reasonable doubt" nor was an objection raised when the judge actually charged the jury. Defendant acknowledges his failure to object in either instance but contends that the instruction amounted

to plain error under *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

We first consider whether the instruction as given constitutes error. In *Cage*, the United States Supreme Court determined that the reasonable doubt instruction used in petitioner's trial was constitutionally defective. The instruction as given "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." *Cage*, 498 U.S. at 41, 112 L. Ed. 2d at 342. The Court held:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

The instruction in the present case defines reasonable doubt as "an honest substantial misgiving based upon the jury's reason and common sense and reasonably arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence." The instruction does not mention the terms "grave uncertainty," "actual substantial doubt," or "moral certainty." We reviewed a similar instruction in *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, 506 U.S. ---, 122 L. Ed. 2d 136 (1993), and held:

> Significantly, the combination of the terms found offensive by the *Cage* Court is not present here. Indeed, none of the objectionable language present in *Cage*, "grave uncertainty," "actual substantial doubt," or "moral certainty," is evident in the instant jury instruction. Rather, here we are concerned merely with the phrase "substantial misgiving." Thus, like other courts that have considered this question, we conclude that the reasonable doubt instruction given here is not constitutionally unsound.

Hudson, 331 N.C. at 142-43, 415 S.E.2d at 742-43. *But see State v. Bryant*, 334 N.C. 333, 343, 432 S.E.2d 291, 297 (1993) (holding that use of terms "substantial misgiving" and "moral certainty" in combination in reasonable doubt instruction violates *Cage*). As in *Hudson*, we find the instruction in the instant case to be without error and, thus, we overrule this assignment of error.

[9] Defendant's next assignment of error takes exception to the trial court's jury instruction on premeditation and deliberation arguing it relieved the State of its constitutional burden of proving every element of the crime beyond a reasonable doubt. Defendant urges us to apply the plain error standard since he failed to object at trial. The trial court instructed the jury as follows:

> And fifth, the State must prove that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. That does not mean, members of the jury, that there must be some total absence of passion or emotion if the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion.
>
> It is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect. Neither premeditation nor deliberation are usually susceptible of direct proof, members of the jury. They may be proved by proof of circumstances from which they may be inferred such as lack of provocation on the part of the victim, the conduct of the defendant before, during, and after the killing, any threats or declarations of the defendant, and the manner in which or the means by which the killing was done.

Defendant contends that the instruction on "lack of provocation" blurs the distinction between first- and second-degree murder and allows the jury to find deliberation on an unsupported theory, thus reducing the State's burden of proof on first-degree murder.

However, "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Based on the record before us, we find that the instruction on premeditation and deliberation did not constitute error and a plain error analysis is inappropriate.

Defendant concedes, in his brief, that "[i]t has long been a part of the pattern jury instructions in this state that a lack of provocation on the part of the victim may be considered by the jury on the question of whether the defendant acted with deliberation." *See* N.C.P.I.—Crim. 206.10 (1989). Even though it is the burden of the State to prove each and every element of the crime charged, the instruction, according to defendant, imposes a burden upon defendant to produce evidence of provocation in order to avoid conviction. This burden, defendant argues, is contrary to his presumption of innocence. *See State v. Faulkner*, 241 N.C. 609, 86 S.E.2d 81 (1955).

The trial court properly instructed the jury that lack of provocation is merely one of many circumstances which, if found, the jury could use to infer premeditation and deliberation. *See generally State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *Id.* at 23, 343 S.E.2d at 827. This Court held in *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990) (*Cummings I*), that each example listed by the trial court need not be proven beyond a reasonable doubt. "Therefore, the trial court's mere recital of such examples cannot be construed as an expression of an opinion that any of them have been proven." *State v. Stevenson*, 327 N.C. 259, 264, 393 S.E.2d 527, 529 (1990).

Additionally, we conclude that the challenged instruction was justified because the evidence failed to suggest that either victim provoked defendant. Since he presented no evidence during the guilt phase of the trial, the only possible evidence of provocation in the record is Deputy Ronnie Stallings' testimony concerning a statement given by defendant on 31 August 1990. Defendant confessed to Deputy Stallings that he had been drinking on 18 August 1990 when he entered Rogers' Grocery. A white male, not identified, taunted defendant, calling him a "dickhead". Minh Rogers called defendant a troublemaker. Defendant challenged the white male to fight outside. Once the two men were outside, the white male told defendant he was only kidding and left the premises. Defendant went to his car, picked up his 12-gauge, sawed-off shotgun, reentered the store, shot and killed Minh Rogers, and then raped and killed her daughter, Linda Rogers. Even assum-

ing the presence of an unidentified white male, the actions do not amount to legal provocation sufficient to negate premeditation and deliberation. The acts are not of such a nature as the law would deem adequate to " 'temporarily dethrone reason and displace malice.' " *State v. Cope*, 309 N.C. 47, 62, 305 S.E.2d 676, 685 (1983) (quoting *State v. Montague*, 298 N.C. 752, 756-57, 259 S.E.2d 899, 903 (1979) ("Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter.")). "An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason." *Jackson*, 317 N.C. at 24, 343 S.E.2d at 828. For these reasons, we find no error and, consequently, no plain error in the challenged portion of the instruction.

[10] Defendant next contends that the trial court committed plain error in instructing the jury that the ascertainment of the truth is the highest aim of a criminal trial. Defendant argues that the instruction improperly shifted the burden of persuasion by imposing upon him a duty to present a version of the truth consistent with his innocence. Defendant specifically objects to the following portion of the instruction:

> The highest aim of every legal contest is the ascertainment of the truth. Somewhere, somewhere within the facts of every single case the truth abides. And where you, the jury, find that truth, that is where justice steps in, garbed in her robes, to tip the scales. This is not a case of sympathy for anyone. It is not a case of prejudice against anyone. This is not a case in which you have some friend whom you should seek to reward. It is not a case in which you have some enemy whom you should seek to punish.

We have previously examined and approved this instruction in *State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991). Justice Frye, writing for a unanimous Court, noted:

> [The] instructions came verbatim from the criminal Pattern Jury Instructions. *See* N.C.P.I.—Crim. 101.36. Prior to that instruction, as part of his charge, Judge Allen instructed that "[t]he State must prove to you that the defendant is guilty beyond a reasonable doubt." The court then defined "reasonable". Moreover, Judge Allen repeated the reasonable doubt stand-

ard throughout the jury charge. Clearly, the record is replete with the trial court's instructions to the jury on reasonable doubt. When construed as a whole, no reasonable juror would have been misled.

Id. at 296, 410 S.E.2d at 874. In his jury charge in this case, Judge Watts also repeatedly instructed the jury that the State must prove defendant's guilt beyond a reasonable doubt and carefully explained the definitions of "reasonable" and "doubt". He then recited the "highest legal aim" jury instruction from the Pattern Jury Instructions. As in *Garner*, when viewed as a whole, the instructions as given would not mislead a reasonable juror on the premise of reasonable doubt. This assignment of error is without merit and a plain error analysis is, again, unnecessary.

III.

SENTENCING PROCEEDING

[11] Defendant argues that the trial court erred in limiting questions during *voir dire* regarding potential jurors' feelings about the death penalty. More specifically, defendant maintains he was prohibited from asking prospective jurors if they would automatically vote for the death penalty if defendant was found guilty of first-degree murder.

During *voir dire*, the trial court questioned the jurors regarding their ability to "follow the law" in imposing the death penalty but not in recommending a life sentence. The court first asked each juror if, knowing that the death penalty would be a possible sentence, he or she would be unable to find defendant guilty of first-degree murder. The court then inquired of each juror:

> THE COURT: Considering your personal beliefs about the death penalty, [Name], state whether you would be able or unable to vote for a recommendation of the death penalty even though you are satisfied beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances which the State is required to prove?
>
> . . . .
>
> THE COURT: All right. And if the defendant is convicted of first degree murder, [Name], can and will you follow the law of North Carolina as to the sentence recommendation re-

quired to be made by the jury as the Court will explain it to you at an appropriate time?

Twelve jurors were excused by the court for responding that they would automatically vote against the death penalty. If the juror responded that he or she would be able to recommend the death penalty and that he or she would follow the law as to the sentencing recommendation as the Court would explain it to them, the trial court passed that juror to the State for questioning.

Once the State passed the initial group of twelve potential jurors, defense counsel asked them the following questions to determine if their feelings about the death penalty were such that they would automatically vote for the death penalty rather than a life sentence.

MR. WARMACK: Let me see if I can rephrase that, [Name]. You indicated earlier that you could vote for the death sentence under the appropriate circumstances. Could you also vote for the life—to recommend life under the appropriate circumstances?

THE JUROR: Well, if I feel that the crime deserved life, yes.

. . . .

MR. WARMACK: [Name], you were nodding. Under the appropriate circumstances as I understand it, then that if the State did not meet its burden or if you thought that the case merited it you could recommend a recommendation of life; is that right?

THE JUROR: Yes, sir.

MR. WARMACK: And, [Name], I'll ask you the same question. If you did not feel like the circumstances of the case called for the imposition of the death penalty or the State had failed to meet its burden of proof, could or would you recommend to the Court that a life sentence be given in this case?

THE JUROR: Yes.

These questions were allowed. Defendant accepted six of the original twelve potential jurors. In questioning the remaining potential jurors, defense counsel upon objection by the prosecution, was not allowed to ask the following questions:

> Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?
>
> Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first degree murder?
>
> Do you feel that the death penalty is the appropriate penalty for someone convicted of first degree murder?

The trial court sustained each of the State's objections to these questions based on *State v. Taylor*, 304 N.C. 249, 265, 283 S.E.2d 761, 772. This Court, in *Taylor*, found certain questions improper because they were overly broad, incomplete as hypotheticals, and made no mention of mitigating or aggravating factors. *Id.* This Court has long recognized that ambiguous questions or hypotheticals misstating the law should not be allowed. *See State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *judgment vacated in part*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976).

In the present case, with some, but not all of the jurors who actually served, the court asked the juror individually the following question or a variation thereof during *voir dire*:

> If we were to reach the penalty portion of the trial, will you carefully and thoroughly follow the Court's instructions with regard to the jury's duty concerning that portion and apply and follow those instructions closely and carefully?

The State contends that the general "follow the law" questions repeatedly asked by the trial court were sufficient to determine whether any prospective jurors were predisposed toward imposing the death penalty. We disagree. Since the trial of this case, the United States Supreme Court issued its opinion in *Morgan v. Illinois*, 504 U.S. ---, 119 L. Ed. 2d 492, holding that during *voir dire* in a capital case, the trial court's refusal to permit inquiry into whether a prospective juror would automatically vote to impose the death penalty upon defendant's conviction regardless of the evidence of mitigating circumstances is inconsistent with the Due Process Clause of the Fourteenth Amendment. Under *Morgan*, general "follow the law" questions are insufficient to determine any predilection a juror may have regarding the death penalty.

> Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized."

Id. at ---, 119 L. Ed. 2d at 506-507 (alteration in original) (citation omitted) (footnote omitted) (quoting *Turner v. Murray*, 476 U.S. 28, 36, 90 L. Ed. 2d 27, 36 (1986)). The Court further noted that if a juror's stated willingness to "follow the law" were sufficient to render harmless any error in restricting *voir dire*, "death qualification" under *Witherspoon* and *Witt* would, as a matter of course, be unnecessary.

> Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

Morgan, 504 U.S. at ---, 119 L. Ed. 2d at 506.

The specific question giving rise to *Morgan* error is whether a prospective juror would *automatically* or *always* vote for the death penalty following conviction for a capital offense irrespective of the facts and circumstances. A potential juror's affirmative response to this question entitles defendant to challenge the juror for cause. Although the holding of *Morgan* is directed to this narrow question, the tenor of the language and the rationale in *Morgan* suggest that the wording of the question should not necessarily be limited to this specific inquiry but that a broader question should be permitted to assure a fair and impartial, qualified jury.

[12] In the present case, we conclude that although defense counsel did not use the words, "automatically" or "always," the gist of the questions was an attempt by counsel to determine whether the prospective juror was willing to consider a life sentence in

the appropriate circumstances or would automatically vote for death upon conviction. Indeed, in *Taylor*, decided almost eleven years before *Morgan*, this Court recognized that the questions were asked, "with the intention of showing that those jurors would automatically vote for the death penalty if defendant was found guilty." *State v. Taylor*, 304 N.C. at 265, 283 S.E.2d at 772. Accordingly, we hold that the first two questions noted above which the trial court did not allow should have been permitted. The third question, however, was overly broad, called for a legislative, policy decision, and was properly disallowed. Pursuant to *Morgan*, the trial court's failure to allow defendant to "life qualify" all the jurors who sat violated his due process right to a capital sentencing proceeding by a qualified, impartial jury.

An error that violates a defendant's rights under the United States Constitution is prejudicial unless the State can show that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Only the first six jurors accepted by defendant were "life qualified." The remaining jurors' latent biases regarding punishment for first-degree murder were not explored on *voir dire*; hence, whether one or more of these jurors had a predisposition to impose the death penalty upon conviction without regard to the aggravating and mitigating circumstances is pure speculation. For this reason, the State cannot demonstrate that the error was harmless beyond a reasonable doubt. As the United States Supreme Court stated: "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at ---, 119 L. Ed. 2d at 503. Defendant, therefore, is entitled to a new sentencing hearing. *See Morgan*, 504 U.S. at --- n.11, 119 L. Ed. 2d at 509 n.11; *State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992) (*Cummings II*); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990) (holding that error under *Witherspoon* and *Witt* affects only the sentencing phase of a capital trial).

Finally, we note that in light of *Morgan* and this holding in the present case, the first three questions deemed inappropriate in *State v. Taylor*, 304 N.C. at 265, 283 S.E.2d at 772, would now be acceptable.

Since defendant is receiving a new capital sentencing proceeding as the result of *Morgan* error, we will not address the assignments of error argued in this portion of defendant's brief as they relate

only to sentencing issues and these same errors, if any, are unlikely to recur at the new proceeding.

IV.

PRESERVATION ISSUES

Defendant's remaining assignments of error relate to additional sentencing issues or to issues this Court has previously decided contrary to defendant's position, but which defendant nonetheless brings forward to preserve for further appellate review. Defendant is receiving a new capital sentencing hearing; therefore, we do not address those sentencing issues as the error, if any, is not likely to recur at the new proceeding. As to the remaining issues that previously have been ruled on by this Court, defendant's related assignments of error are overruled.

V.

CONCLUSION

In summary, we find no error in the guilt phase of defendant's trial for first-degree murder. For error in the jury selection which affected only the sentencing proceeding pursuant to *Morgan v. Illinois*, 504 U.S. ---, 119 L. Ed. 2d 492, we hereby order a new capital sentencing proceeding.

NO. 90CRS648—FIRST-DEGREE MURDER OF LINDA MINH ROGERS: NO ERROR IN THE GUILT PHASE; DEATH SENTENCE VACATED AND REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING.

NO. 90CRS649—FIRST-DEGREE MURDER OF MINH LINDA LUONG ROGERS: NO ERROR IN THE GUILT PHASE; DEATH SENTENCE VACATED AND REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING.

NO. 90CRS812—ROBBERY WITH A DANGEROUS WEAPON: NO ERROR.

NO. 90CRS813—FIRST-DEGREE RAPE: NO ERROR.

STATE OF NORTH CAROLINA v. DEREK LAJUAN REID AND FRED POITIER ADAMS

No. 150A93

(Filed 4 March 1994)

1. Assault and Battery § 26 (NCI4th)— aggravated assault—defendant as perpetrator—sufficiency of evidence

There was sufficient evidence from which the jury could reasonably infer that defendant shot the victim with a deadly weapon with the intent to kill inflicting serious injury where the evidence tended to show that, on the night of the shooting at a club, three bullets were fired from a .357 Magnum revolver, two from a .38-caliber revolver, and one from a security officer's .40-caliber handgun; defendant testified that he was holding and fired the .38; he shot in response to a companion's instruction to "shoot the mother f---er"; the club was searched by crime scene technicians immediately after the incident occurred; three bullets identified as coming from the .357 Magnum and one bullet fired from the officer's .40-caliber handgun were recovered; no bullets were recovered that were identified as being shot from the .38; one bullet and fragments of another bullet remained unidentified in the victim's body; and the victim sustained near fatal injuries but survived.

Am Jur 2d, Assault and Battery §§ 92 et seq.

2. Assault and Battery § 13 (NCI4th)— aggravated assault—acting in concert—sufficiency of evidence

There was sufficient evidence from which the jury could find that defendant was guilty of assault with a deadly weapon with intent to kill inflicting serious injury on the theory that defendant was acting in concert with the codefendant who actually shot the victim where the evidence tended to show that defendant, the codefendant and three companions went to a bar together; one companion and the victim's cousin got into an argument over a girl and the victim also harassed the companion; defendant and the codefendant left the bar and returned within a few minutes; the codefendant had kept a gun in his car in the past; defendant, the codefendant, the companion and some other men approached the victim and a group of men sitting at a table; the victim stated, "I thought this was over with"; defendant's companion said, "we're going

to settle this," at which point a member of the victim's group picked up a chair and advanced on defendant's group; defendant's companion then shouted, "shoot the mother f---er," and defendant and the codefendant pulled out guns and began shooting; there was testimony that it was possible that the victim was shot by a .357 Magnum revolver; after the shooting, the codefendant fled to a bathroom where the .357 Magnum was later found; and the victim told witnesses that the codefendant shot him.

Am Jur 2d, Assault and Battery §§ 8 et seq.

3. **Criminal Law § 47 (NCI4th)— aggravated assault—acting in concert—codefendant acquitted—inconsistent verdicts permissible**

Defendant could properly be convicted of assault with a deadly weapon with intent to kill inflicting serious injury under the theory that he acted in concert with the codefendant even though the codefendant was acquitted of that crime since inconsistent verdicts in the same trial are permissible.

Am Jur 2d, Criminal Law § 167.

4. **Evidence and Witnesses §§ 870, 942 (NCI4th)— statement before shooting—not hearsay—excited utterance**

Testimony by an assault victim that defendants' companion yelled "shoot the mother f---er" just before defendants drew their guns and began shooting was not inadmissible hearsay since the testimony was admitted to establish why defendants began shooting and to show the context in which the shooting began. Even if the statement was hearsay, it was admissible under the "excited utterance" exception to the hearsay rule where it was made when someone with whom the companion had been arguing came toward him holding a bar chair in the air.

Am Jur 2d, Evidence §§ 497 et seq.; Homicide § 334.

5. **Evidence and Witnesses § 1331 (NCI4th)— in-custody statement—waiver of juvenile and Miranda rights**

There was ample evidence to support the trial court's findings of fact, and those findings support the court's conclusion that defendant voluntarily waived his juvenile and *Miranda*

rights and that the statement that he gave thereafter to the police was freely, voluntarily, and understandingly given.

Am Jur 2d, Evidence § 585.

6. Homicide § 253 (NCI4th)— first-degree murder—sufficient evidence of premeditation and deliberation

The State presented sufficient evidence of premeditation and deliberation to support defendant's conviction of first-degree murder where its evidence tended to show that defendant, the codefendant, and three others went to a bar together; one of defendant's companions and the victim got into an argument over a girl; after the argument, defendant and the codefendant left the bar and returned a few minutes later; defendant was known in the past to have put a .357 Magnum in his car in the parking lot of the bar; defendant's group approached the victim and his group; the victim picked up a chair and swung it at defendant's companion, who yelled, "shoot the mother f---er"; defendant pulled out his gun and began firing; at the time defendant fired his gun, he was holding his arm straight out and pointing it into the crowd where the victim was standing; and the gun that fired the bullet which killed the victim was identified as the gun being held by defendant on the night of the murder.

Am Jur 2d, Homicide § 439.

7. Homicide § 489 (NCI4th)— premeditation and deliberation—lack of provocation by "defendant"—lapsus linguae—no plain error

The trial court's *lapsus linguae* in instructing the jury that it could infer premeditation and deliberation from lack of provocation by the "defendant" rather than by the "victim" did not constitute plain error where the trial court's instructions as a whole indicated that provocation on the part of the "victim" was the relevant inquiry; the court instructed on voluntary manslaughter, which clearly indicated that provocation on the part of the victim was at issue; and the trial court corrected its mistake when it gave the same instruction to the jury for the codefendant.

Am Jur 2d, Homicide § 501.

8. Homicide § 489 (NCI4th)— premeditation and deliberation—lack of provocation—instruction supported by evidence

The trial court's instruction that the jury could infer premeditation and deliberation from lack of provocation by the victim was supported by the evidence in that there was evidence that the murder victim did not provoke defendant where there was evidence that it was another person, not the victim, who wielded a chair and that the chair was thrown toward defendant's companion, not toward defendant; and there was evidence that defendant approached the victim and initiated the fight, and that the victim's group was sitting down talking when defendant's group approached them.

Am Jur 2d, Homicide § 501.

9. Homicide § 493 (NCI4th)— first-degree murder—instructions—premeditation and deliberation—lack of provocation—legal provocation reducing murder to manslaughter

The trial court's instruction in a first-degree murder trial that premeditation may be proven by lack of provocation, when coupled with the trial court's subsequent charge on voluntary manslaughter and the definition of legal provocation which will reduce murder to manslaughter, could not have misled the jurors to believe that they must find legal provocation to negate premeditation and deliberation.

Am Jur 2d, Homicide § 501.

10. Homicide § 609 (NCI4th)— first-degree murder—insufficient evidence of self-defense—mistakes in gratuitous instructions—harmless error

Defendant was not entitled to an instruction on either perfect or imperfect self-defense in a first-degree murder trial because he presented no evidence that he believed it was necessary to kill the victim in order to save himself from death or great bodily harm, and any mistakes in the trial court's gratuitous self-defense instructions were harmless error, where defendant said he had no fear of death and that he never shot at the victim or went near him; defendant's whole case was based on the theory that he shot at the floor when a fight began and that if he did shoot the victim, it was an accident; defendant never stated that he feared for his life; and no other evidence was presented that defendant shot the

victim because he feared for his life. Defendant's testimony showing that he had some vague and unspecified nervousness or fear due to the fighting that was going on around him was insufficient to justify an instruction on self-defense.

Am Jur 2d, Homicide §§ 519 et seq.

11. Homicide § 620 (NCI4th)— first-degree murder—imperfect self-defense—first-aggressor theory—instructions as harmless error

Any error by the trial court in instructing the jury in a first-degree murder trial on the first-aggressor theory of imperfect self-defense was harmless where (1) defendant never presented any evidence that he acted under a reasonable belief that it was necessary to kill in order to save himself from death or great bodily harm and was thus entitled to no instruction on self-defense, and (2) the jury found defendant guilty of first-degree murder and thus found that the killing was without just cause or excuse and with malice.

Am Jur 2d, Homicide §§ 519 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment entered by Johnston, J., at the 28 September 1992 Criminal Session of Superior Court, Mecklenburg County, sentencing defendant Fred Poitier Adams to life imprisonment upon his conviction of first-degree murder. Defendant Derek Lajuan Reid's motion to bypass the Court of Appeals as to a conviction for assault with a deadly weapon with intent to kill inflicting serious injury was allowed by the Supreme Court on 16 April 1993. Heard in the Supreme Court 15 November 1993.

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellant Reid.

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

MEYER, Justice.

On 27 January 1992, a Mecklenburg County grand jury indicted defendants, Fred Poitier Adams and Derek Lajuan Reid, for the

first-degree murder of Delancey Wilkes and for the assault with a deadly weapon with intent to kill inflicting serious injury of Antwane Drakeford. Defendants were tried jointly and noncapitally at the 28 September 1992 Criminal Session of Superior Court, Mecklenburg County. On 6 October 1992, the jury returned verdicts finding defendant Adams guilty of the first-degree murder of Delancey Wilkes and defendant Reid guilty of assault with a deadly weapon with intent to kill inflicting serious injury upon Antwane Drakeford. The trial court sentenced defendant Adams to life imprisonment for the murder conviction and imposed a six-year sentence on defendant Reid for the assault conviction. Defendant Adams appeals to this Court as of right from the judgment sentencing him to life imprisonment. Defendant Reid was allowed to bypass the North Carolina Court of Appeals on his conviction of assault with a deadly weapon with intent to kill inflicting serious injury.

The evidence presented at defendants' trial tended to show the following. On the night of 8 January 1992, defendant Fred Adams, defendant Derek Reid, Brian Moore, Brian White, and Chris Roach went to the Casanova Club. At some point in the evening, Chris Roach and Bernard Wilkes, the decedent, got into an argument. The testimony of numerous witnesses as to what happened after this initial argument between the decedent and Chris Roach is not clear. What is uncontradicted is that at the end of the evening, Bernard Wilkes had been shot and killed by a bullet from a .357 Magnum revolver, and Antwane Drakeford had been seriously wounded by two gunshots.

Some time after Chris Roach argued with Bernard Wilkes, defendant Adams talked with Roach; Adams and defendant Reid then left the club, returning a few minutes later. Adams, Reid, Roach, and some other men then approached Drakeford, Wilkes, and some others. Drakeford said, "I thought this was over with," to which Roach replied, "we're going to settle this." At this point, someone in the Drakeford/Wilkes group picked up a bar chair and wielded it toward the Adams/Reid group. Chris Roach then shouted, "shoot the mother f---er," and Adams and Reid pulled guns and began shooting.

Officer Stith, a security guard on duty outside the club, testified that he ran into the club and saw a chair in the air and Adams and Reid with guns. The security guard stated that he shot his .40-caliber handgun one time in the general direction of Adams

and told everyone to freeze and drop their weapons. Stith testified that Reid followed his instructions, but Adams ran into the men's bathroom. A .38-caliber revolver was found on the floor close to where Reid was standing when Stith first observed him. A .357 Magnum revolver, later identified as the murder weapon, was found in a toilet in the bathroom into which Adams had run.

It was determined that the bullet that killed Bernard Wilkes came from the .357 Magnum revolver found in the toilet. It was not possible to determine what type of bullet struck Drakeford nor from what gun the bullets came, as doctors were unable to remove the bullets from Drakeford's body. Drakeford believed Adams shot him, but there was also testimony that Drakeford had his back to his assailant when he was shot and thus could not have actually seen who shot him.

There was expert testimony that three bullets were fired from the .357 Magnum revolver, two from the .38-caliber revolver, and one from the security guard's .40-caliber handgun. Three bullets from the .357 Magnum found in the bathroom were recovered; a bullet and casing from Officer Stith's .40-caliber handgun were also recovered. No bullets that were identified as coming from the .38 were recovered.

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

Defendant Reid first argues that the trial court erred in failing to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury because the evidence was insufficient to convict defendant of the charge, first, on the basis that it failed to show that he was the one who actually shot Drakeford and, second, that it failed to show that he and defendant Adams were acting in concert. The State argues that there was sufficient evidence from which the jury could find either that defendant was guilty of assault with a deadly weapon with intent to kill inflicting serious injury or that defendant was guilty of the crime on the theory that Adams shot Drakeford and that Reid was acting in concert with Adams.

We note that the principles that guide us when we consider a defendant's motion to dismiss based on the insufficiency of the evidence are well settled.

> The evidence is to be viewed in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). All contradictions in the evidence are to be resolved in the State's favor. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). All reasonable inferences based upon the evidence are to be indulged in. *Id.* Our cases also establish that defendant's evidence may be considered on a motion to dismiss where it clarifies and is not contradictory to the State's evidence or where it rebuts permissible inferences raised by the State's evidence and is not contradictory to it. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 528 (1983); *State v. Bruton*, 264 N.C. 488, 142 S.E.2d 169 (1965). The same principle obtains where, as here, the defendant's statement is introduced by the State. *State v. Todd*, 222 N.C. 346, 23 S.E.2d 47 (1942). Finally, while the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved beyond a reasonable doubt. *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981).

State v. Reese, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987).

[1] Defendant was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C.G.S. § 14-32(a). The essential elements of the crime are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1968); *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905, *disc. rev. denied, stay denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). "Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator." *State v. Barts*, 316 N.C. 666, 686, 343 S.E.2d 828, 841 (1986). We conclude that there was substantial evidence from which the jury could reasonably infer that defendant Reid shot Antwane Drakeford with a deadly weapon, with the intent to kill, inflicting serious injury.

Evidence was presented that three guns were fired that night, a .38-caliber revolver, a .357 Magnum revolver, and a .40-caliber

handgun. There was testimony that three bullets were fired from the .357, two from the .38, and one from the .40. Derek Reid testified that he was holding the .38 and that he fired the .38. There was evidence that he shot in response to Roach's instruction to "shoot the mother f---er." The club was thoroughly searched by the crime scene technicians immediately after the incident occurred; three bullets identified as coming from the .357 Magnum were recovered, and one bullet fired from Officer Stith's .40-caliber handgun was recovered. No bullets were recovered that were identified as being shot from the .38. One bullet and bullet fragments of another bullet remained unidentified in Drakeford's body. Drakeford sustained near fatal injuries but survived.

From this evidence, a rational trier of fact could have determined that Reid assaulted Drakeford by shooting him; that the assault was with a deadly weapon, a .38-caliber revolver; that he had the intent to kill as he responded to Roach's instruction to shoot; and that Drakeford suffered serious injury not resulting in death.

[2] There is also evidence that defendant Reid is guilty of assault with a deadly weapon with intent to kill inflicting serious injury on the basis that he acted in concert with Adams, who was the other potential gunman.

In *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), we concluded:

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E.2d at 395; *see also State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988).

In this case, the evidence taken in the light most favorable to the State shows that Reid, Adams, Roach, Moore, and White came to the bar together; that Roach and Wilkes got into an argument over a girl; and that Drakeford, Wilkes' cousin, also harassed

Roach. After Roach and Wilkes exchanged words, Reid and Adams left the bar together, returning within a few minutes. Testimony indicated that Adams, in the past, had kept a gun in his car. Reid, Adams, Roach, and some other men then approached Wilkes, Drakeford, and some other men sitting at the table with Wilkes and Drakeford. Drakeford said, "I thought this was over with"; then Chris Roach said, "we're going to settle this," at which point a member of the Wilkes/Drakeford group picked up a chair and advanced on the Reid/Adams group. Roach then shouted, "shoot the mother f---er," and Reid and Adams pulled guns out and began shooting.

This evidence supports the argument that Reid and Adams were acting in concert in accordance with a common plan or scheme. A rational juror could find, based on the evidence presented, that Reid and Adams had decided to shoot Wilkes and Drakeford after Roach had argued with the two men. Reid and Adams left the bar together to get their weapons; after they returned, they approached Wilkes and Drakeford, and upon Roach's command, pulled their guns and shot Wilkes and Drakeford.

There was also evidence that it was defendant Adams who actually shot Drakeford. Adams was supposedly holding the .357 Magnum revolver recovered from the crime scene, there was testimony that it was possible Drakeford had been shot by a .357, and Drakeford told witnesses that Adams had shot him.

Finally, there was also evidence that Adams was holding the .38-caliber revolver. If the jury believed that he was shooting this weapon, then it could have believed that he shot Drakeford under the theory that it was the unrecovered bullets from the .38 that wounded Drakeford.

Because of the numerous different accounts of the events that night, presented by the State's evidence and examination of the defense witnesses, it is possible that a rational juror, in interpreting the evidence presented at trial, could have found Reid guilty of assault with a deadly weapon with intent to kill inflicting serious injury, either because the juror believed the evidence proved that Reid shot Drakeford or because he believed that Adams shot Drakeford but that Reid was "acting in concert" with Adams.

[3] Defendant next argues that his motion to dismiss should have been granted, contending that he could not have been found guilty

of assault with a deadly weapon with intent to kill inflicting serious injury under the concerted action principle because defendant Adams was not convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The State argues that there is sufficient evidence for the conviction to stand and that this Court in the past has allowed a coprincipal to be convicted of a crime for which another principal has been acquitted. *State v. Beach*, 283 N.C. 261, 196 S.E.2d 214 (1973), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984).

We hold that the trial court did not err in allowing the conviction to stand. In *State v. Beach*, a defendant moved to dismiss charges pending against him on the grounds that he was being tried as an aider and abettor of certain crimes and that the principal had been tried and acquitted of the charges upon which defendant's indictments were based. In *Beach*, we noted that "where one principal has been acquitted at a former trial it was no bar to the trial of the others who were indicted as principals." *Id.* at 269, 196 S.E.2d at 220. "The fact that one mistakenly supposed to have committed a crime was tried therefor and acquitted does not affect the guilt of one proven to have been present aiding and abetting, so long as it is established that the crime was committed by someone." *Id.* The decision in *Beach* was based on a theory first enunciated in 1893 in *State v. Whitt*, 113 N.C. 716, 18 S.E. 715. *Whitt* held that a principal in the second degree, or an aider and abettor, could be convicted even if the principal in the first degree, the one actually perpetrating the crime, had been acquitted. *Id.* at 719-20, 18 S.E. at 716. The issue of what to do in this particular situation, where there are inconsistent jury verdicts among coprincipals in the same trial, has not been previously addressed by this Court; however, our research reveals that the United States Supreme Court has a long-standing rule that allows inconsistent jury verdicts from the same trial to stand.

The rule was first set forth in *Dunn v. United States*, 284 U.S. 390, 76 L. Ed. 356 (1932). In *Dunn*, the Court held that a criminal defendant convicted on one count could not attack that conviction because it was inconsistent with the jury's acquittal of the same defendant on another count. *Id.* at 393-94, 76 L. Ed. at 358-59, *cited in United States v. Powell*, 469 U.S. 57, 59, 83 L. Ed. 2d 461, 464 (1984). The Supreme Court has used the reasoning of *Dunn* to uphold inconsistent verdicts among codefendants. *United States v. Dotterweich*, 320 U.S. 277, 279, 88 L. Ed. 49, 50, *reh'g*

denied, 320 U.S. 815, 88 L. Ed. 492 (1943). In *Dotterweich*, the Court held that the president and general manager of a corporation could be found guilty of a violation of the federal Food, Drug and Cosmetic Act even though the corporation, which was a codefendant, was acquitted. "Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation[ ] is immaterial. Juries may indulge in precisely such motives or vagaries." *Id.* at 279, 88 L. Ed. at 50-51; *see also Harris v. Rivera*, 454 U.S. 339, 345, 70 L. Ed. 2d 530, 535 (1981) (in criminal case tried without a jury, the facially inconsistent verdicts acquitting one codefendant while convicting two others was upheld; "Inconsistency in a verdict is not a sufficient reason for setting it aside" even if the inconsistency is the result of lenity on the part of the trial judge).

The most recent case enunciating the reason for allowing inconsistent verdicts in the same trial convinces us that the rule should be adopted for the case before us. In *United States v. Powell*, 469 U.S. 57, 83 L. Ed. 2d 461, decided in 1984, a defendant had been acquitted of the charge of conspiracy to possess with the intent to distribute cocaine. *Id.* at 60, 83 L. Ed. 2d at 465. The defendant was also acquitted of the charge of possession with intent to distribute cocaine. However, she was convicted of facilitating the commission of certain felonies. The felonies she was charged with facilitating were the two felonies she had been acquitted of: "conspiracy to possess with intent to distribute cocaine" and "possession with intent to distribute cocaine." *Id.* Defendant appealed her conviction, arguing that the verdicts were inconsistent, as she had been acquitted of the charges upon which her facilitating conviction was based. Defendant argued that she was entitled to reversal of her facilitating conviction because of the inconsistency. *Id.*

The Supreme Court concluded that inconsistent verdicts in a criminal trial need not be set aside, but may instead be viewed as a demonstration of the jury's lenity. *Id.* at 65, 83 L. Ed. 2d at 469. The *Powell* Court noted that in *Dunn*, Justice Holmes had stated that:

> "Consistency in the verdict is not necessary. . . . The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the [jurors] did not

> speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Id. at 62-63, 83 L. Ed. 2d at 467 (quoting *Dunn*, 284 U.S. at 393, 76 L. Ed. at 358-59).

The Supreme Court concluded that the rule that a defendant may not upset such an inconsistent verdict embodies acknowledgment of a number of factors. *Id.* at 65, 83 L. Ed. 2d at 468. The acquittal may represent the mistake of the jury due to "compromise[ ] or lenity." *Id.* If this is true, "the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause." *Id.*

"The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable." *Id.* at 66, 83 L. Ed. 2d at 469.

The United States Supreme Court also rejected as "imprudent and unworkable a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." *Id.* The Court felt it was simply too difficult to tell exactly what the jury was thinking. *Id.*

Finally, the United States Supreme Court noted that

> a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. . . . Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the

> jury could rationally have reached a verdict of guilt beyond a reasonable doubt.

Id. at 67, 83 L. Ed. 2d at 470 (citations omitted).

In conclusion, the United States Supreme Court held that based on all the problems arising from consideration of jury's inconsistent verdicts, "the best course to take is simply to insulate jury verdicts from review on this ground." *Id.* at 69, 83 L. Ed. 2d at 471.

In the case at hand, defendant Reid has argued that his conviction should be reversed because he was convicted of acting in concert with Adams on the assault conviction, but Adams was acquitted of the assault; thus, Reid's conviction is inconsistent with Adams' acquittal. Based on our previous decisions that it is not required that a principal be convicted in order for an aider and abettor to be convicted, and the United States Supreme Court's view on inconsistent verdicts, we conclude that defendant Reid's conviction should stand. We further conclude that the jury's verdict in this case may have been a demonstration of lenity for both Reid and Adams. It is possible that the jury properly reached the decision of defendant Reid's guilt on the basis that he was acting in concert with Adams but then, through mistake, compromise, or lenity, arrived at an inconsistent conclusion in its verdict against Adams. We note that if the jury did believe that Adams and Reid were acting in concert, then it could have also convicted Reid of the murder of Wilkes. The jury's decision to acquit Reid on this crime may have been a demonstration of compromise or lenity for Reid. A case such as this, where the evidence, even among the witnesses for each side, is contradictory and confusing, is a prime example of why we should not attempt to enter the jury's thought process to determine whether the jurors spoke their real conclusions in their conviction of Reid for assault, acquittal of Reid for murder, conviction of Adams for murder, or acquittal of Adams for assault. What we have done to protect defendant Reid from an irrational jury is determine if the evidence was sufficient to find defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury beyond a reasonable doubt. We have concluded that viewing the evidence in the light most favorable to the State, the jury could have determined that defendant Reid was acting in concert with defendant Adams and found him guilty under this theory. Reid's conviction will not be

reversed on the ground that there were inconsistent verdicts in his trial.

[4] Defendant next argues that the trial court erroneously allowed Drakeford to testify to a statement made by Chris Roach. The State argues that the statement was admissible as an "excited utterance" exception to the hearsay rule and, in the alternative, that there was no error in allowing the evidence to come in because the statement was admitted without objection later in the trial.

We conclude, first, that the statement is not hearsay and thus was correctly admitted; second, even if the statement is hearsay, it was admissible under the hearsay exception as an "excited utterance"; and third, defendant cannot argue that any error resulted from the admission of the statement because the same statement later came into evidence through another witness without objection.

Defendant argues that Drakeford should not have been allowed to testify that Chris Roach yelled "shoot the mother f---er" just before defendants drew their guns because the statement was hearsay that did not fall under any exception. In this jurisdiction, " '[h]earsay' 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) (1992). When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). Statements of one person to another are not hearsay if the statement is made to explain the subsequent conduct of the person to whom the statement was made. *Id.; see also State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 402 (1978) (decided prior to the enactment of the North Carolina Rules of Evidence, N.C.G.S. ch. 8C).

Drakeford's testimony that Chris Roach shouted "shoot the mother f---er" immediately before defendants pulled out their guns and began shooting was admitted to establish why defendants began shooting and to show the context in which the shooting began. The particular words that Roach said were not important to the case; what was important was that Roach made a statement and defendants responded. As such, the significance of the statement "lies solely in the fact that it was made," and the statement is not hearsay and is admissible. N.C.G.S. § 8C-1, Rule 801 official commentary (1992).

Assuming *arguendo*, however, that the statement is hearsay, the statement is admissible under N.C.G.S. § 8C-1, Rule 803(2). Rule 803(2), entitled "Excited Utterance," states that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C.G.S. § 8C-1, Rule 803(2) (1992). The reason for allowing this exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces "spontaneous and sincere" utterances. 6 John H. Wigmore, *Evidence* § 1747(I) (James H. Chadbourn ed. 1976). "[T]he trustworthiness of this type of utterance lies in its spontaneity . . . ." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 216 (4th ed. 1993). There is simply no time to "fabricate or contrive" statements spontaneously made during the excitement of an event. *Id.* For a statement to qualify as an "excited utterance," "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

In *State v. Poole*, 298 N.C. 254, 258 S.E.2d 339 (1979), we concluded that a statement made as a person pulled a rifle out of his truck, before any violence actually started, was clearly admissible as a " 'spontaneous and instinctive declaration of the witness springing out of the transaction and relating to the contemporaneous acts' of the defendant." *Id.* at 258-59, 258 S.E.2d at 342 (quoting *State v. Bethea*, 186 N.C. 22, 25, 118 S.E. 800, 801 (1923)). We have also held that a statement to a mother that her son was being arrested for manufacturing marijuana was a startling event triggering the excited utterance exception for the statement then made by the mother. *State v. Beaver*, 317 N.C. 643, 650, 346 S.E.2d 476, 480-81 (1986).

In this case, the statement was made by Chris Roach after someone with whom he had been arguing came toward him wielding a bar chair in the air. We hold that such an experience meets the requirement of a sufficiently startling event. Also, the statement was a spontaneous one, made in reaction to the threatening gestures; thus, there was no time to reflect or fabricate. We therefore conclude that the statement was admissible as an "excited utterance."

Furthermore, even if this statement is not admissible under the excited utterance exception, we hold that there is still no error

in admitting the statement into evidence, as the statement was admitted without objection during the testimony of the next witness, Mr. Dockery. "It is a well-settled rule that 'if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence.' " *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 30 (1982)). Therefore, witness Dockery's testimony, without objection, as to what Chris Roach said just before the shooting operated as a waiver of defendant's objection to Drakeford's testimony.

[5] Defendant Reid's final contention of error is that the statements that he made to Officer Mangum after his arrest should not have been admitted at trial. We conclude that the trial judge's finding that defendant waived his rights understandingly, knowingly, and willingly is supported by competent evidence; thus, it was not error to admit the statement into evidence at trial.

It is well settled that a defendant may waive his *Miranda* rights, but the State bears the burden of proving that a defendant made a knowing and intelligent waiver. *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Id.* The totality of the circumstances must be carefully scrutinized when determining if a youthful defendant has legitimately waived his *Miranda* rights. *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983).

The trial judge stated his conclusions in part as follows:

> That on January 9, 1992, after the incident at the Casanova Club in which Delancey Bernard Wilkes was killed and Antwane Drakeford was injured, the defendant Derek Reid was taken to the Law Enforcement Center. That while at the Law Enforcement Center he was allowed to sleep and did sleep for a considerable period of time. That he was brought breakfast from McDonald's and was allowed additional sleep. That he was allowed to go to the restroom when he requested.
>
> That there is no evidence that he was coerced or otherwise abused at the Law Enforcement Center. . . .

That on or about 1:30 the chief investigating officer M.A. Mangum commenced reading Derek Reid the Juvenile Waiver of Rights form, included in State's Exhibit 1-M. That each of the rights were read to the defendant and that he acknowledged receiving such rights by his signature. That in addition he was allowed to read such rights and affix his signature to the Juvenile Waiver of Rights form incorporated by reference herein.

. . . .

[That Officer Mangum obtained a complete statement from Derek Reid] and that the first page of the statement was completed at 2:55 p.m., January 9, 1992. That the statement was completed on or about 5:00 p.m. that same date, and that the defendant was given an opportunity to read the statement. That he did, in fact, read the statement and had it in his possession approximately 30 minutes, and that on or about 5:30 p.m. he signed each page of the statement indicating that he had read the statement.

That Officer Mangum did not hear the defendant Reid at any time request to call his mother or use a telephone.

. . . .

Based on the foregoing findings of fact, all found by at least a preponderance of the evidence, and by the Court's consideration of the totality of the circumstances, the Court concludes as a matter of law that none of the constitutional rights of the defendant were violated in connection with his detention, interrogation or statements. . . .

That the statement made by the defendant was freely, voluntarily, and understandably made, and that at all times in question the defendant was in full understanding of his constitutional rights concerning the right to remain silent, the right to counsel, and all other rights. And that he freely, knowingly, and intelligently and voluntarily waived each of these rights and thereafter made the statements in question.

"While the trial court's findings of fact are binding on this Court if supported by the evidence, the conclusions are questions of law which are fully reviewable by this Court on appeal." *State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993) (statement

of juvenile at issue). In *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986), a seventeen-year-old was tried for the crimes of rape, robbery, kidnapping, and burglary. In a suppression hearing about the admissibility of statements made by defendant to officers, defendant testified that he had asked to see his grandparents, had requested a lawyer, and was never advised of his rights. *Id.* at 654, 340 S.E.2d at 44. The trial court found that defendant had voluntarily and understandingly waived his rights and admitted the juvenile rights waiver form and statements made by the juvenile after he signed the form. After close examination of the entire record, we concluded that no prejudicial error occurred at the trial.

In this case, we conclude that there was ample evidence to support the findings of fact, and those facts support the conclusions of law that defendant voluntarily waived his juvenile and *Miranda* rights and that the statement that he gave thereafter was freely, voluntarily, and understandingly given. These conclusions support the trial judge's order that the statement given by defendant to Officer Mangum was admissible in this case.

For the reasons stated above, we conclude that defendant Reid received a fair trial free of prejudicial error.

[6] We move now to the issues presented by defendant Adams. Adams first argues that the evidence was insufficient to support a conviction of first-degree murder. Applying the same standard of review set out above, we hold that the evidence taken in the light most favorable to the State does support a conviction of first-degree murder.

Defendant Adams was convicted of first-degree murder under the theory of premeditation and deliberation. "Premeditation means that the defendant thought about killing the victim for some period of time, however short, before the killing. Deliberation means the execution of an intent to kill in a cool state of blood without legal provocation and in furtherance of a fixed design; it does not require reflection for any appreciable length of time." *State v. Bray*, 321 N.C. 663, 671, 365 S.E.2d 571, 576 (1988) (citations omitted). "A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, and therefore, proof of premeditation and deliberation is also proof of intent to kill." *State v. Thomas*, 332 N.C. 544, 560, 423 S.E.2d 75, 84 (1992).

"An unlawful killing is deliberated and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *Id.* The requirement of a cool state of blood does not require that the defendant be calm or tranquil. The phrase cool state of blood means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. *Id.* at 560-61, 423 S.E.2d at 84.

Defendant Adams argues that the State presented no evidence that defendant killed the victim after premeditation and deliberation. "Defendant correctly notes that in order to convict him of premeditated and deliberate murder, the jury must have found beyond a reasonable doubt that defendant not only intended the killing, but formed that intent after premeditation and deliberation." *State v. Zuniga*, 320 N.C. 233, 258, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

In *State v. Meyers*, 309 N.C. 78, 305 S.E.2d 506 (1983), we concluded that circumstantial evidence may be used to infer premeditation and deliberation and that certain circumstances may be considered as tending to show premeditation and deliberation. These circumstances include: "(1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner." *Id.* at 84, 305 S.E.2d at 510.

We conclude that there was substantial evidence that the killing here was premeditated and deliberated. The evidence showed that Roach, Reid, Adams, White, and Moore went to the club together; the victim and Chris Roach got into an argument over a girl; after the argument, defendants Reid and Adams left the club, returning a few minutes later. In the past, defendant was known to have put a .357 Magnum in his car in the parking lot of the Casanova Club. Defendants, Chris Roach, and some other men approached Antwane Drakeford and the decedent. The victim picked up a chair and swung it at Roach, who yelled, "shoot the mother f---er." Adams pulled out a gun and began firing. At the time Adams fired his gun, he was holding his arm straight out and pointing it into the crowd where the decedent was standing.

The gun that fired the bullet which killed the victim was identified as the gun being held by defendant on the night of the murder. Taken in the light most favorable to the State, this evidence was clearly sufficient to support a finding of premeditation and deliberation.

[7] Defendant next argues that the trial court erred when it instructed the jury that it could infer premeditation and deliberation from lack of provocation by the "defendant" (rather than by the "victim"). Defendant failed to object to the court's instructions at trial; thus, we review defendant's assignment of error under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1992). "A mere slip of the tongue which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby." *State v. Silhan*, 302 N.C. 223, 257, 275 S.E.2d 450, 475 (1981). Additionally, we have concluded that when a trial judge makes an improper instruction earlier in the charge and then corrects it, the error is "completely lacking in prejudicial effect." *State v. Wells*, 290 N.C. 485, 498, 226 S.E.2d 325, 334 (1976); *see also State v. Swift*, 290 N.C. 383, 405, 226 S.E.2d 652, 668 (1976) (judge's error in instruction that is later corrected is simply a "*lapsus linguae*" that "resulted in no prejudice to defendant"). In *Silhan*, *Swift*, and *Wells*, as here, the judge made a mistake while instructing the jury. We conclude that viewing the jury instructions as a whole, the jury would not have been misled and confused by the *lapsus linguae* of the judge in this case.

In the case *sub judice*, the trial court's instructions as a whole indicate that provocation on the part of the "victim," not the defendant, is the relevant inquiry. The trial court instructed that the burden was on the State to show that defendant acted intentionally, with malice and premeditation. Additionally, the court instructed on voluntary manslaughter, which clearly indicated that provocation on the part of the "victim" is what is at issue. Finally, the trial court corrected its mistake when it gave the same instruction to the jury for defendant Reid. The trial court had instructed the jury at the beginning of the instructions that "basically, I'm going

to read the instructions twice. . . . I want you to know that if the first time I read it over to you it's confusing, I'll be reading it over to you again." The trial court correctly instructed the jury the second time through. We conclude that the *lapsus linguae* simply had no discernable prejudicial effect and will not be held to be plain error.

[8] Defendant Adams also argues that this instruction was erroneous, as all the evidence indicated that the victim did provoke Adams. We conclude that there was evidence presented that Wilkes did not provoke defendant Adams. There was evidence presented that it was Drakeford, not Wilkes, who was wielding the chair, and there was also evidence presented that the chair was being thrown towards Roach, not Adams. Finally, there was evidence that Adams approached the victims and initiated the fight and that the victims were sitting down talking when defendant's group approached them. We conclude that the evidence supported the instruction on lack of provocation by the victim.

[9] We also do not believe, as alleged by defendant Adams, that the trial court's instructions confused the jury on the distinction between "ordinary provocation" and "legal provocation." Defendant argues that the trial judge only instructed the jury on the definition of legal provocation such as to reduce first-degree murder to voluntary manslaughter. Defendant argues that the trial judge did not define "ordinary provocation," which would reduce first-degree murder to second-degree murder. Thus, when the jurors were instructed that premeditation and deliberation may be proven by "lack of provocation," they would have thought that they must find legal provocation to negate premeditation and deliberation.

Defendant argues that it was more likely that the jury was confused because of an additional error the trial court made during instructions. In instructing as to Adams, for first-degree murder, the trial court varied from the pattern jury instruction, stating:

> If the intent to kill was formed with a fixed purpose, not *only* under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

(Emphasis added.) Defendant alleges that by inserting the word "only," the trial court reinforced the notion that deliberation is

only negated if the defendant is completely overtaken with passion and thus has a heat-of-passion defense.

We note that the trial court corrected its instruction when instructing the jury as to defendant Reid and that no objection was made to the instruction at trial; thus, the inclusion of the word "only" in the first instance could not have been prejudicial error. Additionally, we have recently held against the defendant on the issue of jury confusion, concluding that the pattern jury instructions (which the trial court used here, with the exception of the inclusion of the word "only" when instructing as to Adams) do not confuse juries about the two types of provocation. In *State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992), the defendant alleged that an instruction on premeditation and deliberation, "coupled with the trial court's subsequent charge on voluntary manslaughter and the definition of 'legal' or 'adequate' provocation, which is sufficient to reduce murder to manslaughter, may have misled the jurors to believe that a killing committed without 'legal' or 'adequate' provocation constitutes first-degree murder committed with premeditation and deliberation." *Id.* at 525, 419 S.E.2d at 550. We concluded that this was not a correct interpretation of the instructions.

In *Handy*, we found that the jury had been correctly instructed that in order to find the defendant guilty of first-degree murder, it must find that the State had proven beyond a reasonable doubt that defendant acted with premeditation and deliberation. In *Handy*, as here, the trial court gave definitions of the theories of premeditation, deliberation, and intent to kill. The jury was charged that defendant would not be guilty of first-degree murder if he formed the intent to kill under the influence of some suddenly aroused violent passion. *Id.* at 527, 419 S.E.2d at 551.

In *Handy*, we held that the instructions would not have "caused the jurors to conclude that defendant acted with premeditation or deliberation merely because the evidence showed that defendant did not act in a heat of passion following adequate provocation the proof of which reduces the degree of homicide to voluntary manslaughter." *Id.* We reaffirm our holding in *Handy* and conclude that the jury would not have been confused by the instructions at issue here and that there was no prejudicial error to defendant Adams.

[10] Next, defendant argues that North Carolina's law on imperfect and perfect self-defense is internally inconsistent. Defendant argues that to prove imperfect self-defense, a defendant should only have to show that defendant had an honest belief in the need to use deadly force. Defendant also argues that the trial judge did not clearly set out the difference between perfect and imperfect self-defense. We conclude that defendant was not entitled to any instruction on self-defense and that any instruction on self-defense that was given was error favorable to defendant.

The principles regarding the law of self-defense are well established. The elements that constitute perfect self-defense are:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992).

Under the law of perfect self-defense, a defendant is altogether excused if all of the above four elements existed at the time of the killing. Under the law of imperfect self-defense, "if the first two elements existed at the time of the killing, but defendant, although without murderous intent, was the aggressor in bringing on the affray or used excessive force, defendant is guilty at least of voluntary manslaughter." *Id.* at 596, 417 S.E.2d at 497.

> [B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the

> affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Bush, 307 N.C. 152, 160-61, 297 S.E.2d 563, 569 (1982). If there is no evidence from which a jury could reasonably find that defendant, in fact, believed it to be necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense. *Id.* at 161, 297 S.E.2d at 569.

We hold that defendant has presented no evidence that he believed it was necessary to kill the deceased in order to save himself from death or great bodily harm; thus, defendant was not entitled to any self-defense instructions. Defendant said he had no fear of death and that he never shot at Wilkes or went near Wilkes. In fact, although Adams testified extensively, he never stated that he feared for his life, instead stating that he simply shot at the ground, never going near Wilkes or aiming at anyone in particular when he shot his gun. If what defendant contended was true, that he never aimed his gun at anyone, then "the first requirement of self-defense, that defendant believed it necessary to kill the victim[,] would not be met." *State v. Mize*, 316 N.C. 48, 54, 340 S.E.2d 439, 443 (1981); *see also State v. Wallace*, 309 N.C. 141, 148-49, 305 S.E.2d 548, 553 (1983) (evidence would not support a finding of not guilty by reason of self-defense or a verdict of guilty of voluntary manslaughter where defendant's evidence indicated that he did not shoot the deceased intentionally and the State's evidence if believed clearly supports nothing less than a verdict of murder in the second degree). Defendant's whole case is based on the theory that he shot at the floor when the fight began and that if he did shoot Wilkes, it was by accident. Defendant never states that he was in fear of his life because of Wilkes' actions. Nor was any other evidence presented that defendant shot at Wilkes because he feared for his life. In fact, defendant argued that he was not even holding the weapon that killed Wilkes. Seemingly, it never appeared to defendant and he never "believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm." *McAvoy*, 331 N.C. at 595, 417 S.E.2d at 497. Thus, he cannot argue that he was acting in self-defense because he feared he was going to be killed or suffer great bodily harm. Defendant's own testimony, taken in the light most favorable to him, shows that he had some vague and unspecified nervousness

or fear due to the fighting that was going on around him but does not state that he specifically feared the decedent; this is not enough to justify an instruction on self-defense. *Bush*, 307 N.C. at 159, 297 S.E.2d at 568.

In *State v. Rawley*, 237 N.C. 233, 74 S.E.2d 620 (1953), we concluded that where a defendant testifies "(1) that, at the time, she did not think she was in great enough danger to make it necessary for her to cut deceased; (2) that not only [did] she . . . not cut [the deceased] in self-defense, but [she] did not cut him at all; and (3) that she claims he was cut accidentally," then the idea that defendant believed she was in danger of losing her life or suffering great bodily harm is refuted. Hence, the principle of self-defense should not be considered. *Id.* at 237, 74 S.E.2d at 623.

When a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is required, the gratuitous instructions on self-defense are error favorable to defendant. As defendant was not entitled to any jury instructions on self-defense, any mistakes by the trial court in its instructions on self-defense were, at worst, harmless error not necessitating a new trial. *Bush*, 307 N.C. at 161, 221 S.E.2d at 569.

[11] Finally, defendant argues that the trial court erroneously instructed the jury on the first-aggressor theory of imperfect self-defense, arguing that there was no evidence to support the instruction. As noted above, defendant never presented any evidence that he acted under a reasonable belief that it was necessary to kill in order to save himself from death or great bodily harm. This is the first requirement to establish any type of self-defense, perfect or imperfect. As defendant could not meet this requirement, he was not entitled to any instruction on self-defense, perfect or imperfect. We conclude that any mistake made by the trial court in its instruction on imperfect self-defense was at worst harmless error.

This conclusion is further supported by the fact that defendant was convicted of murder in the first degree. The first-aggressor instruction is relevant to the finding of voluntary manslaughter. *Potter*, 295 N.C. at 144, 244 S.E.2d at 408. The jury would consider whether defendant was the aggressor if it first found that defendant killed because he believed it necessary to kill in order to save himself and that defendant's belief was reasonable. In finding de-

fendant guilty of first-degree murder, the jury must have found that defendant acted without just cause or excuse and with malice, specifically intending to kill the deceased after premeditation and with deliberation. *Id.* at 145, 244 S.E.2d at 409.

Thus, by finding both that the killing was without just cause or excuse and with malice, the jury must have found either that defendant did not believe it was necessary to kill Bernard Wilkes in order to save himself from death or great bodily harm or that, if he did, such a belief was not reasonable under the circumstances. Having so found, the jury never reached the question whether defendant was the aggressor in bringing on the affray; or, if the jury did reach it, the answer became immaterial. Any error in the instruction on the first-aggressor theory must have been harmless. *Id.* at 144, 244 S.E.2d at 409.

We conclude that no prejudicial error resulted from the giving of the instructions at issue here.

For the reasons stated above, we conclude that defendant Adams received a fair trial free of prejudicial error.

In conclusion, having carefully reviewed the record and each of defendants' assignments of error, we hold that defendants received a fair trial, free of prejudicial error. Accordingly, we leave undisturbed defendant Reid's conviction of assault with a deadly weapon with intent to kill inflicting serious injury and defendant Adams' conviction of first-degree murder.

NO ERROR.

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM E. NICHOLSON, III, CHARLES A. DANCY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALINA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, BROWNING ADAMS, PRITCHARD G. ADAMS, WILLIAM H. ADAMS, EDWARD H. AND FLOSSIE P. ALLEN, JOSEPH A. ALLEN, RACHEL C. ALLRED, HELEN L. AND LEO I. ANCTIL, RONALD E. ANDERSON, CLARENCE P. ARMSTRONG, CARROLL W. AUSTIN, F.L. AUSTIN, JR., DONALD P. BAHR, PAUL BALLUS, CHARLES D. BARKER, SR., WALTER E. BARKHOUSE, EDWARD C. BARRET, JAMES L. BAXTER, RUSSELL W. BEARD, BERNARD L. BEATTY, RICHARD K. BELL, LEO E. BENADE, SHERMAN W. BETTS, JOSEPH H. BETZ, ROBERT L. BLEVINS, FRANKLIN M. BLUNT, TIMOTHY C. BOLICK, MARGARET C. BOONE, HENRY A. BOTKIN, ALEX BOURDAS, OLA MAY (TATE) BOVENDER, EUGENE A. BOWEN, LAVAUNE K. BREDA, MARLOWE G. BREDA, TROND G. BREKKE, LAURA B. BRENDLE, MILLARD BRIDGERS, CLARENCE M. BRIDGES, DORIS K. BRIDGES, CYRUS H. BROOKS, JR., DANIEL R. BROWN, K.A. BROWN, WILLIAM D. BROWN, BETTY P. BULLOCK, ROBERT S. BULLOCK, FINDLEY BURNS, JR., RAY G. BURRELL, RICHARD E. BUSH, JAMES M. BYRNE, NORMAN L. CARLTON, MATTHEW E. CARMEAN, FRANK CATES, J. CRAWFORD CATON, HARRY E. CHAMBERLAIN, VINCENT H. CHASE, PAUL F. CHAVEZ, WOODROW H. CHILDRESS, JOHN G. CHURCH, HERMAN L. CLANTON, ROBERT L. CLARKE, CHARLES C. CLAUSEN, SR., DENNIS E. CLECKNER, STEVE P. CLEMENIC, LACY W. COATES, RUCIA A. COBB, JAMES A. CODDINGTON, CATHERYN S. COLEY, LAURA K. CONDER, JAMES C. CONINE, MARSHALL G. COOPER, ASBURY COWARD, III, NEWTON P. COX, RUTH A. COX, BURNETTE E. CREASMAN, THOMAS J. CULKIN, HAZEL B. CURLEE, MILTON L. DAIL, BEATRICE G. DAVIS, BERNLEY S. DAVIS, DONALD M. DAVIS, ESSIE M. DAVIS, GEORGE E. DAVIS, ROBERT J. DAVIS, CLIFFORD H. DAWSON, CALVIN F. DEAN, ORIEN G. DEAN, JR., JACK M. DEATON, VIOLET B. DEITMARING, ARLEN J. DEVITO, JOHN E. DEVLYN, SARA E. DEVLYN, JOY E. DICKINSON, MRS. LEROY B. DICKINSON, JAMES E. DIFFEE, DELBERT R. DILLON, MARGARET H. DOPF, RAYMOND E. DOPF, LEROY M. DUFFY, CHARLES F. DUPONT, BOBBY R. EASON, DAVID EDMISTEN, CARL L. EFFLER, JOHN H. ELDER, JR., JOHN R. ELLIS, MANFORD G. FARR, RITA FESTO, JOHN J. FILAN, ANGELO A. FLORENTINO, ROBERT W. FOLDEN, OSCAR F. FOWLER, MELVIN W. FRITZ, WALTON E. FULCHER, ROBERT C. FULLER, WALTER E. FULLER, FRANK W. FURCHES, NORMAN CARL GADDIS, MARSHALL L. GADDY, THOMAS B. GARDINER, ROBERT F. GEISSLER, WILLIAM E. GENTNER, JR., THOMAS P. GINN, ROBERT W. GOODMAN, JOHN R. GORDON, BERNICE C. GRANDY, JR., STEVEN W. GRANDY, ROBERT J. GREEN, MICHAEL R. GREESON, JAMES H. GRIFFIN, THOMAS M. GROOME, JR., JAMES W. GROSS, ARTHUR S. GUNDERSON, HERT L. HANCOCK, JR., JAMES M. HARDIN, C. LEE HARRIS, HOWARD W. HARRIS, PAUL H. HARVEY, ROLAND R. HATCHER, HENRY S. HEFFLEY, JR., CARROLL A. HEFNER, CLARENCE

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SMITH, JAMES E. SMITH, JAMES P. SMITH, JOE F. SMITH, PERCY H. SMITH, JOSEPH L. SOMMER, RAY H. SPANGLER, JAMES A. SPRANKLE, WILEY L. STANDIFER, JR., JAMES W. STARBUCK, GERTRUDE D. STARLING, STACY J. STARLING, HENRY C. STEED, JR., ROY C. STEELEY, ARTHUR L. STEWART, BURLENA J. STEWART, JOHN R. STEWART, JR., GEORGE W. STILLWAY, RITA M. STILLWAY, HAROLD E. STONE, CLYDE DALTON STOWE, HARRY H. STRUNK, E.C. STUMPF, THOMAS A. SUMMEY, JR., ELLIS G. SUMNER, LEO B. AND MILDRED Y. SUMNER, MARGARET K. SWINK, JAMES E. SYKES, OLIVER B. TALBERT, JAMES D. TERRELL, CLYDE E. AND EMOGENE M. THOMPSON, FRED L. TRACY, ROCCO H. TROMBELLO, JOHN G. TRUITT, JR., WILLIAM H. TURK, JAMES T. VANCE, FRANCES A. VANDEN, GEORGE W. VANDEN, ETHEL D. VANHORN, EDWARD J. VAUGHN, EDWARD VENKLER, ROY L. VICK, SR., KERMIT J. VINSON, MYRTLE H. VINSON, WILLIAM E. WADE, FLOYD H. WALDROP, WANDA E. WALLACE, ROLAND J. WEBER, GRACE F. WEINER, LONA C. WEISNER, LAWRENCE O. WELCH, PAUL B. WELCH, JR., GEORGE L. WESTERLIND, WILLIAM B. WHITE, T.M. WHITTINGTON, JR., GEORGE W. WILKINS, ROBERT S. WILLIAMS, JR., WILLIAM C. WILLIAMS, WINTON H. WILLIAMS, HAROLD P. WILLIAMSON, EDNA MAE WILSON, ROBERT GRAVES WILSON, JR., ERNEST G. WINSTEAD, PETER S. WONDOLOWSKI, ROBERT V. WOOD, MAYNARD B. AND EVELYN W. WOODBURY, JACK R. WORLEY, JOHN T. WORRELL, GEORGE T. WORRELL, GEORGE E. YALE, JR., AND WILLIAM P. YARBOROUGH, INDIVIDUALLY FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, CLASS A PLAINTIFFS, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER AND PAUL H. TURNEY, INDIVIDUALLY AND FOR THE BENEFIT AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, CLASS B PLAINTIFFS v. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, INDIVIDUALLY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE AND HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. 64PA91

(Filed 4 March 1994)

1. Taxation § 217 (NCI4th) — retirement benefits — lack of exemption for retired federal employees unconstitutional — no refund — procedure not followed

The trial court improperly granted summary judgment for plaintiffs in a class action for refunds of state income tax paid on federal pensions after it was held to be unconstitutional to exempt state but not federal pensions from state income tax. The sole procedure by which a North Carolina taxpayer may challenge the legality of any tax is by N.C.G.S. § 105-267, which requires an individual notice, protest, or demand. Failure

to comply with the statutory requirements bars a taxpayer's action against the State for a refund of taxes; a constitutional challenge to the tax does not exempt a taxpayer from following the statute's mandatory procedure. Although plaintiffs sent three class demand letters, those letters do not constitute refund demands as required by N.C.G.S. § 105-267.

Am Jur 2d, State and Local Taxation § 1082.

2. **Taxation § 217 (NCI4th)— taxation of federal pensions—procedure for refund—no violation of due process**

The statutory tax refund procedure in N.C.G.S. § 105-267 does not transgress the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Although the statute does not permit North Carolina taxpayers to challenge the legality, or constitutionality, of a tax before paying the tax, the U.S. Supreme Court has long held that postdeprivation remedies in the area of taxation can comport with due process. North Carolina gives taxpayers desiring to challenge the illegality, or unconstitutionality, of a tax a clear and certain remedy and meaningful, backward-looking relief by providing a full refund of the tax if the challenge is successful. It also provides a clear and fair opportunity to contest the tax by the procedures set out in N.C.G.S. § 105-267.

Am Jur 2d, State and Local Taxation § 1082.

3. **Judgments § 270 (NCI4th)— taxation of federal pensions—constitutionality of refund procedure—parallel federal action—no final judgment**

Neither res judicata nor collateral estoppel applied to a state action for refund of taxes paid on federal pensions where there was no final adjudication in the federal case.

Am Jur 2d, Judgments § 457.

Justice MITCHELL dissenting.

Justice PARKER joins in this dissenting opinion.

On remand from the United States Supreme Court. Heard in the Supreme Court 17 November 1993.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, and Charles H. Taylor for plaintiff-appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, Thomas F. Moffitt and Norma S. Harrell, Special Deputy Attorneys General, and Marilyn R. Mudge, Assistant Attorney General, for defendant-appellants.

EXUM, Chief Justice.

This is an action by plaintiffs, former federal employees and active duty federal military personnel and reservists, for the refund of certain income taxes paid by them before the 28 March 1989 decision of the United States Supreme Court in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989). We conclude the action may not be maintained because plaintiffs failed to comply with the procedural prerequisites of N.C.G.S. § 105-267 (1992). We, therefore, reverse the entry of summary judgment for plaintiffs entered by the trial court and remand for entry of judgment for defendants dismissing the action.

Before *Davis*, twenty-three states, including North Carolina, exempted retired state employees from payment of income tax on pension benefits. Retired federal employees were exempt from payment of state income taxes on the first $3,000 of their pension benefits. There was no exemption for beneficiaries of private pensions. As of 1979, the first $1,500 of income for members of the North Carolina National Guard was excluded from taxation. In 1989, the State amended this benefit so that members of the National Guard received a $1,500 deduction. The State conferred no comparable benefit on members of the federal armed forces.

In *Davis* the United States Supreme Court held that a state statute exempting state employees' retirement benefits from taxation but not granting the same exemption to their federal counterparts violated the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. § 111 (1989). Under section 111 the federal government "consents to [state] taxation of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111.

Responding to *Davis*, the North Carolina General Assembly amended its taxation scheme. First, it repealed the tax exemption for the retirement benefits of state employees retroactive to 1 January 1989 and created a $4,000 exclusion for the retirement benefits of both state and federal employees. N.C.G.S. § 105-134.6(b) (1992). Second, it authorized federal retirees to claim a tax credit on their 1990, 1991, and 1992 income taxes for taxes paid in 1988 on their federal pensions. N.C.G.S. § 105-151.20 (1992). Third, it repealed the $1,500 deduction for National Guard compensation. 1989 N.C. Sess. Laws, ch. 1002 (1990).

This is the third time this case has come before us. We first held plaintiffs were not entitled to the refunds claimed because the decision in *Davis* did not apply retroactively. *Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (1991) (*Swanson I*). Next we concluded, on rehearing, that certain provisions in our state constitution afforded plaintiffs no relief, and we reaffirmed our earlier decision. *Swanson v. State of North Carolina*, 330 N.C. 390, 410 S.E.2d 490 (1991) (*Swanson II*). The result of the *Swanson* decisions was to reverse the trial court's order granting plaintiffs income tax refunds for the years 1986 through 1989 and to dismiss plaintiffs' action.

Plaintiffs then petitioned the United States Supreme Court for review of the *Swanson* decisions. On 28 June 1993, the United States Supreme Court granted plaintiffs' petition for writ of certiorari, vacated our decisions in *Swanson I* and *Swanson II*, and remanded the case for further consideration in light of its holding in *Harper v. Virginia Department of Taxation*, 509 U.S. ---, 125 L. Ed. 2d 74 (1993), that *Davis* must be applied retroactively. *Swanson v. North Carolina*, --- U.S. ---, 125 L. Ed. 2d 713 (1993).

Plaintiffs moved this Court to remand the case to superior court "for implementation of orders previously entered," or, alternatively, for additional briefing and argument on the meaning and effect of *Harper*. On 29 July 1993, the Court denied plaintiffs' motion for remand, granted plaintiffs' alternative motion and directed the parties to file additional briefs on the remaining issues pending before this Court and any other issues raised by *Harper*.

I.

[1] Plaintiffs contend they are entitled to full refunds for income taxes paid by them on pension benefits for the tax years 1985 through 1988 pursuant to North Carolina's taxation statutes held

unconstitutional in *Davis*. We conclude plaintiffs are procedurally barred from recovering in this action the refunds sought because they did not comply with the State's statutory postpayment refund demand procedure.

The sole procedure by which a North Carolina taxpayer may challenge the legality of any tax is as follows:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. *At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue* and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within the three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (emphasis added).

In *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, --- U.S. ---, 118 L. Ed. 2d 547 (1992), this Court held that "[w]hen a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267." *Id.* at 235, 412 S.E.2d at 300. That the challenge is to the constitutionality of the tax does not exempt a taxpayer from following the statute's mandatory procedure. *Id.* Failure to comply with the requirements in section 105-267 bars

a taxpayer's action against the State for a refund of taxes. *Id.* at 236, 412 S.E.2d at 301.

The plaintiffs in *Bailey*, state and local government employees whose retirement benefits had vested, brought suit against the State, claiming it had violated assurances that their benefits would be exempt from state income tax. We held that "[i]nsofar as plaintiffs' complaint seeks a refund of 1989 taxes paid, it should have been dismissed for failure of plaintiffs to satisfy conditions precedent to such an action as required by N.C.G.S. § 105-267." *Id.* at 234, 412 S.E.2d at 300. We said:

> A taxpayer with "a valid defense to the enforcement of the collection of a tax" must first pay the tax, then demand a refund of that tax in writing within thirty days after payment. Only when the Secretary of Revenue fails to refund the tax within ninety days may the taxpayer sue the Secretary of Revenue for the amount demanded. Absent protest in the form of a demand for refund, a tax is voluntarily paid, and "voluntary payments of unconstitutional taxes are not refundable." *Coca-Cola Co. v. Coble*, 293 N.C. [565,] 569, 238 S.E.2d [780,] 783. The right to sue is a conditional right; the terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove they demanded a refund within thirty days after payment. Failure to do so forfeits the right to sue. *Kirkpatrick v. Currin, Comr. of Revenue*, 250 N.C. [213,] 216, 108 S.E.2d [209,] 211; *Stenhouse v. Lynch*, 37 N.C. App. 280, 281, 245 S.E.2d 830, 831 (1978).

Id. at 236, 412 S.E.2d at 301. The purpose for this statutory protest requirement is that,

> [w]here protest has been interposed, the [taxing authority] is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds.

Id. at 238, 412 S.E.2d at 302 (quoting *Conklin v. Town of Southampton*, 141 A.D.2d 596, 598, 529 N.Y.S.2d 517, 519 (1988) (quoting *Mercury Mach. Importing Corp. v. City of New York*, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957)).

In *Bailey* all demand letters sent to the Secretary of Revenue were preceded by the plaintiffs' complaint. *Id.* at 237, 412 S.E.2d at 301. The Court held the plaintiffs' "demands for refunds followed neither the letter of the statute nor the reasonable criteria required by the Secretary of Revenue and were properly rejected and deemed invalid for purposes of suing for refunds under N.C.G.S. § 105-267." *Id.* at 238-39, 412 S.E.2d at 302.

Here plaintiffs sent a "class demand letter" on 14 April 1989 to Helen A. Powers, Secretary of the North Carolina Department of Revenue, requesting refund of all income taxes paid on pension benefits for tax years 1985 to 1989. A second class demand letter was sent to Secretary Powers on 18 April 1989. On 11 July 1989 Secretary Powers responded to plaintiffs' letters of demand as follows:

> In order to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement income received by the taxpayer during the year.
>
> To the extent that your letters furnish information concerning the named taxpayers sufficient to determine the amount of tax which they paid with respect to the federal retirement income for each year in question, the Department will, pursuant to G.S. 105-267, issue refunds for any such tax paid by those persons within the thirty days preceding the date of your letter.
>
> To the extent that your letter makes demand for refund of taxes paid by unnamed persons or by named persons not sufficiently identified to permit a determination as to their liability, your letter will not be considered a valid demand for refund, and no refunds will be issued.[1]

---

1. As of 19 February 1990 the State, presumably pursuant to this letter, had refunded $9,145,523.92 to 12,404 taxpayers in plaintiff classes who timely filed refund requests pursuant to section 105-267. The State denied approximately $8,000,000 of refunds for 1988 taxes paid by taxpayers in plaintiff classes.

Plaintiffs filed this suit against Secretary Powers in her official capacity and individually on 16 March 1990 seeking refund of income taxes paid on pension benefits from 1985 to 1989. Thereafter, on 12 April 1990 plaintiffs sent a similar third class demand letter to Secretary Powers. Secretary Powers responded to plaintiffs' third demand letter by stating,

> Your letter does not identify any individual taxpayer, nor does it furnish information sufficient to determine the amount of tax which any taxpayer paid with respect to federal military or retirement income for any of the taxable years in question. Accordingly, your letter will not be considered a valid demand for refund, and no refunds will be issued.

The three class demand letters filed by plaintiffs were invalid protests and, as such, did not satisfy the requirements of section 105-267. "N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class"; however, "it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others." *Id.* at 237, 412 S.E.2d at 301. "Even when taxpayers are seeking a tax refund as a class, the requisites of N.C.G.S. § 105-267 must be met." *Id.* (footnote omitted). Plaintiffs' action "cannot be maintained unless preceded by an individual notice, protest or demand." *Id.* at 239 n.4, 412 S.E.2d at 302 n.4. "[A]bsent specific statutory authorization for class or representative tax refund demands, such [class] demands are ineffectual to satisfy this condition precedent to legal action for a tax refund under N.C.G.S. § 105-267." *Id.* at 240, 412 S.E.2d at 303.[2]

The only demands for tax refunds alleged or proved in this action are the class demand letters which we described above. Since these class demand letters do not constitute refund demands as required by section 105-267, this necessary prerequisite to filing this action against the State for the refunds claimed has not been met. The action therefore must be dismissed, provided these procedures comport with constitutional due process, a question we now address.

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2. Plaintiffs contend section 105-267 unconstitutionally denies them the right to bring a class action suit. We disagree. Once taxpayers have individually met the requirements of section 105-267, they are free to pursue their claim as a class.

II.

[2] Plaintiffs contend the statutory refund procedure transgresses the Due Process Clause of the Fourteenth Amendment of the United States Constitution insofar as it bars full refunds to plaintiffs for tax years 1985 through 1988 which, plaintiffs contend, are required by the United States Supreme Court's decision in *Harper v. Virginia Department of Taxation*, 509 U.S. ---, 125 L. Ed. 2d 74.

We do not agree. Rather, we conclude that in light of both *Harper* and *McKesson Corporation v. Division of Alcoholic Beverage and Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17 (1990), the refund procedure provided in section 105-267 is free from any constitutional infirmity. It may, therefore, effectively bar actions for refunds in the tax years for which the procedure was not followed.

Admittedly, this statute does not permit North Carolina taxpayers to challenge the legality, or constitutionality, of a tax before paying the tax. It does not, in other words, provide for a predeprivation remedy for the taxpayer. Instead it requires the taxpayer first to pay the tax sought to be challenged; second, to demand within 30 days of payment that the tax be refunded; and third, if the State refuses within 90 days to make the refund, the taxpayer must bring suit against the State for the refund within three years of the expiration of the 90-day period. As we have shown above, the timely demand for refund is a prerequisite for bringing suit against the State to recover the challenged tax.

We are convinced this procedure comports with due process under the United States Supreme Court's jurisprudence on the subject as it relates to taxation. That Court has long held that postdeprivation remedies in the area of taxation can comport with due process. *Cheatham v. United States*, 92 U.S. 85, 89-90, 23 L. Ed. 561, 562-63 (1875) (government has right to prescribe conditions on which it will subject itself to judgment of the courts in collection of revenues); *Dodge v. Osborn*, 240 U.S. 118, 122, 60 L. Ed. 557, 560 (1916) (requirement that taxes be paid and administrative procedures exhausted before suit for recovery could be filed does not violate due process); *Bob Jones University v. Simon*, 416 U.S. 725, 747, 40 L. Ed. 2d 496, 515 (1974) (congressional restriction to postenforcement review of an organization claiming tax-exempt status is not constitutionally infirm in light of the powerful government interests in protecting the administration of the tax system from premature judicial interference).

The principle that due process does not require predeprivation remedies in the area of taxation was most recently reaffirmed in *McKesson*, 496 U.S. 18, 110 L. Ed. 2d 17. The *McKesson* Court held postdeprivation remedies for tax refunds are sufficient to meet due process standards provided taxpayers are afforded meaningful backward-looking relief for taxes paid under a tax scheme subsequently found to be unconstitutional. *McKesson*, 496 U.S. at 22, 110 L. Ed. 2d at 27.

In *McKesson*, the petitioner challenged a Florida tax scheme which afforded special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced in the state. The petitioner, a wholesale distributor of alcoholic beverages whose products did not qualify for the rate reduction, followed the statutory procedure for repayment or refund of taxes by paying the applicable taxes each month and then seeking a refund from the Florida Office of the Comptroller on the ground that the tax scheme unlawfully provided preferences for distributors of certain local products. Upon denial of its refund request, petitioner brought suit in a Florida trial court against the comptroller and the Florida Division of Alcoholic Beverages. The petitioner's suit challenged the constitutionality of the tax under both the Federal Constitution's Commerce Clause and other federal and state constitutional provisions. The petitioner requested declaratory and injunctive relief, and sought a refund of the excess taxes it had paid because of the tax scheme's discriminatory treatment. The trial court enjoined the state from giving effect to the preferences in the future, but refused to provide a refund or any other relief to the petitioner for taxes it had already paid.

In affirming the trial court's order, the Florida Supreme Court held that while the preferential rate reductions should be given no future operative effect, the petitioner was not entitled to a refund of previously paid taxes. The court reasoned that the Division of Alcoholic Beverages and Tobacco had relied in good faith on a presumptively valid statute. Additionally the petitioner, if given a refund, would most likely receive a windfall, since the cost of the tax likely had been passed on to its customers.

The United States Supreme Court reversed, holding that postdeprivation remedies for unlawful taxes do not meet due process standards if a taxpayer who has paid the illegal tax meets

the statutory requirements for a remedy, but is limited to prospective relief. *Id.* at 31, 110 L. Ed. 2d at 32. The Court held:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge that tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.
>
> . . . .
>
> Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action. To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy.

Id. at 38-39, 110 L. Ed. 2d at 37.

McKesson was a troubling case because Florida did not provide a full refund of the challenged tax even after the taxpayer complied with all of the procedural requirements for challenging the tax later determined to be unconstitutional. *McKesson* makes abundantly clear, as do the cases it cites, that a full refund of the challenged tax is all that due process requires provided that a fair opportunity to contest the tax is given. The Court said:

> The State may, of course, choose to erase the property deprivation itself by providing petitioner with a full refund of the tax payments.
>
> . . . .
>
> In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a "clear and certain remedy" designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property.

Id. at 39-40, 110 L. Ed. 2d at 38. There can, of course, be no clearer or more certain remedy nor more meaningful backward-looking relief than a full refund of the challenged tax.

Plaintiffs contend, nevertheless, that the State cannot, consistent with due process, deprive them of full refunds of all taxes

paid in all tax years within the period of the statute of limitations even though these taxes were not duly challenged under the procedures established by section 105-267. Again, *McKesson* answers this contention adversely to plaintiffs' position.

McKesson holds that a state may provide full refunds to taxpayers, and at the same time, protect its fiscal stability by imposing "various procedural requirements on actions" seeking such refunds:

> The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such action . . . . The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

Id. at 45, 110 L. Ed. 2d at 41. Indeed, in remanding the case to the Florida Supreme Court, the United States Supreme Court noted, "upon remand the State may invoke as an independent basis for refusing to provide a refund, petitioner's failure to comply with a notice requirement that was in effect at the time of petitioner's tax payments." *Id.* at 24 n.4, 110 L. Ed. 2d at 28 n.4.

North Carolina thus gives taxpayers desiring to challenge the illegality, or unconstitutionality, of a tax a clear and certain remedy and meaningful, backward-looking relief by providing a full refund of the tax if the challenge is successful. It also provides a clear and fair opportunity to contest the tax by the procedures set out in section 105-267. Denial of refunds to taxpayers for the tax years for which they failed to comply with this procedure does not, as the Court made clear in *McKesson*, deprive these taxpayers of constitutional due process.[3]

---

3. A "state is free, of course, to provide broader relief as a matter of state law than is required by the Federal Constitution." *McKesson*, 496 U.S. at 52 n.36, 110 L. Ed. 2d at 45 n.36. The North Carolina General Assembly has chosen to do this by enacting N.C.G.S. § 105-151.20, which provides:

> A taxpayer who received government retirement benefits during the 1988 tax year may claim a credit against the tax imposed by this Division equal to the amount by which the tax under this Division paid by the taxpayer for the 1988 tax year would have been reduced if none of the taxpayer's government retirement benefits had been included in the taxpayer's taxable

Other jurisdictions, reviewing taxpayers' eligibility for refunds of taxes paid pursuant to a statute subsequently pronounced unconstitutional, have applied the due process principles articulated in *McKesson* and, in several cases, have awarded or denied refunds to taxpayers on the basis of their compliance with state procedural refund requirements. *Jenkins v. Missouri*, 962 F.2d 762 (8th. Cir. 1992) (refund of unlawfully levied tax limited to those taxpayers who paid under protest), *cert. denied*, --- U.S. ---, 121 L. Ed. 2d 242 (1992); *Farrar v. Franchise Tax Board*, 15 Cal. App. 4th 10, 18 Cal. Rptr. 2d 611 (1993) (failure to provide timely notice of class claim warranted dismissal of claim for refunds), *cert. denied*, --- U.S. ---, --- L. Ed. 2d ---, 62 USLW 3449, 62 USLW 3451 (Jan. 10, 1994); *Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993) (refund awarded to taxpayers who timely filed amended returns within the limitation period); *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992) (statutes requiring taxpayer to file legal action before becoming eligible for refunds and denying taxpayer refunds for taxes collected prior to the filing of the action was a reasonable procedural barrier).

Plaintiffs contend that by its later decision in *Harper*, the United States Supreme Court somehow altered *McKesson*. Their argument seems to be that *Harper*, if not *McKesson*, requires a refund of the taxes paid in all tax years within the period of the statute of limitation even though the taxpayers failed to comply with the statutory procedures for challenging the tax for those years. We disagree. In our view, insofar as *Harper* addressed due process concerns with regard to statutes providing relief from unconstitutional taxes, it reaffirmed what was held and said in *McKesson*.

> income. If a taxpayer received a refund of any tax paid under this Division on government retirement benefits for the 1988 tax year, the amount of the refund reduces the amount of the credit allowed under this section. . . .
>
> The credits allowed under this section shall be taken in equal installments over the taxpayer's first three taxable years beginning on or after January 1, 1990. The credit allowed under this section may not exceed the amount of tax imposed by this Division reduced by the sum of all credits allowed against the tax except payments of the tax made by or on behalf of the taxpayer.

N.C.G.S. § 105-151.20 (1992). Thus federal retirees who were ineligible for tax refunds because of failure to comply with protest requirements were entitled to relief for the 1988 tax year in the form of tax credits.

The issue in *Harper* was whether the Virginia Supreme Court had erred in not giving retroactive effect to *Davis*. The United States Supreme Court concluded that it had. *Harper* involved an action for refund of taxes unlawfully assessed for the years 1985 to 1988 in violation of *Davis*. In response to *Davis*, Virginia had repealed its exemption from state income taxation for state and local government employees. It also enacted a statute under which taxpayers could seek a refund of state taxes imposed on federal retirement benefits in the years 1985, 1986, 1987 and 1988 for up to one year from the date of the final determination as to whether Virginia must refund these taxes.

The petitioners in *Harper*, 421 federal civil service and military retirees in Virginia, sought refunds of the taxes improperly or erroneously assessed. The trial court denied the refunds on the ground that the *Davis* decision was to be applied prospectively. The Supreme Court of Virginia affirmed, concluding that because *Davis* was to be applied prospectively, the pre-*Davis* assessments were not improper under Virginia's tax refund statute.

The United States Supreme Court vacated the Virginia Supreme Court's decision and remanded the case in light of the Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ---, 115 L. Ed. 2d 481 (1991), which held that an earlier decision invalidating excise taxes on alcoholic beverages was retroactively applicable to claims arising from facts predating the earlier decision. On remand, the Supreme Court of Virginia affirmed its prior decision in all respects on the ground that the issue of retroactivity was not decided in *Davis* because Michigan had not contested plaintiff's entitlement to a refund.

Reversing the Virginia Supreme Court, the United States Supreme Court held that *Davis* was to be applied retroactively. The Court noted, however, that retroactive application of *Davis* did not necessarily entitle the petitioners to a refund. Rather, Virginia was only required to provide relief consistent with federal due process. *Harper*, 509 U.S. at ---, 125 L. Ed. 2d at 88. The *Harper* Court did not fashion a new test for due process. Instead, it relied on well-established tests enunciated in *McKesson* and earlier cases. The Court said:

> Because we have decided that *Davis* applies retroactively to the tax years at issue in petitioners' refund action, we reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily

entitle them to a refund. Rather, the Constitution requires Virginia "to provide relief consistent with federal due process principles." *American Trucking*, 496 U.S. at 181, 110 L. Ed. 2d 148, 110 S.Ct. 2323 (plurality opinion). Under the Due Process Clause, U.S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, 110 S.Ct. 2238 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard . . . sufficient by itself to satisfy the Due Process Clause." *Id.* at 38, n.21, 110 L. Ed. 2d 17, 110 S.Ct. 2238. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31, 110 L. Ed. 2d 17, 110 S.Ct. 2238 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create[s] in hindsight a nondiscriminatory scheme." *Id.* at 40, 110 L. Ed. 2d 17, 110 S.Ct. 2238. *Cf. Davis*, 489 U.S. at 818, 103 L. Ed. 2d 891, 109 S.Ct. 1500 (suggesting that a State's failure to respect intergovernmental tax immunity could be cured "either by extending [a discriminatory] tax exemption to retired federal employees . . . or by eliminating the exemption for retired state and local government employees").

Id. at ---, 125 L. Ed. 2d at 88-89.

The *Harper* Court also noted that were Virginia to have provided an adequate predeprivation remedy, that is, a "meaningful opportunity for taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing," due process would be satisfied. *Id.* at ---, 125 L. Ed. 2d at 89 (quoting *McKesson*, 496 U.S. at 38, 110 L. Ed. 2d at 37). Where no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* (quoting *McKesson*, 496 U.S. at 31, 110 L. Ed. 2d at 32).

In its brief before the Supreme Court the State of Virginia argued that "[t]axpayers in Virginia are entitled to challenge a tax assessment in a prepayment procedure set forth in §§ 58.1-1821 and 58.1-1822 of the Virginia Code." Brief for Respondent at 47, *Harper v. Virginia Department of Taxation*, 509 U.S. ---, 125 L. Ed. 2d 74 (1993). Thus, Virginia contended petitioners "had a clear, meaningful, prepayment opportunity to challenge the validity of the tax of which they now complain." *Id.* The sufficiency of this predeprivation procedure had not been reviewed by the Virginia Supreme Court. The United States Supreme Court held:

> The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law "provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." *McKesson*, 496 U.S. at 36-37, 110 L. Ed. 2d 17, 110 S.Ct. 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia "is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *Id.* at 51-52, 110 L. Ed. 2d 17, 110 S.Ct. 2238.

Harper, 509 U.S. at ---, 125 L. Ed. 2d at 89. The constitutionality of a postdeprivation remedy, such as that afforded in North Carolina, was not before the Court in *Harper*. The Court chose to comment on, but did not decide, whether Virginia's predeprivation remedy satisfied due process.

Thus, *Harper* did not modify the Court's previous jurisprudence, including *McKesson*, regarding the tests for determining whether a state's postdeprivation remedy by which a tax may be challenged on legal or constitutional grounds satisfies due process. Rather, the *Harper* Court made it clear that a state satisfied due process if it offered taxpayers relief consistent with the due process standards delineated in *McKesson*.

III.

[3] We next turn to plaintiffs' argument that any defenses by the State under section 105-267 to plaintiffs' federal challenges have been settled by *res judicata* and collateral estoppel. The basis

of plaintiffs' argument is the denial of the State's motion to dismiss based on the Tax Injunction Act, 28 U.S.C. § 1341, in the companion case brought by plaintiffs in the United States District Court for the Eastern District of North Carolina, Raleigh Division. *Swanson v. Powers* (E.D.N.C. 1990) (No. 89-282-CIV-5-H). We find no merit in this argument because there has been no final adjudication of the federal case.

Under *res judicata*,

> a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. See Restatement (Second) of Judgments 18, 19 (1982); 1B Moore's Federal Practice 405[1] at 181-85 (2d ed. 1984).

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 556-57 (1986). For *res judicata* to apply, a party must show that a "previous suit has resulted in final judgment on the merits, that the same cause of action is involved, and that [plaintiffs] and [the State] were either parties or stand in privity with parties." *Id.* at 429, 349 S.E.2d at 557. Similarly,

> [u]nder collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. *See* Restatement (Second) of Judgments § 27 (1982); 1B Moore's Federal Practice 0.441[1] at 718 (2d ed. 1984).

Id. (footnote omitted). Thus, collateral estoppel, like *res judicata*, only occurs "when there has been a final judgment or decree." *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973).

In the federal case, by an order dated 26 October 1993, United States District Judge Malcom H. Howard found that "a final judgment has not been issued in this case and . . . this court has never ordered that this case be closed"; and Judge Howard ruled "the court hereby puts all parties on notice that this case is not closed and the court stands ready to hear any and all matters

that properly come before it." *Swanson v. Powers* (E.D.N.C. 1990) (No. 89-282-CIV-5-H). Because the requisite element of a final judgment is lacking, neither *res judicata* nor collateral estoppel based on the federal litigation apply.

For the foregoing reasons, the decision of the superior court granting summary judgment in favor of plaintiffs is reversed. The case is remanded for entry of judgment for defendants dismissing the action.

Reversed and remanded.

Justice MITCHELL dissenting.

Neither the defendants nor the majority of this Court dispute the fact that the defendants have unlawfully collected taxes from the plaintiffs through the application of an unconstitutionally discriminatory tax. The issue is whether the defendants must return the money they have unlawfully taken from the taxpayer-plaintiffs, or may keep that money because the plaintiffs have not sought to recover it in strict accordance with the requirements set forth in N.C.G.S. § 105-267. I believe that under the particular facts presented by this case, the plaintiffs have been denied due process of law. Therefore, I must dissent from the opinion of the majority which holds to the contrary and denies relief to the taxpayer-plaintiffs.

At the outset, I take exception to the apparent view of the majority that by failing to comply with the procedural prerequisites of N.C.G.S. § 105-267, the plaintiffs somehow voluntarily paid the unconstitutional taxes in question. When, as here, a tax is paid to avoid financial sanctions or a seizure of real or personal property, the tax is paid under duress. *McKesson v. Division of Alc. Bev.*, 496 U.S. 18, 39 n.21, 110 L. Ed. 2d 17, 37 n.21 (1990).

> In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. As the opinion of the majority concedes, North Carolina law did not provide the plaintiffs with any form of predeprivation remedy. Therefore, they may not be denied recovery on the basis of any ruling grounded in the notion that they have somehow voluntarily paid the unconstitutional taxes in question, thereby rendering those unlawfully collected taxes nonrefundable.

> When, as here, the State places
>
> a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id. at 31, 110 L. Ed. 2d at 32 (footnotes omitted). "In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.' " *Harper v. Virginia Dept. of Taxation*, 509 U.S. ---, 125 L. Ed. 2d 74, 89 (1993) (quoting *McKesson*, 496 U.S. at 40, 110 L. Ed. 2d at 38). Any such postdeprivation procedure provides all of the process due, if it provides "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40, 110 L. Ed. 2d at 38. I am convinced under the facts presented by the present case, however, that N.C.G.S. § 105-267 does not provide these plaintiffs the type of meaningful backward-looking relief required by the Due Process Clause.

The opinion of the majority concludes that the taxpayer-plaintiffs were required under N.C.G.S. § 105-267 to make a postdeprivation demand upon the administrative functionaries responsible for collecting the taxes in question and then wait the required period of time thereafter before initiating any court action seeking to recover money taken from them unlawfully pursuant to an unconstitutional tax. However, courts have uniformly held that plaintiffs will not be required to exhaust administrative remedies before bringing suit, where pursuing such administrative remedies would be futile. Pursuing an administrative remedy is "futile" when it is useless to do so either as a legal or practical matter. *See Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 709 (1988). For me, this clearly is a case in which it would have been futile for the

plaintiffs to exhaust their administrative remedies under N.C.G.S. § 105-267 before seeking relief in the courts.

In the present case, neither of the State functionaries who have been made defendants in this case—the Secretary of Revenue and the State Treasurer—have or have ever had the authority to grant the relief sought by the taxpayer-plaintiffs. Those defendants, who have administrative responsibilities with regard to the tax at issue, did not and do not have the power to pass upon the constitutionality of that tax, since decisions as to the constitutionality of tax statutes are *exclusively* for the judiciary. *Bailey v. State of North Carolina*, 330 N.C. 227, 246, 412 S.E.2d 295, 306 (1991), *cert. denied*, --- U.S. ---, 118 L. Ed. 2d 547 (1992). Thus, it is clear beyond question that the conclusion of the majority requiring these taxpayers to "jump through the procedural hoops adopted and applied by the State bureaucracy under N.C.G.S. § 105-267" amounts to a holding that they were entitled to relief only if they did an utterly vain and useless act. *Bailey*, 330 N.C. at 248-49, 412 S.E.2d at 308 (Mitchell, J., dissenting). That being the case, I reject the majority's view that the statute provides meaningful backward-looking relief of the sort which is adequate to satisfy minimum due process requirements. *See id.; Reich v. Collins*, 437 S.E.2d 320, 322-25 (Ga. 1993) (Carley, J., joined by Sears-Collins, J., dissenting). Therefore, I also reject the majority's conclusion that the defendants are entitled to the entry of a judgment dismissing the taxpayers' action against them.

Under the opinion of the majority, these taxpayer-plaintiffs would be entitled to a refund only if they had foreseen at an early stage that the tax in question was unconstitutional—foresight which would have exceeded that of the legislature, the defendants who are experts in such matters, and this Court. *See Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (1991), *vacated and remanded*, --- U.S. ---, 125 L. Ed. 2d 713 (1993) (in which a majority of this Court held that these plaintiffs were not entitled to refunds of the taxes in question because the decision of the Supreme Court of the United States in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), declaring taxes such as that at issue here unconstitutional, did not apply retroactively). I am completely aware that a concern for the ability of taxing entities such as the various states and local governments to engage in sound fiscal planning has led to the adoption of rules which are heavily weighted against the taxpayers and in favor

of the taxing entity in cases such as this. I believe, however, that the opinion of the majority in the present case goes well beyond any legitimate need supporting such concerns and upholds a sham procedure for postdeprivation relief which was futile from the outset in this case. Surely, this unseemly result may only be properly characterized as tilting the scales too far in favor of the taxing entity and denying these taxpayers fundamental due process.

For the foregoing reasons, I believe that the taxpayer-plaintiffs have been denied due process of law by the majority's interpretation and application of N.C.G.S. § 105-267. Therefore, I respectfully dissent.

Justice Parker joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. HERBERT BARTON, JR.

No. 210A92

(Filed 4 March 1994)

1. **Homicide § 677 (NCI4th)— premeditation and deliberation— diminished capacity—specific causes—sufficiency of instruction**

The trial court did not commit plain error in its instructions on lack of mental capacity as a factor tending to negate the specific intent required for first-degree murder by failing to include in its instructions the specific causes of "mental illness and mental retardation or borderline intellectual functioning" when there was evidence that defendant's impairment resulted from these causes. The trial court delivered the appropriate pattern jury instruction on this issue, which lists examples of factors that could contribute to a diminished legal capacity, and the trial court's instructions were of sufficient particularity to enable the jury to understand the law on lack of mental capacity and to apply it to the evidence presented on that issue.

Am Jur 2d, Homicide § 515.

2. Evidence and Witnesses § 2302 (NCI4th)— premeditation and deliberation—diminished capacity—exclusion of cumulative evidence

The trial court in a first-degree murder prosecution did not err by sustaining the prosecutor's objection to defense counsel's question seeking to elicit from defendant's psychiatric expert testimony that defendant had a limited capacity to plan and a limited capacity "to carry out something in accordance with the plan" where defendant had previously been allowed to place before the jury considerable evidence that his diminished mental capacity adversely affected his ability to make and carry out plans, since the trial court's action was merely an exclusion of cumulative evidence and was consistent with N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

3. Robbery § 126 (NCI4th)— armed robbery—instructions—acting in concert—intent

The trial court's instructions on acting in concert as they applied to a charge of armed robbery did not amount to plain error where they could only have been understood by the jury to allow conviction of the defendant for armed robbery if the defendant himself acted alone or together with the others and the defendant himself intended that the robbery from the victim result from such action.

Am Jur 2d, Robbery §§ 71 et seq.

4. Robbery § 88 (NCI4th)— armed robbery—acting in concert—sufficiency of evidence

The evidence supported the trial court's instruction permitting the jury to convict defendant of armed robbery on the basis of acting in concert where the evidence tended to show that defendant, his brother and a third person waited for the victim at the murder scene together, where defendant shot and killed the victim; still holding a shotgun, the defendant stood by while his brother and the third person took the victim's wallet from his pocket; they then went to the victim's car, where the third person found the victim's pistol and gave

it to the defendant; the defendant took the pistol and then drove the victim's car away from the scene; and the defendant, his brother and the third person thereafter each took steps to conceal evidence which would point to their participation in the crimes committed against the victim.

Am Jur 2d, Robbery §§ 62 et seq.

5. Homicide § 439 (NCI4th)— intentional use of deadly weapon—insufficiency to show premeditation and deliberation—failure to instruct

The trial court did not commit plain error by failing to expressly instruct the jury that while the intentional use of a deadly weapon may give rise to a presumption that a killing was malicious, it will not alone sustain a finding of premeditation and deliberation.

Am Jur 2d, Homicide § 509.

6. Evidence and Witnesses § 2907 (NCI4th)— redirect testimony—new matter—discretion of court

The trial court did not abuse its discretion in allowing a witness to testify on redirect examination in a first-degree murder trial about her encounter with defendant the night following the murder because the testimony went beyond the scope of her testimony during direct and cross-examination where the testimony was relevant and otherwise admissible, and the trial court provided the defendant an opportunity to recross-examine the witness about her new testimony.

Am Jur 2d, Witnesses §§ 737 et seq.

7. Evidence and Witnesses § 712 (NCI4th)— objection to testimony sustained—court's failure to strike and give curative instruction

The trial court did not err by failing to strike a witness's testimony in a first-degree murder trial that defendant's accomplice had stated that "*they* had shot the man" and by failing to give a curative instruction where the trial court sustained defendant's objection to the testimony; defendant failed to move to strike the objectionable testimony and thus waived his right to assert error on appeal; defendant made no request for a curative instruction; and there was no prejudice because the jury had previously heard defendant's con-

fession that he had shot the victim in the head and "didn't care what [he had] done."

Am Jur 2d, Trial §§ 1478-1485.

8. **Evidence and Witnesses § 1652 (NCI4th)— photographs showing defendant in handcuffs—admission for illustrative purposes—no abuse of discretion**

The trial court did not abuse its discretion in a first-degree murder trial by admitting for illustrative purposes a color photograph of defendant and two others standing handcuffed next to a sheriff's deputy in the area where the victim's car was found and a color photograph of defendant and others walking across a field near the location of the car where the trial court determined that the photographs would assist law officers in illustrating their testimony about the assistance given them by the defendant in locating items of evidence; the photographs were not used excessively or repetitiously; and the trial court gave a limiting instruction and also instructed the jury that the fact that a photograph may depict the defendant in handcuffs is no evidence of his guilt.

Am Jur 2d, Evidence § 785.

9. **Constitutional Law § 318 (NCI4th)— meritless issues—submission under Anders v. California—inappropriate where other assignments argued**

It was inappropriate for defense counsel to present three meritless additional issues to the Supreme Court for its own review in light of *Anders v. California*, 386 U.S. 738, where counsel for defendant has vigorously argued twelve assignments of error, since *Anders* applies only to cases that appointed counsel determines to be *wholly* without merit. If counsel determines that an assignment of error is without merit, he or she should either present it only as a preservation issue or omit it entirely from the argument on appeal.

Am Jur 2d, Criminal Law §§ 752, 985-987.

10. **Criminal Law § 409 (NCI4th)— capital sentencing—limiting each counsel to one argument—prejudicial error**

The trial court committed prejudicial error by limiting each counsel for the defendant to one argument to the jury

at the conclusion of defendant's capital sentencing proceeding. N.C.G.S. § 84-14.

Am Jur 2d, Trial §§ 547 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Allen (J.B.), J., on 5 June 1992, in the Superior Court, Robeson County, sentencing the defendant to death for first-degree murder. The defendant's motion to bypass the Court of Appeals on his appeal from an additional judgment for robbery with a dangerous weapon was allowed by the Supreme Court on 6 May 1993. Heard in the Supreme Court on 14 October 1993.

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

Richard B. Glazier for the defendant-appellant.

MITCHELL, Justice.

On 20 May 1991, a Robeson County Grand Jury indicted the defendant for first-degree murder, robbery with a dangerous weapon, felonious larceny, larceny of a firearm and conspiracy to commit murder. The defendant was tried capitally at the 18 May 1992 Criminal Session of Superior Court, Robeson County. The trial court dismissed the conspiracy charge at the close of the State's evidence. The jury returned verdicts finding the defendant guilty of first-degree murder, robbery with a dangerous weapon, felonious larceny and larceny of a firearm.

At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of death for the first-degree murder and the trial court sentenced the defendant in accord with the jury's recommendation. The trial court also sentenced the defendant to imprisonment for fourteen years for robbery with a dangerous weapon and continued prayer for judgment for five years on the two larceny convictions. The defendant appealed to this Court as a matter of right from the judgment sentencing him to death for first-degree murder. *See* N.C.G.S. § 7A-27(a) (1989). We allowed his motion to bypass the Court of Appeals on his appeal from the judgment for robbery with a dangerous weapon.

The evidence presented at the defendant's trial tended to show the following. Around 6:00 p.m. on 8 February 1991, the defendant shot Harold Craven in the back of the head with a shotgun because,

as the defendant said, he had "been wanting to shoot somebody for about two weeks." It was Mr. Craven's custom in the evenings to drive to an area of Maxton, North Carolina, where several garbage dumpsters and a couch were located, in order to sit and think. The defendant had seen Mr. Craven at the dumpsters two nights prior to the murder and had attempted to kill him then. However, the shotgun the defendant was using, which he described as his "old shotgun that had tape on the barrel," failed to fire. One of the defendant's accomplices, Michael Emanuel, procured another shotgun, and the defendant returned to the dumpsters with that shotgun on the evening of 8 February 1991. Present with the defendant were Michael Emanuel and the defendant's younger brother, Heath Barton. All three were waiting for Mr. Craven when he arrived. Mr. Craven got out of his car and was looking around when the defendant shot him. The victim fell to the ground and Emanuel and the defendant's brother moved forward and took his wallet. Emanuel and the defendant drug the victim's body into a patch of woods adjacent to the dumpsters and covered it with leaves and brush. They then returned to the victim's car, from which Emanuel took a .25-caliber pistol belonging to Mr. Craven and gave it to the defendant.

The defendant and the others drove off in the victim's car with the defendant at the wheel. Later, the defendant parked the car in a patch of woods near the defendant's mobile home. After sweeping the ground around the car, they ran to the mobile home. Emanuel and the defendant's brother tossed the murder weapon into a ditch behind the mobile home. The defendant hid the victim's .25-caliber pistol behind a stump. The three then went to buy beer, cocaine, marijuana and knives.

Local sheriff's deputies approached the defendant at his mobile home two days later. After receiving the Miranda warnings and signing a waiver form, the defendant stated to the deputies that he had killed Mr. Craven. The defendant then helped the deputies locate the .25-caliber pistol and other items of evidence. The deputies found the murder weapon in the ditch where Emanuel and the defendant's brother had hidden it and found the shotgun with tape around the barrel inside the mobile home.

The deputies then arrested the defendant and took him to the sheriff's department. After receiving the Miranda warnings a second time, the defendant confessed. He also stated that he, his

brother and Emanuel had "all wanted to shoot somebody" and "didn't care who it was." The defendant explained that he "was mad and didn't care what [he had] done." He said he "would have shot anybody that drove up there that night."

Other pertinent facts will be introduced in the discussion of the assignment of error to which they are relevant.

I. Guilt Phase

[1] By an assignment of error regarding the guilt-innocence determination phase of his trial, the defendant contends that the trial court erred in its instructions on lack of mental capacity as a factor tending to negate the specific intent required for first-degree murder. Specifically, the trial court instructed the jury that if it found "that [the] defendant was intoxicated or drugged or lacked mental capacity at the time of the killing, [it] should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first-degree murder." The defendant complains that there was substantial evidence that his impairment "was caused by mental illness and mental retardation or borderline intellectual functioning," yet the trial court did not include these causes in its instructions. The defendant insists that the trial court's omission of these causes suggested to the jury that these causes were not sufficient to allow for a finding of lack of specific intent. The defendant contends that the trial court thereby "impaired the jury's consideration of the diminished capacity defense" in violation of the defendant's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

The defendant admits, however, that he did not object to the instructions or request more specific instructions. This assignment of error is therefore barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and the defendant is not entitled to relief unless any error constituted plain error. *See State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). We have previously explained that to rise to the level of plain error, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). Stated another way, the error must be one "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).

Having reviewed the trial court's instructions on lack of mental capacity under this standard, we find no plain error. The trial court delivered the appropriate pattern jury instruction on this issue, which lists examples of factors that could contribute to a diminished mental capacity. *See* N.C.P.I.—Crim. 305.11 (1986). As the defendant himself recognizes, the trial court was not required to provide the jury with an exhaustive list of all possible factors that could have contributed to his diminished mental capacity. Indeed, "[t]he trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). The instructions given in the case at bar were of sufficient particularity to enable the jury to understand the law on lack of mental capacity and apply it to the evidence presented on that issue. No more was required of the trial court. We therefore cannot say that the trial court committed plain error. This assignment of error is without merit.

[2] By another assignment of error, the defendant insists that the trial court erred by sustaining an objection to a question his counsel posed to Dr. Thomas W. Brown, the defendant's psychiatric expert. Near the close of Dr. Brown's testimony on direct examination, counsel for the defendant asked Dr. Brown the following question:

> [B]ased on your education, training and experience, and based on the several diagnoses that you made or diagnoses [the defendant] is suffering from, do you have an opinion satisfactory to yourself as to the impact of all those different diagnoses on his ability to plan?

The prosecution objected and the trial court sustained the objection on the ground that Dr. Brown had previously "answered that question." The defendant then made an offer of proof during which Dr. Brown testified that "the combination of those would severely limit [the defendant's] capacity to plan" and his capacity to "carry out something in accordance with the plan."

The defendant maintains that the question he posed to Dr. Brown was "directly related to a critical issue in the case" and

was "proper under existing law." The defendant contends that, contrary to the trial court's ruling, the question did not call for cumulative testimony. He therefore argues that he is entitled to a new trial under our opinion in *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). We disagree.

In *Shank*, we held that the trial court committed prejudicial error by excluding the testimony of the defendant's psychiatric expert that, in his opinion, the "defendant's diminished mental capacity adversely affected his ability to make and carry out plans." We reasoned that because (1) the testimony would have tended to show that the defendant lacked the capacity to premeditate or deliberate, (2) the North Carolina Rules of Evidence allow opinion testimony embracing an ultimate issue, *see* N.C.G.S. § 8C-1, Rule 704 (1992), and (3) the testimony was otherwise admissible, the trial court erred in excluding the doctor's opinion. *Shank*, 322 N.C. at 249, 367 S.E.2d at 643. Since there was a reasonable possibility that a different result would have been reached had the trial court not committed this error, the error was prejudicial and entitled the defendant to a new trial. *Id. See also* N.C.G.S. § 15A-1443(a) (1988).

In the present case, we assume *arguendo* that the question was proper as to form and that the tendered answer was not expressly made inadmissible by any rule of evidence. Unlike the defendant in *Shank*, however, the defendant in the case at bar was allowed to place before the jury considerable evidence that his diminished mental capacity adversely affected his ability to make and carry out plans. Prior to the question at issue, Dr. Brown had testified that: (1) the defendant's capacity "for being able to plan" was limited, (2) the defendant "would have been significantly, substantially impaired" at the time of the murder, (3) the defendant's "ability to make plans or think things out" was "definitely limited" and (4) the defendant "draws conclusions about what [it] is possible to do or what [it] makes sense to plan on doing in ways that are unrealistic or don't make sense." The additional testimony the defendant attempted to elicit from Dr. Brown that the defendant had a limited capacity to plan and a limited capacity to "carry out something in accordance with the plan" would have added little, if anything, to the testimony he had already given.

North Carolina Rule of Evidence 403 provides that evidence, although relevant, "may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay, waste

of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). By sustaining the prosecutor's objection to the question at issue, the trial court in the case at bar did nothing more than exclude cumulative evidence. The trial court's action, therefore, was consistent with Rule 403 and did not constitute error. Accordingly, we overrule this assignment of error.

By another assignment of error the defendant contends that he is entitled to a new trial on the charge of robbery with a dangerous weapon because the trial court erred in instructing the jury on the theory of acting in concert as it applied to that charge. The trial court instructed the jury, in pertinent part, as follows:

> [F]or a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together *with a common purpose to commit robbery with a firearm*, each of them is held responsible for the acts of the others done in the commission of robbery with a firearm.
>
> So I charge you that if you find from the evidence beyond a reasonable doubt that on or about February 8, 1991, the defendant, Herbert Barton, Jr., acting either by himself or acting together with Heath Barton and Michael Emanuel, had in their possession a firearm and took and carried away property from the person or presence of a person without his voluntary consent by endangering or threatening his life with use or threatened use of a firearm, *the defendant* knowing that he was not entitled to take the property and *intending to deprive him of its use permanently*, then it would be your duty to return a verdict of guilty of robbery with a firearm.
>
> However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty in case 91 CRS 3025.

(Emphasis added). This instruction was taken nearly verbatim from the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 202.10 (1971). The defendant did not object to this instruction at trial, nor did he request an additional instruction. Therefore, our review is limited to a review for plain error. *State v. Joplin*, 318 N.C. 126, 132, 347 S.E.2d 421, 425 (1986); *Odom*, 307 N.C. at 659-60, 300 S.E.2d at 378.

[3] The defendant first argues that the instructions given by the trial court amounted to plain error because the jury was not informed that to convict the defendant of the robbery it must first find from the evidence that he specifically intended that the robbery occur and communicated to the perpetrators his intent to assist them with the commission of that crime, if necessary. We do not agree. Instead, we conclude that the instruction complained of could only have been understood by the jury to allow conviction of the defendant for robbery with a dangerous weapon *if the defendant himself* acted alone or together with the others and *the defendant himself* intended that the robbery from the victim result from such action.

[4] The defendant also argues in support of this assignment of error that no evidence was introduced at trial to support a reasonable finding that he acted in concert with his brother and Emanuel to commit the robbery with a dangerous weapon. Therefore, he contends that the trial court erred in giving any instruction permitting the jury to convict him of that robbery on the basis of the doctrine of acting in concert. We find this argument feckless.

Overwhelming evidence tended to show that the defendant, his brother and Emanuel waited for the victim at the murder scene together, where the defendant shot and killed the victim. Still holding the shotgun, the defendant stood by while his brother and Emanuel took the victim's wallet from his pocket. They then went to the victim's car, where Emanuel found the victim's pistol and gave it to the defendant. *The defendant* took the pistol, then drove the victim's car away from the scene. Thereafter, the defendant, his brother and Emanuel each individually took steps to conceal evidence which would point to their participation in the crimes committed against the victim. Such evidence was more than sufficient to support the conviction of the defendant for robbery with a dangerous weapon, either on the theory that he acted in concert with the others or on the theory that he himself robbed the victim. Accordingly, we conclude that the trial court did not commit plain error and overrule this assignment of error.

[5] By another assignment of error, the defendant argues that the trial court should have instructed the jury that while the intentional use of a deadly weapon may give rise to a presumption that a killing was malicious, it will not alone sustain a finding of premeditation or deliberation. *See State v. Zuniga*, 320 N.C.

233, 258, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987) ("[w]hile the intentional use of a deadly weapon may, in and of itself, give rise to a presumption that a killing was malicious, . . . this is insufficient to sustain a finding of premeditation and deliberation"). The defendant maintains that the trial court's failure to expressly so instruct the jury may have allowed the jury to infer, in violation of *Zuniga*, that the intentional use of a deadly weapon "was tantamount to premeditation and deliberation."

The defendant did not object to the instructions given and did not request additional instructions. He therefore is entitled to relief only if the trial court committed plain error.

The trial court properly instructed the jury on the elements of first-degree murder in accordance with the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 206.10 (1989). The trial court is not required to instruct the jury "with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). The trial court's instructions in the case at bar were of sufficient particularity to enable the jury to understand the law with regard to first-degree murder and apply it to the evidence bearing upon the elements of that charge in the present case. We therefore conclude that the defendant has failed to establish plain error in this regard and we reject this assignment of error.

[6] By his next assignment of error, the defendant maintains that the trial court erred in allowing the State to elicit testimony from a witness on redirect examination that went beyond the scope of the witness' testimony during direct and cross-examination. On direct examination, the witness, Ms. Winnie Jacobs, testified that she lived near the defendant in February of 1991. She took the defendant, the defendant's brother and Michael Emanuel "uptown" around 7:30 or 8:00 p.m. on 8 February 1991, the night of the murder. While uptown, she drove the three boys to various locations where they bought gas, cigarettes, knives, beer and ice, and the defendant did not appear to be intoxicated at the time. On cross-examination, Ms. Jacobs again stated that she drove the defendant and the two others uptown around 7:30 or 8:00 p.m. on 8 February 1991. On redirect examination, Ms. Jacobs testified over the defendant's objection about an encounter with the defend-

ant on the night of 9 February 1991, the night following the murder. She explained that the defendant came to her house around 8:00 p.m., that "he acted scared" and that he had mud on his shoes. She also testified that the defendant told her "that he had been running in the woods" and "that the laws was after him." Ms. Jacobs then took the defendant back to his mobile home.

The defendant contends that the trial court erred in allowing Ms. Jacobs to testify about her encounter with the defendant on 9 February 1991 because the testimony went beyond the scope of her testimony during direct and cross-examination. He further argues that the error was prejudicial because Ms. Jacobs' testimony on redirect examination "had the reasonable possibility of suggesting to the jury that the defendant was able to formulate and carry out complex plans, including evasion of law enforcement officers." He therefore insists that he is entitled to a new trial. We disagree.

It is well established that "the calling party is ordinarily not permitted . . . to question the witness on entirely new matters" on redirect examination. *State v. Weeks*, 322 N.C. 152, 169, 367 S.E.2d 895, 905 (1988). However, the decision whether to allow testimony on redirect examination involving matters beyond the scope of the witness' testimony on direct and cross-examination is a matter left to the sound discretion of the trial court. *See State v. Waters*, 308 N.C. 348, 354, 302 S.E.2d 188, 192 (1983) ("the trial judge ha[s] within his discretion the authority to permit the State to introduce new evidence on re-direct examination"). *See also* N.C.G.S. § 8C-1, Rule 611(a) (1992) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."); N.C.G.S. § 15A-1226(b) (1988) ("The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict."). The testimony at issue here was relevant and otherwise admissible. Further, after its admission, the trial court provided the defendant an opportunity to recross-examine the witness—an opportunity of which the defendant did not avail himself. We conclude that the trial court did not abuse its discretion. Accordingly, this assignment of error is without merit.

[7] The defendant contends by another assignment of error that the trial court erred in failing to strike certain testimony of a State's witness and in failing to give the jury a curative instruction with regard to that testimony. The witness, Vashon Locklear, an acquaintance of the defendant who was charged with conspiracy in this matter, testified about a meeting he had with the defendant, the defendant's brother and Michael Emanuel on the day following the murder of Harold Craven. Over the defendant's objection, Locklear testified that he had asked them whether they had "shot the old man." When asked by the prosecutor whether any of the three had responded, Locklear answered: "I believe Michael said that they had shot the man." The defendant objected and the trial court sustained the objection. The defendant neither moved to strike Locklear's testimony nor requested a curative instruction. Nevertheless, he now contends that the trial court should have taken these actions *sua sponte* because merely sustaining the defendant's objection was "insufficient to cure the tremendously damaging statement of Michael Emanuel that 'they had shot the man.' ". We disagree.

We recently rejected a nearly identical contention in *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991). In *Quick*, an SBI agent testified that an ashtray found in the victim's home bore the defendant's fingerprint. He then testified that he had asked a fellow agent, Agent Duncan, to verify this fingerprint identification and that Agent Duncan had "agreed with the identification." The defendant objected and the trial court sustained the objection. On appeal, the defendant argued that he was entitled to a new trial because the testifying SBI agent had introduced highly prejudicial inadmissible hearsay.

In rejecting this contention, we explained that: (1) "where the trial court sustains [the] defendant's objection, he has no grounds to except," (2) by failing to move to strike the objectionable testimony, the defendant waived his right to assert error on appeal and (3) there was no prejudice in any event because the testifying agent had given his own opinion that the fingerprint was that of the defendant and the trial court had sustained the defendant's objection to the corroborating opinion of Agent Duncan. *Id.* at 29, 405 S.E.2d at 196. Similarly, in the case *sub judice* the trial court sustained the defendant's objection and the defendant failed to move to strike the objectionable testimony. He therefore has waived his right to assert on appeal error arising from Vashon Locklear's

objectionable testimony. Further, the defendant has not shown prejudice since prior to Locklear's testimony, the jury heard the defendant's own confession to law enforcement officers that he had shot the victim in the head and "didn't care what [he had] done."

We have also recently rejected a defendant's contention that the trial court should have given the jury a curative instruction *sua sponte*. We plainly stated in *State v. Williamson*, 333 N.C. 128, 139, 423 S.E.2d 766, 772 (1992), that "[a] trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense." As the defendant in the case at bar did not request a curative instruction, the trial court did not err by failing to give one. The trial court thus took sufficient action by sustaining the defendant's objection and was not required either to strike the testimony or to give a curative jury instruction. Accordingly, we overrule this assignment of error.

[8] By another assignment of error, the defendant argues that the trial court erred in allowing the State to introduce two photographs into evidence. The first was an 8 by 10 inch color photograph of the defendant, the defendant's brother and Michael Emanuel standing handcuffed next to a sheriff's deputy in the area where the victim's car was found. The second was an 8 by 10 inch color photograph of the defendant and the others walking, with their backs to the camera, across a field near the location of the car. The trial court admitted the two photographs for the limited purpose of illustrating the testimony of law enforcement officers regarding the assistance given them by the defendant in locating various items of evidence. The trial court expressly instructed the jury that it was to consider the photographs only for this limited purpose. The trial court also instructed the jury that "the fact that a photograph may depict [the defendant] in handcuffs is no evidence at all of his guilt." The defendant contends that (1) the photographs were not relevant and (2) even assuming the photographs had some probative value, that value "was substantially outweighed by the prejudicial effect of the jury seeing the defendant handcuffed." He therefore insists that he is entitled to a new trial. We disagree.

Photographs of the sort at issue here "may be introduced 'so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.' " *State v. Stager*, 329 N.C. 278, 308, 406 S.E.2d 876, 893 (1991) (quoting *State v. Hennis*, 323

N.C. 279, 284, 372 S.E.2d 523, 526 (1988)). Further, "[w]hether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. An abuse of discretion exists "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* We find no abuse of discretion here. The photographs were used neither excessively nor repetitiously. Only two photographs were introduced, and the trial court determined that they would assist the law enforcement officers in illustrating their testimony regarding the assistance given them by the defendant in locating items of evidence. In addition, the trial court gave the jury a limiting instruction and emphasized to the jury that "the mere fact that [the defendant] is in handcuffs [in the photographs] is no evidence of guilt whatsoever." We therefore conclude that the trial court did not abuse its discretion and overrule this assignment of error.

[9] The defendant raises three additional issues which, after a "thorough review of the record, including all relevant precedent," he concedes are without merit but, nevertheless, tenders to this Court for its own review in light of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967). The three issues are: (1) the trial court erred in denying the defendant's motion to suppress his pretrial statement to law enforcement officers, (2) the trial court's findings and conclusion to the effect that the defendant made his pretrial statement to law enforcement officers voluntarily and knowingly were not supported by the evidence presented at the suppression hearing and (3) the trial court erred in denying the defendant's motions to dismiss all charges and to set aside the verdicts due to the insufficiency of the evidence to support these charges.

We first emphasize that the defendant's approach "is inappropriate in this situation because *Anders* . . . generally applies only where counsel believes the *whole appeal* is without merit." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (emphasis added). *Anders* holds that appointed counsel must "support his client's appeal to the best of his ability" and "if counsel finds his case to be *wholly frivolous*, after a conscientious examination of it, he should so advise the court and request permission to *withdraw*" and accompany that request with a brief "referring

to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498 (emphasis added). By its use of the term "wholly frivolous" and its discussion of withdrawal by appointed counsel, the Supreme Court of the United States clearly contemplated application of its *Anders* opinion only to cases that appointed counsel determines to be *wholly* without merit. In the case at bar, however, counsel for the defendant has vigorously argued twelve assignments of error, indicating his belief that the defendant's appeal is not wholly without merit. It is therefore inconsistent and inappropriate for defense counsel to present three meritless additional issues to this Court for its own review in light of *Anders*.

Apart from the language of *Anders*, we also note that among the responsibilities of counsel representing a criminal defendant on appeal is the duty to carefully review the assignments of error, separate those of arguable merit from those without merit and assert the former on appeal. If counsel, during the course of this review, determines that an assignment of error is without merit, he or she should either present it only as a preservation issue or omit it entirely from his or her argument on appeal, thereby allowing the appellate court to focus its attention and expend its judicial resources on those issues about which a genuine controversy exists. The submission, as in the case at bar, of isolated "*Anders* issues" for the appellate court to research is not a viable course of action. Nevertheless, we have reviewed the record with regard to these assignments and have found no error. These three assignments of error are therefore without merit.

For the foregoing reasons, we find no error in the guilt phase of the defendant's trial.

II. Capital Sentencing Proceeding

[10] By another assignment of error, the defendant contends that the trial court erred by limiting each counsel for the defendant to one argument at the conclusion of the defendant's capital sentencing proceeding. The defendant argues that the trial court's action violated N.C.G.S. § 84-14, N.C.G.S. § 15A-2000(a)(4), and his constitutional rights to a fair trial, due process of law and freedom from cruel and unusual punishment. We conclude that the trial court erred and that the defendant must receive a new capital sentencing proceeding.

At the charge conference prior to closing arguments in the capital sentencing proceeding, the following dialogue took place between the trial court and the two counsel for the defendant:

THE COURT: All right. Now, who will take the last argument?

MR. DAVIS: I will.

. . . .

THE COURT: . . . And when will you argue Mr. Rogers, before [the District Attorney] Mr. Townsend or after Mr. Townsend?

(Counsel for the defendant confer.)

MR. ROGERS: Your Honor, just for tentative—and, you know, we've still got some talking to do, there will very well be a possibility that if the court would approve of it, split my argument—

THE COURT: No.

MR. ROGERS: No.

THE COURT: I'll give you an argument, but I'm not going to allow you to split it.

MR. DAVIS: Your Honor, aren't we entitled to open and close?

THE COURT: Yes.

MR. DAVIS: We're talking about he open and then also do—

THE COURT: I'll give you the last argument, *but I'm not going to let him have two arguments.*

MR. DAVIS: Just for the purpose of the record, we're requesting that Mr. Rogers be allowed to argue—open arguments and then let [the District Attorney] do his and then come back and do additional arguments and then I close out with my arguments.

THE COURT: No, . . . I'm not going to give one lawyer over there on your side two different arguments. Now, I'll let you have it any way you want to. I'll let you argue before [the District Attorney]. I'll let one of you argue before [the

District Attorney], one after. I'll let both of you argue after. *But I'm not going to let one lawyer, Mr. Rogers, have two separate arguments.*

MR. DAVIS: Your Honor, for the purpose of the record, then, that was our intention. And since we won't be allowed to do that, we would except for the record. And give us time to decide how we're going to do arguments in light of that.

. . . .

THE COURT: All right. So, then, in the morning, Mr. Rogers, you will either argue before [the District Attorney]. And if you elect not to, then [the District Attorney] will go first and then Mr. Rogers and Mr. Davis.

MR. DAVIS: Yes, sir.

MR. ROGERS: Yes.

(Emphasis added). The trial court then took a recess until the following morning.

On the morning after the charge conference, the following occurred in open court out of the presence of the jury:

THE COURT: All right. Mr. Bailiff, are all fourteen members of the jury in the jury room?

THE BAILIFF: Yes, sir.

THE COURT: Let the record show it's now Thursday, June the 4th, 1992.

Mr. Rogers, will you go before [the District Attorney] or after [him]?

MR. ROGERS: Well, we'd renew our motion as of yesterday as far as the arrangement we proposed yesterday which I understand you are going to—

THE COURT: *Well, that is to let you argue and let another person argue and you argue again*?

MR. ROGERS: Yes, sir.

THE COURT: Okay, okay. That motion will be denied.

MR. ROGERS: I will go, then, after [the District Attorney] and Mr. Davis will follow me.

> THE COURT: So, [District Attorney] Townsend, that means that you will be first, and you say that you'll take approximately forty-five minutes; and then Mr. Rogers you will be next with approximately forty-five minutes; and Mr. Davis then you'll be approximately forty-five minutes.

(Emphasis added).

The foregoing dialogue between the trial court and counsel for the defendant during the charge conference and immediately before the arguments of counsel on the following morning at the close of the capital sentencing proceeding made it clear the trial court would not, under any set of circumstances, allow Mr. Rogers to make more than one single argument on behalf of the defendant during the capital sentencing proceeding. The trial court erred in this regard.

In N.C.G.S. § 84-14, the General Assembly of North Carolina has expressly provided in pertinent part that:

> In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, *except in capital felonies, where there shall be no limit as to number.* The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; *in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side.*

N.C.G.S. § 84-14 (1985) (emphases added). In *State v. Gladden*, 315 N.C. 398, 421, 340 S.E.2d 673, 688, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986), this Court stated:

> We construe N.C.G.S. § 84-14 to mean that, although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish *and each may address the jury as many times as he desires.* Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury

> and may, upon being refreshed, rise again to make another address during the defendant's time for argument.

(Emphasis added). In a later case, this Court reemphasized that *Gladden* "makes it clear" that in a capital case all counsel for the defendant may argue for as long as they wish and each may address the jury as many times as he or she desires. *State v. Eury*, 317 N.C. 511, 516, 346 S.E.2d 447, 450 (1986).

In the present case, the trial court erred in denying Mr. Rogers the opportunity to argue more than once on behalf of the defendant at the close of the capital sentencing proceeding. *Id.* Further, as one can only speculate as to how the jury would have reacted had the defendant not been deprived of the benefit of multiple arguments on his behalf by Mr. Rogers, we are required under our prior decisions to hold that this error by the trial court constituted prejudicial error. *Id.* at 517, 346 S.E.2d at 450. Accordingly, the defendant is entitled to have the sentence of death entered against him vacated and to have this case remanded to the Superior Court, Robeson County, for a new capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

III. Preservation Issues

The defendant has brought forward eight additional assignments which he concedes this Court has previously rejected in other cases. We have considered the defendant's arguments with regard to these issues and have found no compelling reason to depart from our prior holdings which the defendant correctly recognizes as dispositive. These assignments of error are therefore without merit.

Having considered all of the defendant's assigned errors, we hold that the guilt-innocence determination phase of the defendant's trial was free of prejudicial error. However, the trial court's failure to allow both counsel for the defendant to argue as many times as they wished at the conclusion of the capital sentencing proceeding requires that the defendant receive a new capital sentencing proceeding. The verdict against the defendant for first-degree murder and the verdict and judgment for robbery with a dangerous weapon shall remain undisturbed. The sentence of death for first-degree murder is vacated and this case is remanded to the Superior Court, Robeson County, for a new capital sentencing proceeding in accordance with N.C.G.S. § 15A-2000.

NO. 91CRS3025, ROBBERY WITH A DANGEROUS WEAPON: NO ERROR.

NO. 91CRS2709, FIRST-DEGREE MURDER: GUILT PHASE, NO ERROR; SENTENCE VACATED AND CASE REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING IN ACCORDANCE WITH N.C.G.S. § 15A-2000.

STATE OF NORTH CAROLINA v. CHARLES L. PICKENS, JR., AND JAMES EDWARD ARRINGTON

No. 121A92

(Filed 4 March 1994)

Criminal Law § 338 (NCI4th)— murder—defendants joined for trial—motion to sever—erroneously denied—antagonistic defenses

The trial court erred in a prosecution for first-degree murder and discharging a firearm into occupied property by denying defendants' motion to sever where various joinder-driven evidentiary rulings, and the exchanges that occurred between defendants related to these rulings, demonstrate that the joinder of these defendants for trial yielded an evidentiary contest more between the defendants themselves than between the State and the defendants. Given the conflict in defendants' respective positions at trial and considering the other evidence in the case, including the paucity of evidence on acting in concert, a severance was necessary to promote a fair determination of defendants' guilt or innocence. N.C.G.S. § 15A-927(c)(2).

Am Jur 2d, Trial § 21.

Antagonistic defenses as ground for separate trials of codefendants in criminal case. 82 ALR3d 245.

Defendants appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Rousseau, J., at the 30 September 1991 Criminal Session of

Superior Court, Buncombe County. Heard in the Supreme Court 15 October 1993.

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

Robert W. Clark and Curtiss A. Graham, Assistant Public Defenders, for defendant-appellant Pickens.

David G. Belser for defendant-appellant Arrington.

FRYE, Justice.

Defendants were indicted on 7 May 1990 for first-degree murder and discharging a firearm into occupied property. The State's motion for joinder was allowed on 13 April 1991. Defendants were tried capitally and found guilty of all charges. On the first-degree murder charge, the jury rejected a theory of premeditation and deliberation and found both defendants guilty based on a theory of felony murder. The trial court determined that there was insufficient evidence of any aggravating circumstances and therefore no capital sentencing proceeding was held. Each defendant was sentenced to life imprisonment for first-degree murder, and judgment on the underlying felony was arrested as to each defendant.

Both defendants bring forth numerous assignments of error on appeal. We find merit in defendants' assignments of error regarding their joinder for trial. We therefore remand this case to the trial court for new and separate trials for each defendant.

The State's evidence at trial tended to show the following facts and circumstances: On 24 March 1990, Tereca Stewart, the nine-year-old daughter of Karen Robinson, was killed by a large caliber bullet while she was inside apartment 18-B of the Erskine Street Apartments in Asheville. Karen Robinson had been the longtime girlfriend of defendant Arrington, who lived with her and her three children, including Tereca, in apartment 4-A of the same housing complex. Karen married Darryl Cannady two weeks after the shooting. Defendant Arrington is the half-brother of defendant Pickens whose father, Charles Pickens, Sr., lived in apartment 6-A of the Erskine Street Apartments.

On 24 March defendant Arrington and Karen Robinson were having an argument which continued over the course of several hours. Meisha Cannady, Darryl Cannady's niece, testified that she

went with Karen and a group of friends and relatives to the magistrate's office where Karen and Meisha's grandmother, Gloria Cannady, secured assault and trespass warrants against Arrington. The group returned to apartment 4-A and began moving Arrington's property out of the apartment. Arrington arrived and told everyone but Karen to leave. A fight ensued between defendant Arrington and Darryl Cannady, and the others left apartment 4-A and went to apartment 18-B where Meisha's grandmother lived. As Meisha left, she ran into defendant Pickens who was entering apartment 4-A with a gun in his hands. As Meisha was running up the hill toward apartment 18-B, she heard two gunshots. Meisha entered apartment 18-B, followed by Darryl and Karen. The other members of the group were already in 18-B, along with Karen's children and Karen's sister's children. Shortly thereafter, Meisha heard two shots come through the window of apartment 18-B and saw Tereca fall after being shot in the head. Meisha testified that she saw defendant Arrington outside one of the windows of apartment 18-B.

Darryl Cannady testified that defendant Arrington came to apartment 18-B, where Darryl lived with his mother, Gloria Cannady, at about 6:30 p.m. on 24 March. Arrington was arguing with Karen and twice slammed her to the ground. The police were called and Arrington ran down the hill, stating that he would be back. Darryl testified that the police advised Karen and Gloria Cannady to secure assault and trespass warrants, which they did. Later that day, Darryl went with several others to apartment 4-A to help move Arrington's belongings out of the apartment. When the group arrived at 4-A, Darryl borrowed a rifle from Anita Chambers and checked the apartment to make sure Arrington was not there. Darryl returned the rifle to Anita who stood outside the apartment watching for defendant Arrington. Arrington came to the apartment and ordered everyone out; he had a gun, a knife and some nunchakus. Arrington began assaulting Karen and swung the nunchakus at Darryl; Darryl and Arrington began fighting. Defendant Pickens entered the apartment with a .22 caliber rifle and broke up the fight when he pointed the rifle at Darryl and told him to get off Pickens' brother. Darryl ran out of the apartment. Darryl testified that Pickens fired at him twice as he (Darryl) ran up the hill toward apartment 18-B. As Darryl was fleeing, he heard Arrington ask for Pickens' gun; Pickens tell Arrington to "get the .9 millimeter"; and Arrington say, "I got it." Darryl saw Arrington and Pickens outside apartment 18-B and then two shots came through the window, one hitting Tereca.

Ramona Gilliam, Karen's sister, and her three children were in the group that went with Karen to the magistrate's office, to apartment 4-A, and then into 18-B to flee the fighting. Gilliam testified that once inside apartment 18-B, she saw both defendants approach the apartment and saw an automatic weapon in Arrington's hands but could not see Pickens' hands. About two to three minutes later, she heard shots and Tereca was hit.

Stanley Aiken testified that on the evening of 24 March, he and defendant Arrington were sitting in the park near the apartments talking. Arrington asked Aiken to see if Karen was in 18-B, which Aiken did. About forty-five minutes later, as Aiken was looking out the window of apartment 18-A, where he lived, he heard some shots and saw defendant Pickens running up the hill with a gun. Aiken also stated that he saw Monica Pickens, defendant Pickens' sister, behind Pickens as Pickens was firing into 18-B.

Rosetta Boseman testified that she lived in apartment 20-B and that, on the evening of 24 March, she heard Monica Pickens yelling from the bottom of the hill at Gloria Cannady who was trying to dissuade Calvin Cannady from going down to protect his brother Darryl. Half an hour later, Boseman saw defendant Pickens coming across the street with a gun; he walked by her window and fired toward Building 18.

Karen Robinson Cannady testified that on 24 March she had an argument with defendant Arrington over her allegedly "seeing" Darryl Cannady. Arrington followed her from apartment 4-A to 18-B and, once inside, was using profanity and was asked to go outside by Gloria Cannady. Arrington and Karen went outside where Arrington slammed Karen to the ground three times. Karen reentered the apartment and someone called the police. The police advised her to secure a warrant for assault which she did that afternoon. Karen then returned to her apartment and began removing Arrington's personal property. Arrington returned to apartment 4-A and assaulted Karen but she was able to get away when Darryl Cannady intervened. She ran to apartment 18-B and shortly thereafter saw Arrington outside the front window. Karen heard him say, "I'm coming in, I'm coming in." She then heard gunshots and saw her daughter wounded.

Detective Walt Robertson testified that he arrived at apartment 4-A and observed defendant Arrington leaning against an automobile; Arrington had blood on his face and shirt and his right

eye was swollen. Detective Robertson was about to enter apartment 4-A when people arrived screaming that a child had been shot at 18-B. He proceeded to apartment 18-B, followed by Sergeant Tom Aardema. After a warning from Aardema to get down, Robertson looked back and saw defendant Pickens running behind him and then disappearing. Shortly thereafter, Robertson saw a black and gray Oldsmobile exit the apartment complex and called for assistance to stop the automobile. Although unable to stop the automobile at that time, Robertson later identified the driver as defendant Pickens.

Sergeant Ross Robinson participated in the investigation of this case. He testified that in apartment 18-B he observed two bullet holes in the front window, a bullet lodged in the kitchen window frame and a bullet hole beside the window. He found a .22 caliber rifle in a closet. Fingerprints on the rifle were identified as belonging to Anita Chambers. Tests performed on the .22 rifle indicated that the bullet recovered from 18-B could not have been fired by the .22 rifle found in that apartment. Gunshot residue tests performed on both defendants were inconclusive.

An autopsy performed on Tereca Stewart revealed the cause of death to be extensive brain damage caused by a bullet larger than a .22 caliber—one that would have been consistent with a .9 millimeter projectile.

Nineteen witnesses testified for defendant Arrington. Fireman Charles Biddix testified to arriving at the scene at 9:10 p.m. and finding defendant Arrington walking out of apartment 4-A. Arrington was bleeding from a cut above his eye and appeared to have been drinking. Other firemen also testified to treating Arrington. Fireman Jeff Anders testified that he thought he heard a gunshot after arriving on the scene.

Sergeant Tom Aardema testified that he ran up the hill from apartment 4-A to 18-B to assist Detective Robertson. He heard people in the crowd yell, "That's him, that's him, that's the shooter!" Aardema yelled for Robertson to get down and aimed his weapon at a person Robertson later identified as defendant Pickens. Pickens disappeared, but shortly thereafter Aardema saw a gray Oldsmobile go by and heard people screaming, "That was him!"

Anna Galloway, who lived at apartment 14-A, testified that she arrived home by car between 8:45 and 9:15 p.m. on 24 March

and saw Arrington outside Building 4 holding his head. She drove on to her apartment and heard some cursing as she got out of the car. She then saw defendant Pickens run up the hill and heard him say, "That m----- f----- ain't going to f--- with my brother." She then heard two shots but did not see anyone shoot.

Detective Kevin West testified that he responded to the call to apartment 18-B. He helped carry Darryl Cannady out to the ambulance and Darryl told him that defendant Pickens had done the shooting. On cross-examination by defendant Pickens, Detective West testified that Calvin Cannady told him that defendant Arrington shot into the apartment.

Alice Ryans, sister of both defendants, testified next for Arrington. Ryans testified that after hearing on a scanner that Arrington had been shot, she went to apartment 6-A where Charles Pickens, Sr., lived. Once there, she received a telephone call from defendant Pickens, who wanted his father to go out onto the porch and get a "carton of cigarettes" from under a lawnmower. Monica Pickens went to the lawnmower and returned with a .9 millimeter gun which Ryans identified in court. Monica gave the gun to defendant Pickens' father who left the house with it. Later that night, Ryans went to the magistrate's office and spoke with defendant Pickens who told her that he did not know the little girl was in the apartment and that he did not mean to shoot her. The next day, Ryans reported this conversation to Detective Robertson.

Michael Arrington, cousin of both defendants, testified that Harold Ervin brought the .9 millimeter gun to him at Michael Arrington's house in May of 1990. Ervin gave Arrington the gun and Arrington gave him $150 for it. Defendant Pickens' father was outside in the car when this transaction took place. Michael Arrington pawned the gun to one of his friends but later retrieved it and gave it to defendant Arrington's attorney. S.B.I. analysis indicated that the .9 millimeter bullet recovered from the window frame of apartment 18-B was fired by this same .9 millimeter gun.

Defendant Pickens offered the following evidence: Charlie Mae Pickens, sister of both defendants, testified that from apartment 6-A where she lived, she saw Anita Chambers going into apartment 4-A with a handgun and a long gun. She told defendant Pickens what she saw and the two of them then went to apartment 4-A and observed the fight between Darryl Cannady and defendant Arrington. They returned to 6-A where Pickens retrieved a gun

and went back to 4-A. Pickens broke up the fight by pointing the gun at Cannady and telling him to "get off my brother now or I'll shoot." Charlie Mae Pickens testified that she saw Darryl run up the street and heard gunshots after Darryl was out of sight. After hearing the shots, she saw Pickens in his father's car calling to get help for Arrington who was lying on the hood of the car at that time. Pickens drove away in his father's car but returned three or four minutes later. She also testified that her sister Alice Ryans was never in her family's apartment with her that night, and that she only saw Ryans at the police station.

Pickens' sister, Monica Pickens, testified that on the evening of 24 March she was at apartment 6-A with Arrington drinking bourbon and that she told him to leave. Two minutes later, Monica heard two shots and saw Anita Chambers coming out of an apartment with a long gun and a pistol. Monica ran to defendant Pickens and told him that defendant Arrington had been shot. Pickens picked up a long gun from under the couch in 6-A and he and Monica went to 4-A. Monica saw defendant Pickens hold the shotgun on Darryl Cannady and tell him to get off defendant Arrington. Darryl ran away and defendant Pickens used the car telephone to call the police. Monica then heard two shots and she and Pickens ran across the street and looked up the hill. They heard people saying there was a shooting so she and Pickens returned to 4-A where paramedics were treating defendant Arrington. Monica denied ever having seen the .9 millimeter gun and denied having retrieved it from the lawnmower on the porch of apartment 6-A.

Pickens' girlfriend, Renatta Yon, testified that she was in apartment 6-A and heard Monica ask Arrington to leave and then heard a couple of shots two minutes later. She went to 4-A after the fight ended and saw defendant Pickens go to the telephone to call 911. Yon testified that she saw defendant Pickens and Monica Pickens help Arrington to the car. Yon saw defendant Pickens use the telephone and then heard two or three shots while defendants were both still near the car at the bottom of the hill. Yon testified that she was at 6-A the entire night and never saw Alice Ryans nor a handgun there.

Raymond Curtis testified that on 24 March he lived in apartment 20-C and saw defendant Arrington beating Karen. Arrington left and Curtis heard him say he would be back. Later, Curtis saw Arrington coming toward the playground and then fire a pistol

two or three times toward the building next to 20-C. Pickens was about thirty feet behind Arrington and had nothing in his hands. On cross-examination by Arrington, Curtis admitted he was partially blind but stated that this condition occurred after the date of the homicide. Defendant Pickens' objections to further cross-examination of Curtis by defendant Arrington regarding Curtis' medical condition were sustained by the trial court.

Both defendants presented rebuttal evidence tending to challenge the credibility of each others witnesses. The State offered no rebuttal evidence.

Both defendants assign as error the trial court's denial of their motions to sever. Both defendants contend that their defenses were antagonistic and each contends that the joint trial deprived him of a fair trial. Pickens' defense was that he was at the lower end of the apartment complex calling 911 when the shots were fired into apartment 18-B. Arrington's defense was that he was disabled from the fight in apartment 4-A and was waiting at the lower end of the complex for an ambulance when the shots were fired. Each defendant contends that it was the other defendant who fired the shots that killed Tereca Stewart and that they were not acting in concert.

Defendants filed motions to sever prior to trial. These motions were denied and the State's motion for joinder was allowed. Both defendants renewed their motions to sever at various times throughout the trial and these motions were also denied. Both defendants identify numerous evidentiary rulings which they contend resulted in the denial of a fair trial for each of them.

N.C.G.S. § 15A-926(b)(2)(a) provides for joinder of defendants where, as here, the State seeks to hold each defendant accountable for the same offenses. The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge. "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 640 (1979), *cert. denied sub nom. Jolly v. North Carolina*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). Nevertheless, under N.C.G.S. § 15A-927(c)(2) the trial court must deny a joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants.

The existence of antagonistic defenses will not, standing alone, warrant a severance. *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986). On the other hand, the fact that the evidence may be substantial against a defendant will not preclude severance where joinder denies a defendant a fair trial. *See State v. Boykin*, 307 N.C. 87, 296 S.E.2d 258 (1982); *State v. Alford*, 289 N.C. 372, 222 S.E.2d 222, *death penalty vacated sub nom. Carter v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *Lowery*, 318 N.C. at 59, 347 S.E.2d at 734, quoting *Nelson*, 298 N.C. at 587, 260 S.E.2d at 640.

As we said in *Nelson*:

> Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that 'the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' *Rhone v. United States*, 365 F. 2d 980, 981 (D.C. Cir. 1966). Severance should ordinarily be granted where defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants. *See* ABA Standards Relating to Joinder and Severance 41 (Approved Draft 1968). To be avoided is the spectacle where the state simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.' *People v. Braune*, 363 Ill. 551, 2 N.E. 2d 839, 842 (1936).

Nelson at 587, 260 S.E.2d at 640.

Each defendant contends that various "joinder-driven" evidentiary rulings resulted in the admission or exclusion of evidence to the prejudice of one or the other defendant. We find merit in defendants' arguments and conclude that these rulings, and the exchanges that occurred between defendants related to these rulings, demonstrate that the joinder of these defendants for trial yielded an evidentiary contest "more between defendants themselves than between the state and the defendants," and that defendants were thereby denied a fair trial. *See Nelson*, 298 N.C. at 587, 260 S.E.2d at 640. Several of the trial court's rulings are worthy of note since they tend to illustrate the prejudice to defendants of a joint trial.

First, defendant Pickens' failure to testify in his own defense was based on the position taken by his codefendant rather than the position taken by the State. Defendant Pickens filed a motion *in limine* indicating that he intended to testify and requesting that he not be cross-examined regarding five specific prior convictions. The State agreed. Defendant Arrington however, stated that he would not make a similar agreement and that he intended to cross-examine Pickens fully about each of those convictions. As a result of defendant Arrington's position, Pickens did not testify. Pickens was thereby denied the opportunity to present evidence which he would have been able to present in a separate trial, based on the State's position taken at this trial. *See Boykin*, 307 N.C. at 92, 296 S.E.2d at 261 (new and separate trials granted where in joint trial defendant was denied the opportunity to introduce evidence which would have explained his earlier admissions); *Alford*, 289 N.C. at 387-88, 222 S.E.2d at 232 (new trial where joint trial deprived defendant of evidence—his codefendant's statement—which would have corroborated his alibi testimony).

Secondly, defendant Pickens was denied the opportunity to put on potentially inculpatory evidence against his codefendant. On direct examination, defendant Pickens questioned Karen Cannady about threats defendant Arrington had made against her and her children. Arrington objected to this line of questioning based on relevancy and a *voir dire* was held. On *voir dire*, Karen testified that on the day of the murder Arrington had grabbed the victim, scratched her in the chest and cursed at her. Karen also testified that Arrington told her that if she left him he would kill her and her children. Karen's mother, Priscilla Harris, testified that she had witnessed Arrington making threats to Karen and the children prior to and on the day of the murder. Defendants examined and cross-examined these two witnesses extensively on *voir dire* regarding the admissibility of this evidence. The State did not participate in this *voir dire* except to object that a question had been asked and answered. The trial judge eventually inquired as to the State's position and the prosecutor responded that the evidence was relevant. Nevertheless, the trial judge excluded the evidence stating that it was not relevant to prove intent or motive.

Apart from the issues of relevance and admissibility of this evidence, defendant Pickens was denied the opportunity to present this evidence to the jury based on the objection of his codefendant Arrington. If the State maintained its position in a separate trial

between the State and defendant Pickens this evidence, in all likelihood, would have been admitted. It is, of course, possible that in a separate trial the State would have objected to the admission of this evidence. That possibility, however, highlights the extent to which this joint trial involved an evidentiary battle between defendants where the State stood by and allowed the defendants to attempt to destroy each other. *See Nelson*, 298 N.C. at 587, 260 S.E.2d at 64.

Defendant Arrington also identifies numerous instances of his proffered evidence being excluded based solely on the objection of his codefendant. For example, Arrington attempted to cross-examine Darryl Cannady in regards to a previous incident where defendant Pickens shot another person with the same .22 caliber rifle he fired at Darryl Cannady and an incident where Pickens shot into the window of a building. Defendant Pickens, and not the State, objected to this cross-examination. A *voir dire* was then held on the admissibility of this evidence at which the State did not question the witness and expressed no opinion regarding the admissibility of the evidence. The trial court sustained defendant Pickens' objections and ruled the evidence inadmissible.

These and other evidentiary disputes reflect the conflict between defendants that characterized this joint trial. It is clear from the evidence in this case that someone fired into apartment 18-B, killing Tereca Stewart. Based on the evidence presented at trial, in order for the jury to have found both defendants guilty of felony murder it was necessary that the jury find that both defendants either discharged a firearm into 18-B or acted in concert with someone who did. The conflict in the evidence arises on three critical issues: (1) the presence of either or both defendants outside 18-B; (2) the identity of the person(s) firing into 18-B; and (3) whether, if either defendant did not fire into 18-B, that defendant was acting in concert with the person who did fire into the apartment.

The State called six witnesses who testified to the involvement of one or both defendants in this homicide. Karen Cannady, the victim's mother, and Meisha Cannady, Darryl Cannady's niece, testified that they each saw defendant Arrington outside the window of apartment 18-B before shots were fired. Darryl Cannady testified that he saw both defendants outside the window of apartment 18-B before shots were fired. Ramona Gilliam, Karen Cannady's sister, testified that she saw both defendants coming up the hill

and that defendant Arrington had a gun. Stanley Aiken, who lived in apartment 18-A, saw defendant Pickens coming up the hill and shooting into apartment 18-B. Rosetta Boseman, who lived in apartment 20-B, saw defendant Pickens coming across the street with a gun which he fired three times in the direction of 18-B.

Thus, at the close of the State's evidence, there was conflicting testimony as to who was outside the window of apartment 18-B. Two witnesses saw defendant Arrington, two witnesses saw defendant Pickens, and two witnesses saw both defendants. One State's witness, Stanley Aiken, saw yet a third person, Monica Pickens, in the area when shots were fired into 18-B. Only one of these witnesses saw either defendant actually fire into 18-B. There was also very little evidence of acting in concert.

Defendants proceeded to offer evidence, each presenting witnesses who testified that the other defendant or some other person was outside apartment 18-B and did the shooting. Defendant Pickens called his sisters Charlie Mae Pickens and Monica Pickens who testified to hearing gunshots as Pickens and Arrington were both still at the scene of the fight in apartment 4-A. They each testified that defendant Pickens then left to call 911. Defendant Pickens also called Raymond Curtis who lived in apartment 20-C and who testified that he saw defendant Arrington fire shots toward Building 18 and that Pickens was behind Arrington. Defendant Arrington presented witnesses who heard shots and at the same time saw Arrington at apartment 4-A rather than 18-B. One witness, Anna Galloway, saw Arrington at apartment 4-A, saw Pickens running up the hill and then heard gunshots.

The State presented evidence tending to show that one or both of the defendants was outside apartment 18-B and fired shots into that apartment. Defendants each attempted to respond to the State's case by putting on evidence that the other defendant, or some third person, was outside Building 18 firing shots. There was an irreconcilable conflict between defendants' evidence, and their defenses were antagonistic. We believe this is a case where the jury may well have inferred from the conflict alone that both defendants were guilty. *See Nelson*, 298 N.C. at 587, 347 S.E.2d at 640. Given the conflict in defendants' respective positions at trial and considering the other evidence in the case, including the paucity of evidence on acting in concert, we conclude that defendants were denied a fair trial by being tried together. Thus, a severance

is necessary to promote a fair determination of their guilt or innocence of the charged offenses. N.C.G.S. § 15A-927(c)(2) (1988).

We find it unnecessary to discuss defendants' remaining assignments of error as they are unlikely to recur at retrial. For the reasons stated above, this case is remanded to the Superior Court, Buncombe County, in order that each defendant may receive new and separate trials.

NEW TRIAL.

STATE OF NORTH CAROLINA v. MELDON COLUMBUS COLLINS, JR.

No. 69A93

(Filed 4 March 1994)

1. **Homicide § 135 (NCI4th)— first-degree murder—short-form indictment—sufficient**

There was no error in a first-degree murder prosecution where the indictment complied with the short form indictment for murder authorized by N.C.G.S. § 15-144 and was identical, except for the name of the victim, to the indictments approved in *State v. Harris*, 323 N.C. 112, and *State v. Avery*, 315 N.C. 1.

Am Jur 2d, Indictments and Informations §§ 2, 66-69, 82.

2. **Evidence and Witnesses § 221 (NCI4th)— first-degree murder of spouse—failure to provide support for children following wife's death—admissible**

The trial court did not abuse its discretion when trying defendant for the first-degree murder of his wife by allowing the prosecutor to question defendant about his failure to provide financial support to his children following his wife's death where the State sought on cross-examination to rebut the defendant's testimony regarding his loving relationship with his wife and children. Evidence tending to show that the defendant did not support his children and did not send them gifts following his wife's death tended to shed light upon the circumstances surrounding the shooting and was relevant and admissible; furthermore, defendant was not unfairly prejudiced by the introduction of the evidence and similar evidence was already

before the jury without objection in the form of testimony that defendant failed to act responsibly to support his family prior to the shooting. N.C.G.S. § 8C-1, Rules 401, 403.

Am Jur 2d, Evidence § 278.

3. Evidence and Witnesses §§ 1113, 757 (NCI4th)— first-degree murder of spouse—statements by defendant to co-worker —admissible

The trial court did not err when trying defendant for the first-degree murder of his wife by allowing the State to question defendant about statements he had made to a co-worker in which he allegedly threatened to kill his wife. The prosecutor only once even arguably referred to a statement by the co-worker and there was no prejudice from that statement because there was plenary other evidence that defendant had threatened his wife's life on a number of occasions prior to shooting her. The defendant's comments concerning his own statements, to the extent they were hearsay, fall within the exception to the hearsay rule for admissions by a party opponent. N.C.G.S. § 8C-1, Rule 801(d)(A).

Am Jur 2d, Evidence § 611; Homicide § 337.

4. Homicide §§ 251, 252 (NCI4th)— first-degree murder— premeditation and deliberation—evidence sufficient

The evidence in a first-degree murder prosecution was sufficient to submit first-degree murder to the jury on the theory of premeditation and deliberation where the evidence tended to show previous ill will or difficulty between defendant and his wife, the victim; defendant had threatened to kill his wife on a number of occasions prior to her death; defendant loaded the murder weapon the night before the shooting, the same night the victim called her father, sounding upset; defendant gave conflicting accounts to police of the events surrounding his wife's death; an SBI agent testified that the gun required more than fifteen pounds of pressure to fire if the hammer was not cocked; and defendant had served in the military on active duty or in a reserve capacity from 1983 until his wife's death and frequently went hunting, evidence tending to indicate that he knew what was necessary to fire the pistol.

Am Jur 2d, Homicide §§ 437, 439.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Griffin, J., on 14 September 1992, in the Superior Court, Craven County, sentencing the defendant to life imprisonment for first-degree murder. Heard in the Supreme Court on 18 November 1993.

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

Rudolph A. Ashton, III for the defendant-appellant.

MITCHELL, Justice.

On 12 November 1991, a Craven County Grand Jury indicted the defendant, Meldon Columbus Collins, Jr., for first-degree murder. He was tried noncapitally at the 8 September 1992 Criminal Session of Superior Court, Craven County. The jury returned a verdict finding the defendant guilty of premeditated and deliberate first-degree murder. The trial court sentenced the defendant to life imprisonment. The defendant appealed to this Court as a matter of right from the judgment sentencing him to life imprisonment for first-degree murder. *See* N.C.G.S. § 7A-27(a) (1989).

The evidence presented at the defendant's trial tended to show the following. Around 1:00 p.m. on 9 October 1991, the defendant shot his wife, April Collins, in the head with a .22-caliber pistol. The defendant claimed that the shooting was an accident. He testified that on the afternoon of the shooting, he and April were eating lunch in their mobile home, located in the Havelock area of Craven County. The defendant was sitting in a chair and April was sitting across from him on a weight bench. The pistol was in a gym bag beside the defendant's chair. He had loaded the pistol the previous night. The defendant testified that April said to him, "Mel, you said that we were going to shoot the gun today." The defendant then reached down into the bag and removed the gun. He "swung the gun up from the bag" and straightened out his arm. He then "heard a pop" and saw April fall from the weight bench. Although the defendant admitted that he had his finger on the trigger, he insisted that he did not intend to shoot. He explained that he also owned a .44-caliber handgun which would not fire unless the hammer was cocked. It was therefore his practice to pull the .44-caliber handgun out of its holster with his finger on the trigger. He claimed that he had never fired the .22-caliber pistol and thus did not realize that it would fire just by pulling the trigger.

Other evidence introduced at trial, however, tended to show that the shooting was not an accident. The defendant's stepson (and April's biological son), Chris Mock, testified that April and the defendant often argued and that on one occasion, the defendant had put a gun to April's head and threatened to kill her. Similarly, the defendant admitted to police that he had pointed a gun at April and threatened to "blow her ass away" six or seven times. Further, Velma Gossip, a neighbor and co-worker of the defendant, testified that the defendant had told her that April had allowed one of his dogs to "get killed" and that he "ought to have killed her" for allowing it to happen.

Other evidence tended to show that April and the defendant had been arguing the night before the murder and just prior to the shooting. April's father testified that April had called him the night before her death and had sounded upset. Another of the defendant's neighbors, Charles Mason, told police that he had overheard an argument coming from the defendant's mobile home moments before the shooting. Finally, an SBI agent who examined the murder weapon testified that the pistol was working properly and that one would have to apply fifteen to sixteen pounds of pressure to the trigger to fire the pistol when the hammer was not cocked.

Other pertinent evidence is discussed at other points in this opinion where it is relevant.

[1] By his first assignment of error, the defendant contends that the indictment for first-degree murder was fatally defective in that it did not allege each essential element of the offense of first-degree murder. The true bill of indictment returned against the defendant included the following:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder April Collins.

The indictment complies with the short form indictment for murder authorized by N.C.G.S. § 15-144 and is identical, except for the name of the victim, to the indictments approved by this Court in cases such as *State v. Harris*, 323 N.C. 112, 120, 371 S.E.2d 689, 694 (1988), and *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d

786, 792-93 (1985). We have considered the defendant's arguments and have found no compelling reason to depart from our prior holdings in *Harris* and *Avery*, which the defendant correctly recognizes as dispositive. The trial court did not err in denying the defendant's motions to suppress the indictment and to dismiss the charge against the defendant. This assignment of error is without merit.

[2] The defendant argues by his second assignment of error that the trial court erred in allowing the prosecutor to question him about his failure to provide financial support to his children following his wife's death. On direct examination, the defendant testified at length about the nature of his relationship with April and their children. He stated that when he was not working, he attended church with his family and that he regularly took the family on fishing trips. He also explained that he was a certified little league football coach and coached his stepson, Chris Mock. He further testified that when he returned from military duty overseas in 1991, he remained at home for thirty days in order to spend time with his family. Finally, at the close of his direct examination, the defendant testified that he loved April and their children.

On cross-examination, the State sought to rebut the defendant's testimony regarding his loving relationship with his wife and children. The prosecutor began by asking the defendant what he had given one of his children for Christmas in 1991. The defendant's counsel objected and the trial court sustained the objection. Out of the presence of the jury, the prosecutor argued that evidence tending to show "how [the defendant] has treated his family bears directly on the decision this jury will make as to his intent on the day he shot his wife." The trial court allowed the prosecutor to continue his cross-examination of the defendant, but told the prosecutor, "I think you can come up with a little better question." The prosecutor then resumed his cross-examination as follows:

> [PROSECUTOR]: Mr. Collins, you haven't done a thing for your children since the death of your wife, have you?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DEFENDANT]: No, according to my bond.

[PROSECUTOR]: Well, can you read this bond and tell me anywhere in here where it says you cannot send money for your children's support or you cannot send them presents?

. . . .

[PROSECUTOR]: Take this red pen and underline . . . those conditions in your bond where it says you cannot send any child support to your children.

[DEFENDANT]: It's not up here.

[PROSECUTOR]: Underline where it says you cannot send them any presents for Christmas or for their birthday.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENDANT]: It's not up here.

[PROSECUTOR]: But you haven't given them the first thing since you shot and killed their mother, have you?

[DEFENSE COUNSEL]: Objection.

[DEFENDANT]: No. I was asked not to.

THE COURT: Overruled.

The defendant insists that the trial court erred by overruling his objections to these questions because (1) this information was not relevant, and (2) any probative value it did possess was substantially outweighed by its prejudicial effect. We do not agree.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). As a general rule, "[a]ll relevant evidence is admissible." N.C.G.S. § 8C-1, Rule 402 (1992). However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). The decision whether to exclude relevant evidence under Rule 403 "is a matter left to the sound discretion of the trial court." *State*

v. Stager, 329 N.C. 278, 308, 406 S.E.2d 876, 893 (1991). Here, we find no abuse of discretion by the trial court.

We have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. *Id.* at 302, 406 S.E.2d at 890; *see also State v. Riddick*, 316 N.C. 127, 137, 340 S.E.2d 422, 428 (1986).

In the present case, evidence tending to show that the defendant did not support his children and did not send them gifts following his wife's death tended to shed light upon the circumstances surrounding the shooting. *See Stager*, 329 N.C. at 321-22, 406 S.E.2d at 901 (evidence that the defendant disposed of her husband's personal effects the day after his funeral tended to shed light upon the circumstances surrounding the defendant's shooting of her husband and thus was relevant and admissible). Specifically, it tended to rebut the defendant's characterization of his relationship with his wife and children as a caring, supportive one. It was therefore relevant and admissible. *Id.*

Further, the trial court did not err in concluding that the probative value of this evidence was not outweighed by any of the considerations set forth in Rule 403. The defendant was not unfairly prejudiced by the introduction of this evidence. The evidence was relevant and highly probative. Additionally, similar evidence was already before the jury in the form of the testimony of James Willis Mock. Mr. Mock testified on direct examination that he had purchased the mobile home in which the defendant and April were living at the time of her death and that the mobile home was located behind his house. He further testified that April and the defendant had lived in another mobile home during the first year of their marriage. April and her children subsequently moved out of the mobile home they shared with the defendant and into the mobile home purchased by Mr. Mock. During the time that April lived there without the defendant, Mr. Mock helped support her and her children. Even when the defendant returned to live with April and the children one year later, Mr. Mock did not charge them rent and he helped them pay their utility bills. He also provided April and the defendant with an automobile on which he paid the insurance. On cross-examination, Mr. Mock testified that the defendant did not pay any part of his family's bills and that "[a]ll [the defendant] did was [buy] guns, knives, [and] dogs." This evidence

tended to show that the defendant had failed to act responsibly to support his family prior to the shooting and was elicited without objection from the defendant. The defendant has failed to show that the trial court abused its discretion under Rule 403. We reject this assignment of error.

[3] By his third assignment of error, the defendant maintains that the trial court erred in allowing the State to question him about statements he had made to a co-worker, Sharon Smoot. The prosecutor cross-examined the defendant with regard to Ms. Smoot as follows:

> [PROSECUTOR]: And you know a lady by the name of Sharon Smoot?
>
> [DEFENDANT]: Sharon Smoot.
>
> . . . .
>
> [PROSECUTOR]: Is that a girl you work with?
>
> [DEFENDANT]: Yes.
>
> . . . .
>
> [PROSECUTOR]: All right. And she's heard, as people heard you, you had threatened to kill your wife at work before, didn't you?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [DEFENDANT]: Repeat the question, please.
>
> [PROSECUTOR]: You had threatened to kill your wife before you killed her, didn't you?
>
> [DEFENDANT]: Well, some time ago when I may have said it.
>
> [PROSECUTOR]: You think it's a joke to tell people you're thinking about killing your wife?
>
> [DEFENDANT]: No, at that time we was joking. I mean a long time ago, we was joking. You say without thought.
>
> . . . .
>
> [PROSECUTOR]: Now, when you talked to Sharon on one occasion, didn't you have a conversation in which she asked you

if you didn't owe your children and Mr. Mock an explanation about what had happened?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENDANT]: I don't recall when I talked to her about it[.] [B]asically I talked to her about being saved, you know, about the Bible.

[PROSECUTOR]: Didn't you tell her that no, you didn't, that it was all a burden to start with but the Lord took the burden away and you didn't owe the children an explanation and you didn't owe her daddy an explanation?

[DEFENDANT]: No, sir, probably something she probably said. It wasn't in my statement.

[PROSECUTOR]: Isn't that what you said[,] that April and your family w[ere] a burden to you and that the Lord had taken the burden off your shoulders?

[DEFENDANT]: No, I never said that.

[PROSECUTOR]: Never said anything like that—

[DEFENDANT]: I never said that my family was a burden to me, no.

[PROSECUTOR]: The family that you've done so much for since you shot your wife?

[DEFENDANT]: I never said that my family was a burden to me.

[PROSECUTOR]: Did you ever say something like that?

[DEFENDANT]: I know I never said that my family was a burden to me—

[PROSECUTOR]: Okay.

[DEFENDANT]: Never.

[PROSECUTOR]: What did you say?

[DEFENDANT]: I don't know.

The defendant contends that by overruling his objections, the trial court improperly allowed the State to elicit inadmissible hearsay

statements made by Sharon Smoot. He therefore insists he is entitled to a new trial. We disagree.

Only once did the prosecutor even arguably refer to a statement made by Ms. Smoot. Assuming *arguendo*, however, that the State elicited a hearsay statement made by Sharon Smoot, the defendant still must show that there is a reasonable possibility that a different result would have been reached at trial had this error not occurred. *See State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986); *see also* N.C.G.S. § 15A-1443(a) (1988). The defendant has failed to satisfy this burden. As previously noted in this opinion, there was plenary other evidence that the defendant had threatened April Collins' life on a number of occasions prior to shooting her. There was also considerable other evidence tending to show that the shooting was not an accident. The defendant therefore has not shown that there is a reasonable possibility that the result would have been different had the prosecutor not mentioned Sharon Smoot's statement.

The remainder of the colloquy was expressly limited to statements made by the defendant himself, not Ms. Smoot. The defendant's comments concerning his own statements, to the extent they were hearsay, fall within the exception to the hearsay rule for admissions by a party opponent. N.C.G.S. § 8C-1, Rule 801(d)(A) (1992). This assignment of error therefore is without merit.

[4] By his fourth and final assignment of error, the defendant argues that the evidence was insufficient to support submission of first-degree murder to the jury on the theory of premeditation and deliberation. We disagree.

We have often stated in detail the rules to be applied in determining whether evidence introduced at trial will support submission of a charged offense to the jury. *E.g., 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); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). When "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." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993). A defendant's 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." *Id. See also State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

With regard to the elements of premeditated and deliberate murder, "premeditated" means that "the defendant contemplated killing for some period of time, however short, before he acted." *Williams*, 334 N.C. at 447, 434 S.E.2d at 592. A killing 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.' " *Id.* (quoting *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985)). Premeditation and deliberation "are not ordinarily subject to proof by direct evidence, but must generally be proved . . . by circumstantial evidence." *State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). Circumstances tending to prove that the killing was premeditated and deliberate include, but are not limited to:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. at 69, 301 S.E.2d at 349.

Viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could find in the present case that the defendant murdered his wife after premeditation and deliberation. The evidence tended to show that there was previous ill will or difficulty between the defendant and his wife. Chris Mock, the defendant's stepson, testified that April and the defendant frequently argued and that, on one occasion, the defendant had placed a gun to April's head and threatened to kill her. The defendant himself admitted to police that he had pointed a gun at April and threatened to "blow her ass away" six or seven times. Further, Velma Gossip, a neighbor and co-worker of the defendant, testified that the defendant had told her that April had allowed one of the defendant's dogs to "get killed"

and that he "ought to have killed her" for allowing it to happen. Finally, April's father testified that April had called him the night before the shooting and had sounded upset.

Evidence of the defendant's conduct before and after the killing also supports the inference that the defendant acted after premeditation and deliberation. As previously noted, the defendant had threatened to kill his wife on a number of occasions prior to her death. Further, the defendant loaded the murder weapon the night before the shooting—the same night on which April called her father sounding upset. In the hours after the shooting, the defendant gave conflicting accounts to police of the events surrounding his wife's death.

Other circumstances also tended to show the defendant's premeditation and deliberation. An SBI agent who examined the murder weapon testified that the pistol was working properly and that one would have to apply more than fifteen pounds of pressure to the trigger to fire the pistol if the hammer was not cocked. In addition, the defendant served in the military, either on active duty or in a reserve capacity, from 1983 until his wife's death. This, along with evidence that the defendant frequently went hunting, tended to indicate that the defendant knew what was necessary to fire the .22-caliber pistol.

We therefore conclude that the evidence in this case, taken as a whole and in the light most favorable to the State, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the defendant, maliciously and after premeditation and deliberation, murdered his wife, April Collins. The trial court thus did not err in denying the defendant's motions at the close of the State's evidence and at the close of all the evidence to dismiss the charge of first-degree murder. We therefore reject this assignment of error.

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

NO ERROR.

STATE OF NORTH CAROLINA v. HEATH BARTON

No. 173A93

(Filed 4 March 1994)

1. **Constitutional Law § 189 (NCI4th)— armed robbery and larceny—separate takings—no double jeopardy**

Although larceny is a lesser-included offense of armed robbery, separate convictions of defendant for armed robbery and larceny of a firearm did not violate defendant's right to be free of double jeopardy for the same offense because the armed robbery and the larceny involved separate takings where the victim's wallet and automobile were taken in the armed robbery and the firearm was later taken from the victim's automobile.

Am Jur 2d, Criminal Law § 279.

2. **Criminal Law § 793 (NCI4th)— acting in concert—absence of specific intent instruction—no plain error**

Any error in the trial court's instructions on acting in concert which allegedly permitted the jury to convict defendant of the crimes of first-degree murder under the felony murder theory, armed robbery, and larceny of a firearm without finding that he possessed the specific intent to commit the particular crime did not amount to plain error where the trial court expressly told the jury in its instructions on each of the crimes charged that it could convict defendant only if it found that he himself acted, alone or with others, to commit the crime in question and shared a common purpose with others to commit that crime.

Am Jur 2d, Trial §§ 1251, 1255 et seq.

3. **Evidence and Witnesses § 694 (NCI4th)— exclusion of evidence—offer of proof**

Defendant failed to preserve for appellate review any issue concerning the exclusion of testimony where he made no offer of proof regarding his proffered testimony and the significance of the excluded testimony is not obvious from the record.

Am Jur 2d, Appeal and Error § 644.

4. Criminal Law § 1218 (NCI4th)— mitigating factor—passive participant—contradictory evidence—finding not required

The trial court did not err by failing to find as a mitigating factor for larceny of a firearm that defendant was a passive participant or played a minor role in the commission of the offense within the meaning of N.C.G.S. § 15A-1340.4(a)(2)(c), even though the evidence tended to show that defendant never personally handled the pistol taken from the victim's car and defendant presented evidence that he was present in the car only because another participant had slapped him, where there was other evidence tending to show that defendant played an active role in planning and preparing for the murder and robbery of the victim; defendant was present when the murder took place and thereafter robbed the victim of his wallet; defendant actively assisted his accomplices in their efforts to conceal the body; while riding in the car from which the victim's pistol was stolen, defendant did nothing to discourage his accomplices from taking the pistol and did nothing to counteract the ultimate effect of their actions; and defendant told officers that he would do the same thing again and indicated his pleasure with the results of his criminal activity.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 1234 (NCI4th)— mitigating factor—immaturity reducing culpability—finding not required

The evidence did not require the trial court to find as a statutory mitigating factor for larceny of a firearm that defendant's immaturity significantly reduced his culpability where defendant showed that he was only sixteen years old at the time of the crime, but defendant introduced no evidence tending to show that his age reduced his culpability other than his conclusory assertion on appeal that his cooperation was influenced or coerced by his brother's actions. N.C.G.S. § 15A-1340.4(a)(2)(e).

Am Jur 2d, Criminal Law §§ 598, 599.

6. Criminal Law § 1233 (NCI4th)— mitigating factor—limited mental capacity reducing culpability—finding not required

The evidence did not require the trial court to find as a statutory mitigating factor for larceny of a firearm that defendant's limited mental capacity significantly reduced his

culpability where the evidence was uncontradicted that defendant's I.Q. test scores placed him in the range of "mild mental retardation," but it was not uncontradicted with regard to whether his limited mental capacity reduced his culpability in that the evidence tending to show defendant's vulnerability to coercion consisted solely of defendant's self-serving assertions that his brother and another accomplice forced him to participate in the murder and armed robbery of the victim and larceny of the victim's pistol, and evidence that defendant's limited mental capacity reduced his culpability was contradicted by evidence that defendant was present at a prior attempt to kill and rob the victim, was present when an accomplice procured the murder weapon, and actively participated in efforts to conceal the crimes.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Read, J., on 16 November 1992, in the Superior Court, Robeson County, sentencing the defendant to life imprisonment for first-degree murder. The defendant's motion to bypass the Court of Appeals as to an additional judgment for larceny of a firearm allowed by the Supreme Court on 19 May 1993. Heard in the Supreme Court on 7 December 1993.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and Constance H. Everhart, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

On 20 May 1991, a Robeson County Grand Jury indicted the defendant, Heath Barton, for first-degree murder, robbery with a dangerous weapon, larceny of a firearm and felonious larceny of an automobile. The defendant, who was sixteen years of age at the time of these crimes, was tried noncapitally at the 9 November 1992 Criminal Session of Superior Court, Robeson County. At the conclusion of the State's evidence, the trial court dismissed the charge of larceny of an automobile. The jury returned verdicts finding the defendant guilty of first-degree murder under the theory of felony murder, robbery with a dangerous weapon and larceny

of a firearm. The trial court sentenced the defendant to life imprisonment for the first-degree murder conviction and arrested judgment on the underlying conviction for robbery with a dangerous weapon. The trial court also sentenced the defendant to seven years imprisonment for the larceny of a firearm conviction, to be served consecutive to the life sentence. The defendant appealed to this Court as a matter of right from the judgment sentencing him to life imprisonment for first-degree murder. *See* N.C.G.S. § 7A-27(a) (1989). We allowed his motion to bypass the Court of Appeals on his appeal from the additional judgment for larceny of a firearm.

The evidence presented at the defendant's trial tended to show the following. Around 6:00 p.m. on 8 February 1991, the defendant's brother, Herbert Barton, Jr., shot Harold Craven in the back of the head with a shotgun. The defendant later explained that the killing was done "for the fun of it" and to procure money for drugs. It was Mr. Craven's custom in the evenings to drive to an area of Maxton, North Carolina, where several garbage dumpsters and a couch were located in order to smoke and "get out of [his wife's] hair." The defendant, Herbert and a third accomplice, Michael Emanuel, had seen Mr. Craven at the dumpsters two nights prior to the murder and had attempted to kill him then, but the shotgun Herbert was using failed to fire. On the morning of 8 February 1991, the defendant and Michael Emanuel went to the home of "a man named Orson" to procure another shotgun. Emanuel entered Orson's home through a window and emerged with a 20-gauge shotgun. They rejoined Herbert and returned to the dumpsters with the new shotgun later that evening, where they were waiting for Mr. Craven when he arrived. Herbert shot Mr. Craven as soon as the latter got out of his car. When Mr. Craven fell to the ground, Emanuel and the defendant moved forward and took his wallet. The defendant then picked up the victim's coat while Emanuel and Herbert dragged the victim's body into a wooded area behind the dumpsters. The three of them covered the body with leaves and brush and then left in the victim's car, with Herbert driving.

While in the car, Emanuel removed a .25-caliber pistol from the glove compartment and gave it to Herbert. Emanuel also took around $700 in cash from the stolen wallet. Herbert subsequently parked the car in a patch of woods three to four miles from the mobile home where he and the defendant lived with their parents. The defendant threw the car keys farther into the woods, while

Herbert and Emanuel swept the ground near the car. The three of them walked to the mobile home and then went to buy beer, marijuana, cocaine and knives with the money stolen from the victim's wallet. After making their purchases, they tossed the murder weapon into a ditch behind the mobile home and hid their shoes underneath the mobile home.

Local sheriff's deputies arrested Herbert, Emanuel and the defendant two days later. After twice receiving the Miranda warnings and executing a written waiver of constitutional rights, the defendant confessed to the facts set out above. He also told the deputies that if he had to do it all over again, he would do the same thing again.

The defendant testified at trial, however, that he had told Herbert and Michael Emanuel that he "wasn't going to have nothing to do" with shooting Mr. Craven, but that Herbert and Emanuel had forced him to participate in the crimes. He further testified that he did not arrive at the murder scene until after Herbert had shot the victim, that he got into the victim's car only because Herbert slapped him and that he threw the car keys away on instructions from Herbert. He also testified that he had made his statement to law enforcement officers only after a detective had threatened him with "the electric chair." He further claimed that the officers had fabricated the entire confession. He subsequently admitted, however, that portions of the confession described by the officers were true.

Other pertinent facts will be introduced in the discussion of the assignment of error to which they are relevant.

[1] By his first assignment of error, the defendant maintains that the trial court erred in denying his motions to dismiss or arrest judgment on the charge of larceny of a firearm. The defendant contends that larceny is a lesser included offense of robbery with a dangerous weapon. *See State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988). He further argues that since the robbery with a dangerous weapon and larceny of a firearm in the present case were part of a single continuous criminal transaction, the trial court violated his federal and state constitutional rights to be free of double jeopardy for the same offense by sentencing him for both larceny of a firearm and felony murder with the underlying felony being robbery with a dangerous weapon. We disagree.

In *White*, we explained that although larceny is a lesser included offense of robbery with a dangerous weapon, convictions of a defendant for *both* armed robbery and larceny may be upheld so long as the larceny and the armed robbery "involved two separate takings." *Id.* at 517, 369 S.E.2d at 818. Here, the defendant and his accomplices shot the victim, took his wallet from his body and fled the murder scene in the victim's automobile. They later removed a firearm belonging to the victim from the glove compartment of the automobile taken during the murder and armed robbery. Applying the analysis of *White*, we conclude that the separate convictions for robbery with a dangerous weapon and larceny of a firearm in the present case survive the defendant's challenge on double jeopardy grounds because the armed robbery and the larceny involved separate takings.

The defendant, however, directs our attention to *State v. Adams*, 331 N.C. 317, 416 S.E.2d 380 (1992), in which this Court held that it was improper to sentence the defendant for both larceny of a firearm and felonious larceny pursuant to a breaking or entering, where the defendant and his accomplices had stolen satellite equipment, coins and a firearm during the course of a single breaking and entering. *Id.* at 332-33, 416 S.E.2d at 388-89. We therefore vacated the defendant's sentence for felonious larceny pursuant to a breaking or entering. *Id.* at 333, 416 S.E.2d at 389.

Adams does not alter our conclusion. We held in *Adams* that the defendant "was improperly convicted and sentenced for both larceny of a firearm and felonious larceny *of that same firearm* pursuant to a breaking or entering." *Id.* (emphasis added). The two convictions at issue in *Adams* thus did not involve separate takings, but rather involved the same taking of the same firearm. *Adams* is easily distinguishable from the present case, where the armed robbery of the victim—resulting in the taking of his wallet and automobile—and the subsequent larceny of the victim's firearm from his automobile constituted separate takings for double jeopardy purposes. Accordingly, we conclude that this assignment of error is without merit.

[2] The defendant argues by his second assignment of error that the trial court committed reversible error in its instructions on acting in concert. As the defendant recognizes, however, he did not object to the instructions given by the trial court or request additional instructions. Therefore, this assignment of error is barred

by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, and the defendant is not entitled to relief unless any error in this regard constituted plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). Accordingly, our review is limited to a review for plain error. To amount to error so serious as to be "plain error," an error in the trial court's instructions must be clearly "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). In other words, the error must be one "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). We find no such error here.

In the present case, the jury found the defendant guilty of first-degree murder solely on the felony murder theory. The jury also found the defendant guilty of robbery with a dangerous weapon and guilty of felonious larceny of a firearm. The defendant contends that as to each of those crimes, the instructions of the trial court on the doctrine of acting in concert permitted the jury to convict the defendant without finding that he possessed the specific intent to commit the particular crime in question. We do not believe that the trial court committed "plain error" as we have previously defined that term.

At points in its instructions on each of the crimes charged, the trial court expressly told the jury that it could convict the defendant only if it found that he himself acted, alone or with the others, to commit the crime in question and shared a common purpose with the others to commit that crime. For example, in instructing the jury with regard to the crime of felonious larceny of a firearm, the trial court gave, *inter alia*, the following instructions:

> [F]or a person to be guilty of a crime, it's not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a *common purpose to commit felonious larceny of a firearm*, each of them is held responsible for the acts of the others done in the commission of felonious larceny of a firearm.
>
> . . . .

> So, ladies and gentlemen, I charge you in case 91 CRS 3029 that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, *the defendant*, acting either by himself or acting together with Herbert Barton or Michael Emanuel, *took and carried away* Harold Craven's firearm without his consent, knowing that he was not entitled to take it and intending at the time to deprive Harold Craven of its use permanently, it would be your duty to return a verdict of guilty of felonious larceny of a firearm.

(Emphasis added). The trial court likewise gave similar instructions as to the other crimes charged. Such instructions are consistent with the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 202.10 (1971). Those instructions must have been understood by the jury to allow conviction of the defendant for each of the crimes charged if the defendant *himself acted*, alone or with others, to commit that particular crime and intended that it be committed.

We conclude that in light of portions of the instructions such as those quoted above, the alleged errors in the trial court's instructions could not have improperly "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-807 (1983). Therefore we conclude that any error in the portions of the trial court's instructions on acting in concert complained of in the present case did not amount to plain error, and we overrule this assignment of error.

[3] By his third assignment of error, the defendant contends that the trial court erred in sustaining objections by the State and, thereby, excluding testimony of the defendant regarding statements made to him by Herbert Barton, Jr., and Michael Emanuel. The defendant contends that this testimony would have tended to show that he was an unwilling participant in the crimes at issue here. The defendant speculates that the trial court sustained the State's objections to this testimony on hearsay grounds. The defendant maintains that these rulings were improper because he did not intend to introduce the statements to prove the truth of the matter asserted, but merely to demonstrate that the statements were made. The defendant further insists that the trial court's action constituted prejudicial error entitling him to a new trial because the excluded testimony "went to the most crucial feature of this case"—his defense of coercion and duress.

In order to preserve the exclusion of evidence for appellate review, "the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985); *see also* N.C.G.S. § 8C-1, Rule 103(a)(2) (1992). The reason for such a rule is that "the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred." *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60. In the absence of an adequate offer of proof, "[w]e can only speculate as to what the witness' answer would have been." *State v. King*, 326 N.C. 662, 674, 392 S.E.2d 609, 617 (1990). In the present case, the defendant made no offer of proof regarding his proffered testimony and the significance of the excluded testimony is not obvious from the record. The defendant therefore failed to preserve any issue concerning the exclusion of this testimony for appellate review. *Simpson*, 314 N.C. at 370, 334 S.E.2d at 60; *see also State v. Hill*, 331 N.C. 387, 409-10, 417 S.E.2d 765, 775-76 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684, *reh'g denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993); *King*, 326 N.C. at 674, 392 S.E.2d at 617. Accordingly, this assignment of error is overruled.

By his fourth and final assignment of error, the defendant argues that the trial court erred in sentencing him for the larceny of a firearm conviction pursuant to the Fair Sentencing Act. Specifically, he argues that the trial court erred by failing to find the following two statutory mitigating factors: (1) that "[t]he defendant was a passive participant or played a minor role in the commission of the offense" within the meaning of N.C.G.S. § 15A-1340.4(a)(2)(c), and (2) that "[t]he defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense" within the meaning of N.C.G.S. § 15A-1340.4(a)(2)(e). The defendant insists that both of these mitigating factors were supported by the evidence and therefore, by failing to find them, the trial court committed error entitling the defendant to a new sentencing proceeding for the larceny of a firearm conviction. We disagree.

Under the Fair Sentencing Act, the defendant has the burden of proving the existence of a mitigating factor by a preponderance of the evidence. *State v. Jones*, 327 N.C. 439, 453, 396 S.E.2d 309, 317 (1990). The trial court's "failure . . . to find a factor in mitigation urged by the defendant will not be overturned on appeal unless

the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility." *State v. Lane*, 77 N.C. App. 741, 745, 336 S.E.2d 410, 412 (1985); *see also State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983) ("[W]hen a defendant argues . . . that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, . . . [h]e is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' "). Further, the trial court is "permitted wide latitude in arriving at the truth" as to the existence of aggravating and mitigating factors. *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983). The evidence supporting the two mitigating factors at issue here was not uncontradicted. Therefore we must conclude that the trial court's refusal to find these mitigating factors was not error.

[4] With regard to the first mitigating factor at issue, involving the extent of the defendant's participation, there was evidence clearly tending to show that the defendant was more than a passive participant in the theft of the firearm from the victim's automobile. We recognize that the evidence tended to show that it was Michael Emanuel who actually removed the .25 caliber pistol and that the defendant never personally handled it. We also recognize that the defendant introduced evidence that he was present in the victim's car only because Herbert had slapped him. Other evidence tended to show, however, that the defendant played an active role in the earlier stages of the crimes. The defendant accompanied Herbert and Emanuel during the first attempt to kill and rob the victim, he was present when Michael Emanuel procured the murder weapon, he was present when the murder took place and he was aware from the beginning that Herbert and Emanuel were contemplating robbery. Following the murder, the defendant robbed the victim of his wallet and actively assisted Herbert and Emanuel in their efforts to conceal the victim's body. While riding in the car from which the victim's pistol was stolen, the defendant did nothing to discourage Herbert or Emanuel from taking the pistol and "did nothing to counteract the ultimate effect of their actions." *See State v. Parker*, 315 N.C. 249, 256, 337 S.E.2d 497, 501 (1985) (in determining that the defendant was more than a passive participant, this Court noted that although the defendant did not anticipate, plan or carry out the victim's murder, he did nothing

to discourage his co-defendants from stabbing the victim and "did nothing to counteract the ultimate effect of their actions"); *cf. Jones*, 309 N.C. at 221, 306 S.E.2d at 456 (trial court erred in failing to find that the defendant was a passive participant where the defendant had not agreed to kill the victim and had implored his co-defendant not to kill the victim). Evidence tended to show that the defendant actively participated in efforts to conceal evidence of all of the crimes he, Herbert and Emanuel had committed. Evidence also tended to show that the defendant stated to law enforcement officers that if he had to do it all over again, he would do the same thing again and indicated his pleasure with the results of his criminal activity. *See Parker*, 315 N.C. at 256, 337 S.E.2d at 501 (in determining that the defendant was more than a passive participant, this Court deemed it important that the defendant was "pleased with the result" of the crime). There was therefore contradictory evidence introduced with regard to whether the defendant was a mere passive participant in the larceny of the firearm from the victim's automobile. The trial court thus did not err in failing to find this mitigating factor.

[5] The second mitigating factor at issue here, involving the defendant's immaturity or limited mental capacity, requires a bipartite showing. The defendant must show not only his immaturity or limited mental capacity, but also that his immaturity or limited mental capacity significantly reduced his culpability. *See State v. Moore*, 317 N.C. 275, 280, 345 S.E.2d 217, 221 (1986). While the defendant was only sixteen years of age at the time of the crimes and his I.Q. test scores place him in the range of "mild mental retardation," there is contradictory evidence with regard to whether the defendant's immaturity and diminished mental capacity significantly reduced his culpability. Initially, we note that "age alone is insufficient to support this factor." *Id.* By its use of the term "immaturity," the General Assembly contemplated an inquiry which is "broader than mere chronological age" and which is "concerned with all facts, features, and traits that indicate a defendant's immaturity and the effect of that immaturity on culpability." *Id.* While the defendant presented evidence of his age at the time of the crimes, he introduced no evidence tending to show that his age reduced his culpability other than his conclusory assertion on appeal that "his cooperation . . . was influenced or coerced by his brother's actions." We therefore conclude that the trial court's failure to find the defendant's immaturity to be a mitigating factor was not error.

[6] Similarly, there was contradictory evidence with regard to whether the defendant's limited mental capacity significantly reduced his culpability. While the evidence may have been uncontradicted that the defendant is a person of limited mental capacity, it was *not* uncontradicted with regard to whether his limited mental capacity reduced his culpability. The evidence tending to show the defendant's vulnerability to coercion consisted solely of the defendant's self-serving assertions that Herbert and Emanuel had forced him to participate in the crimes. The defendant offered no independent evidence to corroborate these assertions. Further, we have previously recognized that evidence of a defendant's participation in the planning stage of a crime and a defendant's attempts to conceal evidence of his participation tend to contradict evidence that a defendant's limited mental capacity reduced his culpability. *See, e.g., State v. Holden*, 321 N.C. 689, 696-97, 365 S.E.2d 626, 630 (1988) (defendant's attempts at "covering her own tracks"); *State v. Smith*, 321 N.C. 290, 292, 362 S.E.2d 159, 160 (1987) (defendant's participation in the planning stage). As we have noted above, the defendant in the case *sub judice* was present at the first attempt to kill and rob the victim, was present when Emanuel procured the murder weapon and actively participated in efforts to conceal evidence of the crimes. We therefore conclude that the trial court did not err by failing to find the defendant's limited mental capacity as a mitigating factor.

In short, the mitigating factors at issue were not supported by uncontradicted evidence. Therefore, the trial court's failure to find those mitigating factors was not error. This assignment of error is without merit.

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

NO ERROR.

STATE OF NORTH CAROLINA v. JAIME DUARTE SIERRA

No. 93A93

(Filed 4 March 1994)

1. Homicide § 246 (NCI4th)— first-degree murder—sufficiency of evidence—premeditation and deliberation—circumstantial evidence

The trial court did not err in denying defendant's motion to dismiss in a first-degree murder prosecution where defendant argued that there was insufficient evidence to support a jury finding that defendant killed the victim with specific intent after premeditation and deliberation but there was no evidence of provocation by the victim; there was plenty of evidence of ill will between the families, which can be considered as evidence of ill will between defendant and the victim; defendant's conduct before and after the killing was evidence of premeditation and deliberation in that defendant waited until "the boy" actually came to the door before he began shooting through it; defendant could have seen the victim through a window in the door and told a fellow inmate that he had waited until the victim came to the door to shoot; defendant did not check the victim after the shooting, leaving him to die; defendant returned home after the shooting, hid the weapon and went to sleep; and defendant stood in front of the victim's door and fired a .9 millimeter Ruger pistol at the victim at least six times as the victim was unlocking the door, hitting the victim, who was unarmed, at least three times.

Am Jur 2d, Homicide §§ 437, 439.

2. Appeal and Error § 504 (NCI4th)— first-degree murder—no instruction on second-degree murder—invited error

Defendant was not entitled to relief in a first-degree murder prosecution in which the court did not instruct on second-degree murder where defendant stated a total of three times at trial that he did not want such an instruction, telling the trial court that such an instruction was not supported by the evidence and was contrary to defendant's theory of the case. Any error in not instructing on the lesser-included offense was invited by defendant.

Am Jur 2d, Appeal and Error § 719.

3. Evidence and Witnesses § 1483 (NCI4th)— first-degree murder—bullet—admissible

There was no plain error in a first-degree murder prosecution in the admission of a .9-millimeter bullet where defendant contended that the State failed to establish the bullet's connection to the crime but there was evidence that the victim died of a gunshot wound; the victim was transferred to the hospital by the EMS crew that arrived at the scene of the shooting; the detective in charge of the investigation went to the hospital to inquire about the victim and was handed a .9 millimeter bullet by hospital personnel; casings from a .9 millimeter pistol had been found at the site of the shooting; and it was determined that the bullet and the casings both came from defendant's gun, which was found hidden at his home. Even assuming that it was error to admit the bullet, defendant did not meet his burden of showing that the jury would have reached a different verdict if the bullet had not been admitted because the bullet was not the only piece of evidence which linked defendant to the scene of the crime or to the actual killing.

Am Jur 2d, Homicide § 414.

Appeal as 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 Hudson, J., at the 5 October 1992 Criminal Session of Superior Court, Lee County. Heard in the Supreme Court 8 December 1993.

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

Malcolm Ray Hunter, Jr., Appellate Defender, and Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

On 29 June 1992, defendant, Jaime Duarte Sierra, was indicted for the first-degree murder of Refugio "Cuco" Maldonado. Defendant was tried noncapitally in the Superior Court, Lee County, in October 1992 and was found guilty of the first-degree murder of Refugio Maldonado. The trial court thereafter imposed the mandatory life sentence.

The evidence presented by the State at trial tended to show the following. The victim and his father were Mexican natives who had come to the United States seeking work in 1988. When the victim and his father first came to North Carolina, they stayed with the Saucedas, whom they had known in Mexico. However, the two families soon began quarreling over personal matters, and the Maldonados moved out of the Saucedas' home. Defendant was the father of two of Estella Sauceda's children and had lived with her for five years. Defendant had told the victim, whom he knew from work, that he would "back" the Saucedas in their argument with the Maldonados. Defendant and the victim had also had a personal argument over a lost driver's license manual.

On 9 April 1992, the victim and his father saw Estella Sauceda at a grocery store. The victim and his father were standing in the grocery store talking and laughing when Estella came up to them and said in Spanish, "this afternoon your joy will end."

Around 10:00 that evening, there was a knock on the door of the victim's mobile home. As the victim was unlocking the door, shots were fired through it. The victim's father, Gregorio, ducked behind a counter to avoid the gunfire. When the shooting stopped, Gregorio went to a neighbor and asked someone to call for help. Refugio had been struck by three bullets and showed no signs of life after the shooting. Emergency medical service ("EMS") personnel arrived in response to the call and immediately transported the victim to Central Carolina Hospital. The victim was found to be dead upon arrival at the hospital.

The evidence showed that shots had been fired from the front porch and front yard of the Maldonados' mobile home. Six brass casings from a .9-millimeter weapon were found on the porch; three plastic waddings from .20-gauge shotgun shells and three .20-gauge shotgun shells were found in the yard. No fingerprints, footprints, hair, or clothing fibers were found at the crime scene.

After leaving the crime scene, Detective Dawkins, who was in charge of the investigation, went to Central Carolina Hospital in Sanford to check on the victim. While at the hospital, a member of the hospital staff gave Dawkins a rubber glove that contained a partially flattened .9-millimeter brass-jacketed bullet.

Witness Seagroves reported seeing a black Blazer driving away from the crime scene a little after he heard shots being fired.

Detectives had been told by Gregorio that he believed the Sauceda men were involved in the shooting. The detectives went to the Saucedas' home to investigate and learned from Carlos Sauceda that defendant owned a black Blazer. Police then went to defendant's home, where they spotted a black Blazer, which defendant said he owned. Witness Seagroves later identified defendant's Blazer as similar to the one he saw driving away from the crime scene.

Defendant, Estella Sauceda, defendant's brother, and Estella's three children were at the mobile home when police arrived that night. Estella gave the police permission to search her mobile home. The police found four to five pounds of marijuana, a Ruger .9-millimeter automatic pistol, a Beretta .380 semiautomatic handgun, and a Mossburg .20-gauge pump shotgun in the mobile home. Defendant admitted owning the .9-millimeter pistol.

It was determined that the .9-millimeter casings found on the porch and the bullet recovered from the hospital were fired from the .9-millimeter pistol seized from defendant's mobile home. The three .20-gauge shotgun shells found in the yard had been "worked through" the action of the .20-gauge shotgun recovered from defendant's mobile home. Although not able to identify the specific type of weapon that caused the victim's wounds, it was determined that victim's wounds were not from a shotgun.

One of defendant's cellmates, Mark Baldwin, testified that defendant told him that he had killed the victim because of an argument between Estella and the Maldonados at the grocery store earlier in the day. Defendant said that he, his brother, and his brother-in-law went to the Maldonados, knocked on the door, and began shooting when "the boy" came to the door.

Defendant took the stand on his own behalf and stated that he did not shoot the victim. Defendant said he had loaned the gun to his friend Antonio Sunega earlier that day and that Sunega had returned the gun that evening before the police had arrived. Defendant testified that he did not tell Baldwin that he had shot the victim and presented additional evidence that Baldwin was known to be a liar.

Estella testified that someone had come to their door the night of the murder after she and defendant had gone to sleep but before the police arrived. Estella also said that defendant had been asleep next to her since 8:00 p.m. on the night of the murder. Finally,

Estella denied going to the Food Lion on the day of the murder and stated that she had not seen the Maldonados in quite some time.

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

[1] At the end of the State's evidence, defendant moved to dismiss the charge of first-degree murder. This motion was renewed at the close of all evidence. Defendant argues that there was insufficient evidence to support the jury's finding that defendant killed Refugio Maldonado with specific intent, after premeditation and deliberation. In reviewing defendant's argument on this issue, we note that the standard of review under which we consider this issue has been well established.

> The evidence is to be viewed in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). All contradictions in the evidence are to be resolved in the State's favor. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). All reasonable inferences based upon the evidence are to be indulged in. *Id.* . . . [W]hile the State may base its case on circumstantial evidence requiring the jury to infer elements of the crime, that evidence must be real and substantial and not merely speculative. Substantial evidence is evidence from which a rational trier of fact could find the fact to be proved beyond a reasonable doubt. *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981).

State v. Reese, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987).

Before a trial court may submit a charge of first-degree murder to a jury, there must be substantial evidence of every essential element of the offense charged and that defendant was the perpetrator of the crime. *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; it need not be concerned with the weight of that evidence. *Id.*

We have reviewed the transcripts, record, and briefs in this case and conclude that the State presented sufficient evidence of the intent to kill to allow the jury to determine whether defendant was guilty of first-degree premeditated and deliberated murder.

To determine if a crime was done with premeditation and deliberation, there must be evidence that a defendant thought about the act for some length of time, however short, before the actual killing; no particular amount of time is necessary to illustrate that there was premeditation. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). To determine if a defendant deliberated or intended to kill someone, we consider if the crime was "carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990). We have recognized that it is difficult to prove premeditation and deliberation and that these factors are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence. *State v. Thomas*, 332 N.C. 544, 556, 423 S.E.2d 75, 82 (1992). Recognizing this difficulty, this Court has set out circumstances that are illustrative of the existence of premeditation and deliberation. They include:

> (1) absence of provocation on the part of 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). Four of the seven above circumstances were present in the case at bar.

We note, first, that there was no evidence of any provocation on the part of the victim. However, there was plenty of evidence of ill will between the Maldonados and the Saucedas. Because of defendant's connection to the Sauceda family and the fact that he had told the victim that he would back up the Saucedas in their quarrel against the Maldonados, we consider the evidence of the ill will between the families as evidence of ill will between defendant and the victim. The families first had argued when one of Carlos Sauceda's sons married and then abandoned one of Gregorio

Maldonado's daughters in Mexico. The families also argued about phone bills to Mexico. Defendant and the victim had personally argued about a lost driver's license manual, getting into a fight about the lost book at work, which resulted in both men being fired. Defendant and Estella had also fought with the Maldonados in church. Finally, on the day of the murder, Estella had walked up to the victim and his father and told them "this afternoon your joy will end." All these incidents illustrate that ill will existed between defendant and the victim.

Defendant's conduct before and after the killing was also evidence of premeditation and deliberation. Defendant waited until "the boy" actually came to the door before he began shooting through it. Defendant could have seen his victim through a window in the door, and he told a fellow inmate that he had waited until the boy came to the door to shoot. Defendant did not check on his victim after he shot him, instead leaving him to die. After the shooting, defendant returned home, hid the murder weapon, and went to sleep. We found similar facts to be evidence of premeditation and deliberation in *State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478, 481 (1991).

Finally, the nature and number of the victim's wounds provided evidence that the killer premeditated and deliberated. In the case at hand, defendant fired a .9-millimeter Ruger pistol at the victim at least six times. Defendant stood in front of the door and fired shots at the victim as the victim was unlocking the door. The victim was unarmed and was hit three times. The multiple firings at close range, which ensured the victim's demise, were further evidence of premeditation and deliberation. *See State v. Hunt*, 330 N.C. at 428, 410 S.E.2d at 481 (evidence that victim killed by three gunshot wounds in the back supported finding of premeditation and deliberation based on nature and number of wounds); *State v. Robbins*, 319 N.C. 465, 511, 356 S.E.2d 279, 306 (nature and number of wounds support finding of premeditation and deliberation; victim shot five times at close range), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

The overwhelming weight of the evidence supports the conclusion that the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant next contends that the evidence of premeditation and deliberation was equivocal and that the jury should have been

instructed on the charge of murder in the second degree. The record plainly reveals that any error in not instructing on the lesser-included offense was invited by defendant, who expressly stated that such an instruction need not, and in fact should not, be given.

Defendant indicated unequivocally to the trial court on two occasions that he did not wish for the jury to be instructed on second-degree murder. At the end of the case, before concluding for the day, the court asked: "Is there going to be any request from the defendant for any lesser offense other than first degree murder and not guilty?" The defendant responded, "No, Your Honor." At the charge conference, the following colloquy occurred between the court and defense counsel:

> THE COURT: Did not intend to instruct on lesser included [offenses]. I'll hear from the defendant on that so we'll know what we are talking about.
>
> MR. HAGAR [defense counsel]: Your Honor, I think the defense theory and evidence in the case doesn't support that [submission of lesser included offense].
>
> THE COURT: All right, so it would be first degree murder or not guilty?
>
> MR. HAGAR: Yes, sir.

"A defendant is not prejudiced . . . by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1988). Here, defendant foreclosed any inclination of the trial court to instruct on the lesser-included offense of second-degree murder. The trial court specifically asked defendant if he desired an instruction on a lesser-included offense. Defendant stated a total of three times that he did not want such an instruction, telling the trial court that such an instruction was not supported by the evidence and was contrary to defendant's theory of the case. We conclude that defendant is not entitled to any relief and will not be heard to complain on appeal. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993); *see also State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993); *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992).

[3] In defendant's third and final assignment of error, he alleges that it was error to admit into evidence State's Exhibit 7, a .9-millimeter bullet, where the State failed to establish the bullet's

connection to the crime. We conclude that this argument is without merit.

We first note that no objection was made to the admission of the bullet at trial; thus, the error must be reviewed under the plain error rule. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that "absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

This Court has held that "any object which has a relevant connection with the case is admissible in evidence, in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime . . . ." *State v. Crowder*, 285 N.C. 42, 46, 203 S.E.2d 38, 41-42 (1974), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). Under Rule 401, "relevant evidence" is that evidence which has a logical tendency to make a fact at issue "more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Though the evidence presented may only be circumstantial, it is admissible if it tends to connect a defendant with a homicide. *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989). The weight to be given such circumstantial evidence is a decision for the jury. *Id.*

In the case at hand, the .9-millimeter bullet was relevant to establish that defendant killed the victim. There was evidence presented that the victim died of a gunshot wound. The victim was transferred to Central Carolina Hospital by the EMS crew that arrived at the scene of the shooting. Detective Dawkins, who was in charge of the investigation for the county, went to the hospital after investigating the crime scene for the purpose of inquiring about the victim and was handed the .9-millimeter bullet by the hospital personnel. Casings from a .9-millimeter pistol had been found on the front porch of the victim's home, outside the front door. It was determined that the bullet and the casings both came from defendant's gun that was found hidden at his home. All this evidence tended to show that State's Exhibit 7 was a bullet from the victim's body. Thus, the bullet was relevant to defendant's case and was properly admitted into evidence. The fact that there was no direct evidence connecting the bullet to

the body affects the probative force of the exhibit, not its admissibility.

Assuming *arguendo*, however, that it was error to admit the bullet into evidence, defendant has not met his burden of showing that the jury would have reached a different verdict if the bullet had not been submitted. The bullet was not the only piece of evidence that linked defendant to the scene of the crime. Shell casings on the front porch were from defendant's .9-millimeter pistol, shotgun shells from the yard had been "worked through" the .20-gauge shotgun found in defendant's mobile home, and defendant's black Blazer was seen leaving the scene of the crime. In addition, the bullet was not the only evidence that linked defendant to the actual killing of the victim. Gregorio Maldonado testified that two different weapons were fired that night. Also, the physical evidence found at the scene supported the view that two weapons had been fired, a shotgun and a .9-millimeter pistol. The physical evidence also supported the view that it was bullets from the .9-millimeter pistol that struck the victim; the casings from the .9-millimeter pistol were found on the front porch outside the door, and expert testimony revealed that the victim had not been shot by a shotgun. Even without the admission of the bullet, the jury could have concluded that it was the .9-millimeter pistol that inflicted the deadly blows. Based on this evidence, we conclude that the jury's verdict would probably not have changed had the bullet been excluded.

For the reasons stated above, we conclude that defendant Sierra received a fair trial free of any prejudicial error.

NO ERROR.

GEORGE DOUGLAS ROBINSON AND CATHY P. ROBINSON, PLAINTIFFS v. GENERAL MILLS RESTAURANTS, INC., D/B/A RED LOBSTER INNS OF AMERICA, DEFENDANT AND THIRD-PARTY PLAINTIFFS v. SALT WATER SEAFOOD, INC., AND OLDE TOWNSITE COMPANY, INC., T/A SALTWATER SEAFOOD, THIRD-PARTY DEFENDANTS, AND GEORGE DOUGLAS ROBINSON AND CATHY P. ROBINSON, PLAINTIFFS v. GENERAL MILLS RESTAURANTS, INC., D/B/A RED LOBSTER INNS OF AMERICA, OLDE TOWNSITE COMPANY, INC., SALT WATER SEAFOOD, AND SALT WATER SEAFOOD, INC., DEFENDANTS

No. 293PA93

(Filed 4 March 1994)

On discretionary review, pursuant to N.C.G.S. § 7A-31(a), of a decision of the Court of Appeals, 110 N.C. App. 633, 430 S.E.2d 696 (1993), which reversed an order entered on 30 August 1991 by Freeman, J., in Superior Court, Forsyth County, and remanded for further proceedings. Heard in the Supreme Court 1 February 1994.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner, and Kenyann G. Brown, for plaintiff appellees.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., for defendant and third-party plaintiff appellants.

Hendrick, Zotian, Bennett & Blancato, by Richard V. Bennett and Sherry R. Dawson, for third-party defendant appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

SOUTHEASTERN HOSPITAL SUPPLY CORPORATION v. CLIFTON & SINGER, PARTNERSHIP, AND BENJAMIN CLIFTON, JR.

No. 290A93

(Filed 4 March 1994)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 652, 430 S.E.2d 470 (1993), reversing the judgment entered by Johnson (E. Lynn), J., on 12 December 1991, in Superior Court, Cumberland County. Heard in the Supreme Court 3 February 1994.

Senter, Hockman & Koenig, by William L. Senter, for plaintiff-appellee.

Bailey & Dixon, by Gary S. Parsons and Renee C. Riggsbee, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. GARY DEVON BUCKOM

No. 314A93

(Filed 4 March 1994)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 111 N.C. App. 240, 431 S.E.2d 776 (1993), finding error in the defendant's trial by Jenkins, J., on 24 January 1992 in Superior Court, Wayne County and ordering a new trial. Heard in the Supreme Court 3 February 1994.

Michael F. Easley, Attorney General, by Karen E. Long, Assistant Attorney General, for the State appellant.

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

PER CURIAM.

AFFIRMED.

ALT v. PARKER

No. 533P93

Case below: 112 N.C.App. 307

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1994.

BEST v. DUKE UNIVERSITY

No. 51PA94

Case below: 112 N.C.App. 548

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

BROOKS v. HAYES

No. 14P94

Case below: 113 N.C.App. 168

Petition by plaintiff (Brooks) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994. Petition by defendant (Hayes) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

BROWN v. BROWN

No. 566P93

Case below: 112 N.C.App. 614

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

BROWN v. BROWN

No. 565P93

Case below: 112 N.C.App. 619

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

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

BROWN v. LEE

No. 559P93

Case below: 112 N.C.App. 852

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

BULLARD v. BULLARD

No. 54P94

Case below: 113 N.C.App. 201

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

CAMP v. NEIGHBORS

No. 25P94

Case below: 112 N.C.App. 852

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

CANADY v. ONSLOW COUNTY

No. 26P94

Case below: 112 N.C.App. 852

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

CHARLOTTE-MECKLENBURG HOSPITAL AUTH. v. FIRST OF GA. INS. CO.

No. 21PA94

Case below: 112 N.C.App. 828

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

CHESAPEAKE MICROFILM v. N.C. DEPT. OF E.H.N.R.

No. 435A93

Case below: 111 N.C.App. 737

Motion by the defendant to dismiss the appeal for lack of substantial constitutional question allowed 3 March 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 3 March 1994.

CHESSON-GIBSON v. TERRELL

No. 30P94

Case below: 112 N.C.App. 852

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

CITY OF NEW BERN v. NEW BERN-CRAVEN COUNTY BD. OF ED.

No. 5PA94

Case below: 113 N.C.App. 98

Motion by plaintiff to dismiss the appeal by several defendants for lack of substantial constitutional question denied 3 March 1994. Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

COCHRAN v. N.C. FARM BUREAU MUTUAL INS. CO.

No. 64P94

Case below: 113 N.C.App. 260

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

COMPUTER SALES INTERNATIONAL v. FORSYTH MEMORIAL HOSPITAL

No. 551P93

Case below: 112 N.C.App. 633

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

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

CRABTREE v. JONES

No. 537P93

Case below: 112 N.C.App. 530

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

EMPIRE POWER CO. v. N.C. DEPT. OF E.H.N.R.

No. 570PA93

Case below: 112 N.C.App. 566

Petition by plaintiff (George Clark) for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

FARTHING v. COUNCIL

No. 560A93

Case below: 112 N.C.App. 643

Motion by plaintiff and third-party defendants to dismiss appeal allowed 3 March 1994.

HARPER v. FOWLER

No. 545P93

Case below: 112 N.C.App. 543

Petition by defendants (Group III) for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

HAZELWOOD v. BAILEY

No. 544PA93

Case below: 112 N.C.App. 543

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

HOOPER v. PIZZAGALLI CONSTRUCTION CO.

No. 530P93

Case below: 112 N.C.App. 400

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

MABE v. PELLA WINDOW & DOOR CO.

No. 28P94

Case below: 112 N.C.App. 852

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

MARTIN v. PIEDMONT ASPHALT & PAVING CO.

No. 6PA94

Case below: 113 N.C.App. 121

Petition by Industrial Commission for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994. Petition by defendants (Piedmont Asphalt & Paving Company and the PMA Group) for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

MARTIN MARIETTA CORP. v. WAKE STONE CORP.

No. 390A93

Case below: 111 N.C.App. 269

Motion by plaintiffs to dismiss the appeal for lack of substantial constitutional question denied 3 March 1994. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

MILLER v. NATIONWIDE MUTUAL INS. CO.

No. 501P93

Case below: 112 N.C.App. 295

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

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

NATIONAL FRUIT PRODUCT CO. v. JUSTUS

No. 532P93

Case below: 112 N.C.App. 495

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

O'DONNELL v. JOHNSTON

No. 58P94

Case below: 113 N.C.App. 202

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

PENA v. DANNY POUNCEY & CO.

No. 40P94

Case below: 113 N.C.App. 202

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

ROGERS v. HELM

No. 20P94

Case below: 112 N.C.App. 853

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

RUSSELL v. CHAMPION INTERNATIONAL

No. 576P93

Case below: 112 N.C.App. 544

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 3 March 1994.

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

STANLEY v. BROOKS

No. 561P93

Case below: 112 N.C.App. 609

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. CHEEK

No. 3PA94

Case below: 113 N.C.App. 203

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 March 1994.

STATE v. HILTON

No. 516P93

Case below: 112 N.C.App. 644

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. HOBGOOD

No. 477P93

Case below: 112 N.C.App. 262

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. LAWSON

No. 142A81-3

Case below: Superior Court

Petition by defendant for writ of certiorari to review the order of the Cabarrus County Superior Court denied 3 March 1994.

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

STATE v. MONTGOMERY

No. 529P93

Case below: 112 N.C.App. 546

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. OSBORNE

No. 496P93

Case below: 112 N.C.App. 546

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. SKIPWITH

No. 24P94

Case below: 112 N.C.App. 853

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

STATE v. SMITH

No. 18P94

Case below: 112 N.C.App. 853

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

WILKINSON v. SRW/CARY ASSOCIATES

No. 15P94

Case below: 112 N.C.App. 846

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 March 1994.

APPENDIXES

PRESENTATION OF
ASSOCIATE JUSTICE LAKE PORTRAIT

A HISTORICAL REVIEW OF THE SUPREME COURT
OF NORTH CAROLINA, 1919-1994

AMENDMENTS TO ARTICLE IX OF THE RULES
OF THE NORTH CAROLINA STATE BAR TO IDENTIFY
FACTORS IN MITIGATION OF DISCIPLINARY OFFENSES

AMENDMENTS TO ARTICLE II OF THE RULES
OF THE NORTH CAROLINA STATE BAR
TO IMPROVE PROCEDURES IN THE HANDLING
OF MEMBERSHIP QUESTIONS

AMENDMENTS TO THE PROCEDURES FOR RULING ON
QUESTIONS OF LEGAL ETHICS TO PERMIT THE
ISSUANCE OF ADVISORY OPINIONS BY THE
ASSISTANT EXECUTIVE DIRECTOR OF THE
NORTH CAROLINA STATE BAR

AMENDMENTS TO RULES GOVERNING ADMISSION
TO PRACTICE OF LAW

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION
AS A CRIMINAL LAW SPECIALIST

PRESENTATION OF THE PORTRAIT

OF

I. BEVERLY LAKE, SR.

Associate Justice

SUPREME COURT OF NORTH CAROLINA

1965-1978

June 15, 1994

INTRODUCTION OF DR. NORMAN A. WIGGINS

BY

CHIEF JUSTICE JAMES G. EXUM, JR.

It is with pleasure that I introduce a truly great North Carolinian, who will present the portrait of former Associate Justice I. Beverly Lake, Sr., to the Court. He is Dr. Norman A. Wiggins, President of Campbell University.

Dr. Wiggins graduated from then Campbell College, a two-year institution, and received his Bachelor's Degree, magna cum laude, from the then Wake Forest College. He earned his law degree cum laude from Wake Forest Law School. Following further extensive study of law at Columbia University Law School, where he was a Harlan Fiske Stone Fellow, Dr. Wiggins was awarded the LLM degree and ultimately the SJD degree by Columbia University.

As a member of the faculty of Wake Forest Law School, Dr. Wiggins rose to the rank of full professor. A distinguished legal scholar, Dr. Wiggins edited the *N.C. Will Manual*, was a member of the committee that drafted the North Carolina Intestate Succession Act, co-authored the *Treatise on Estates and Trusts* and authored the *Treatise on Wills and Administration of Estates in North Carolina.*

In 1968, shortly after Campbell received accreditation as a four year college, Dr. Wiggins, 43 years young, became the third president of that institution, succeeding Leslie H. Campbell, who was the founder's son.

Under Dr. Wiggins' inspired and effective leadership, Campbell soon added a school of law, graduate programs in business and education and became Campbell University. Campbell University, its law school and other graduate programs continue to grow in excellence, reputation and influence throughout North Carolina, the south and, indeed the nation. It is in many ways "the miracle wrought at Buies Creek."

This Court has certainly benefited both from Dr. Wiggins' scholarship and his vision for Campbell University, especially its School of Law, for many of our able research assistants have been Campbell Law graduates. The Law School's trial advocacy program is nationally recognized. Of it Dr. Wiggins has said "we ought not allow ourselves to become hired guns . . . but seek a just

solution for both sides." That is an admonition that law students need to hear today more than ever.

Dr. Wiggins was once asked "what in his home he is most proud of." Without hesitating, he said "My wife." We are happy to have with us this morning certainly a major secret of Dr. Wiggins' success, Mildred Wiggins, who herself holds a Masters Degree from Columbia University.

Another secret to Dr. Wiggins' accomplishments is that, as a law student, he sat at the feet of Professor I. Beverly Lake, Sr. How fitting it is, then, that I now call to the podium Dr. Norman Wiggins to present the portrait of former Associate Justice I. Beverly Lake, Sr.

PRESENTATION ADDRESS

BY

DR. NORMAN A. WIGGINS

PRESIDENT, CAMPBELL UNIVERSITY

Mr. Chief Justice, distinguished members of the Court, Dr. and Mrs. Lake, members of the Lake family, Dr. Lake's former research clerks and friends from here and all over the state.

First, let me say, Mr. Chief Justice, I appreciate your very generous introduction. I appreciate your extending yourself in this case and I must confess that, while it may not have been merited, it was certainly appreciated.

I count it a real honor to have been invited to present this portrait of my teacher, my colleague, and friend to one of the most outstanding Supreme Courts. It is certainly one of the oldest in the nation. As I come representing these former students, these research clerks and these longtime friends, I realize this morning that there are many present and many absent who relish the privilege that is mine. As a youth growing up in the First Baptist Church in Burlington, North Carolina, I was taught by men who were steeped in the heritage and tradition of Wake Forest. I came to know that the Lake family was an important part of the lore of that great institution. Yet it was not until Millie and I completed our work at Campbell, then a junior college, and transferred to Wake Forest College that I had the privilege of meeting our honoree.

Although a critical and necessary part, the process of registration somehow is not popular with students. Students come looking for the less difficult courses and the more charitable professors. Good advisors insist upon difficult courses and demanding teachers. Let me assure you that Dr. Lake was a very good advisor. On the day of my first registration in the Forest of Wake on the old campus, we made our way to Gore Gymnasium and there, behind a small table identified as pre-law, sat a very distinguished looking advisor. We joined at the end of the line. Upon inquiry I was informed that our advisor for the day was Dr. Lake. If I use that term, I hope that you will understand that is the one that we have used as students all during these years, although we realize that justice and judge and jurist and other terms are appropriate. I quickly observed that our advisor, who appeared really more youthful than some of his veteran students, had a very strong face. His eyes were sharp with the characteristics of quick change. They literally danced with merriment as serious advice was leavened with encouragement and light-hearted banter. Although the teacher and the students were enjoying the process, it became obvious to me that the students were losing the battle of soft courses and charitable professors. Soon we were at the head of the line. I handed Dr. Lake my record and a list of proposed courses and suggested teachers. As he had done with each student before me, he immediately stood and with all the courtesy we associate with the term southern gentlemen, he warmly welcomed Millie and me to Wake Forest. Indeed, he acted as if our coming by for a visit was doing him a great favor. As we settled the schedule for the semester, I noticed a glow on his countenance and I could detect that laughter in his voice from time to time, but never did I dream that that contact with this advisor, who complimented me on my selection of courses as he wrote in more difficult courses and demanding teachers while explaining that they were more worthy of my ability, would ripen into an enriching and lasting friendship. Almost all of his students and I can say that. Many of them are here today. Almost all of his students became lifelong members of what we call the extended Lake family. Little did I know that one day I would have the privilege of trying to help his son, who would later be a distinguished member of this Honorable Court, as his father had helped me and so many others.

I can here testify, I think without question, Dr. Isaac Beverly Lake not was but is one of the nation's greatest classroom teachers. He is a master of the Socratic method. He stated his questions very clearly and pointedly. You learned not to miss any footnotes, you knew you would have to respond, and it was not uncommon

for him to question one student, as he did your speaker, for the entire class period. Of course, students came somewhat apprehensive and occasionally were resentful of this friendly but very, very demanding teacher, but in the end they came to know what he was doing for them, and they came to enjoy and appreciate this meticulous, imaginative teacher and scholar who taught law really and truly in the grand manner.

Demanding though he was in the classroom, it was not uncommon to find Dr. Lake and some of his colleagues joining the students for a Saturday afternoon softball game at Cadell Field, and this warm, personalized interest added much to our educational experiences in those days.

On Sunday, generally with a full class, Dr. Lake taught a Sunday school class in which he taught those basic principles of life and moral character as explained so clearly by Jesus of Nazareth. Every student was encouraged to learn and appreciate the values of the spirit and character. In the light of his interest in and his contribution to the lives of his students, it is not surprising that Dr. Lake would receive what he describes as his ultimate reward in seeing two of his students serve as Justices of the Supreme Court here in North Carolina, one a United States Senator, another a United States congressman, another a President of the United States Chamber of Commerce, others who are judges, state and federal, legislators, outstanding business executives, and yes, some law professors and a university president or two. Without exception, these leaders attribute much of their success to a talented and gifted teacher who called them by their names, who insisted upon their being the best that they were capable of becoming, and who was never too busy to lend a helping hand or just listen if that was all that were needed. Grateful as he is for those students who have made their marks in other fields, Dr. Lake has expressed special gratitude for those students who serve as practicing lawyers. In the preface to his last book, in a dedication that he made, he acknowledged his indebtedness to his former students in these very meaningful words, saying "I dedicate this book to the several hundred young lawyers in this state who were my students at Wake Forest College and who, while there, taught me so much. If in the pages of this book they would find some useable suggestions, I shall have made a token payment on my account to them."

Dr. Lake was reared on the campus of a small Baptist college located in a small North Carolina town. He was surrounded by parents and teachers who were familiar with the nations of Greece

and Rome. Like the Roman emperor Marcus Aurelius, these elders believed and taught their children and their students that it is the duty of every citizen to do his or her part by living willingly in the community and helping others. Justice Arthur Vanderbilt would translate the emperor's admonition into something of a requirement that lawyers should use their talents to serve their state and nation and help to preserve the values and moral order upon which they were founded. This included offering oneself for public office.

Responding to the demand of public service, Dr. Lake authored discrimination by railroads and other public utilities in an effort to correct the wrong discriminatory rail rates too long inflicted upon an innocent people. Many believed that it helped hasten the day for the final reconciliation of a sectional division that scarred our nation. As Assistant, then Deputy, Attorney General of the State of North Carolina, Dr. Lake represented our state as it dealt with one of the most difficult problems of that day or any day. His deft handling of this sensitive problem and the different viewpoints of those parties, I think, served our state very well.

Following the mandate of Chief Justice Arthur Vanderbilt to offer oneself for public office, on two occasions Dr. Lake ran for the office of Governor of North Carolina. Although unsuccessful in his bids for office, he was greatly strengthened in his preparation for a thirteen-year tenure of service as a member of the Supreme Court of North Carolina, where he did serve with distinction. All will agree that few men have ever been better prepared for service on the bench than Dr. Beverly Lake. Practicing lawyer, distinguished professor of law with special expertise in constitutional law, but actually one who taught, literally, every course in the curriculum as he went on the faculty there and joined the great triumph at Wake Forest of that day. He served as acting Dean. He served in an important service in the federal government both in Washington and North Carolina. He handled such complex problems as price administration, rationing of gasoline and scarce commodities. He served as general counsel to such agencies as the National Production Authority, the Department of Motor Vehicles and the Utilities Commission in rate cases. All of these periods of service enriched his service on the bench and to the people of this state.

As one would expect, in his tenure on the Court, the opinions by Justice Lake reflect the principles that he taught in the classroom. In the matters of the Constitution, he made a special effort to see that the decisions handed down did not do violence to the

original ideals upon which the document was based. Always he has strived for justice, tranquility, prosperity and a secure liberty for this republic, and he has always taken special precaution to insure the separation of the powers between the president, the congress and the courts which make possible altogether justice, tranquility, prosperity and liberty. It is not surprising that one with Dr. Lake's integrity and self-discipline would honor his commitments and be able to maintain a happy and optimistic outlook on life.

Shortly after we had gone to Campbell, Millie and I were coming up the street. The Court had recessed, and the members of the Court were going down for lunch. We happened to meet them. They came, congratulated us. Dr. Lake particularly congratulated us, and we talked a little bit about those earlier days. Then I said to him, "I have a dream for Campbell." Upon his inquiring as to what it was, I said, "I hope that the day will come when you will be a member of our faculty," and he said, "Wait until I retire." Dean Davis was a little surprised when I called him one morning when the announcement was made that he would no longer be pursuing another term on the Court. I told him to get in touch with Dr. Lake. He did and Dr. Lake, remembering the conversation, said, "Of course I'll come." He came and taught constitutional law in our newly-established law school, adding luster to the faculty and to the school. He has not authorized me to say this, and I hope I will not embarrass him by saying it, but he steadfastly refused any compensation, saying the pleasure of being there was all the compensation he needed. We urged him to let us take the funds and endow the I. Beverly Lake Constitutional Law Award, and each year we make the award to the student exhibiting the most outstanding scholarship in this area of the law.

No person is a stranger to disappointment. That is especially true, said Theodore Roosevelt, if you leave the sidelines and enter the arena of life. Yet the optimism that Dr. Lake reflected in our first meeting many years ago continues unabated. On several occasions in recent years, as we have prevailed upon him to come and visit our campus and talk to our students, I have heard him use his considerable talent in urging young people to enter the arena of life and then, as he says, spend yourselves in a worthy cause. I assure them, and can assure anyone else, if they will do so, they can follow in the steps of one we honor who has found joy and satisfaction in the service of others.

Mr. Chief Justice, distinguished members of the Supreme Court of North Carolina, on behalf of Dr. Lake's former research clerks,

I would like to present this portrait to the Supreme Court. Thank you very much.

ACCEPTANCE OF ASSOCIATE JUSTICE LAKE'S PORTRAIT

by

CHIEF JUSTICE EXUM

It is a personal pleasure for me, on behalf of the Court, to accept this lovely work of art, the portrait of former Associate Justice I. Beverly Lake, Sr., to hang in the halls of this building to remind us of the great man and the great contributions he made to the law of this state. I am the only one on the present Court who served with him. When I came to the Court in 1975 as the Junior Justice, he was the Senior Associate Justice, and what a privilege it was to sit in the conferences with him in those days. I marveled at his clarity of mind and the quiet persuasiveness with which he always stated his positions. Our discussions in the conference sometimes belie the word discussion. They get pretty heated at times as we argue about some of these difficult issues we have to decide, but never in all of the conferences that I was privileged to participate in with Dr. Lake did he ever raise his voice, always relying instead on the quiet logic of his position, and he was extremely effective in that way. He was not only a leader of the Court in those days, and one to whom I looked to for guidance and for help and with whom I really enjoyed talking about the law and other matters, but he was a personal friend and someone that I really look forward to seeing on the occasions that bring us together. He always has a cheery smile and a very delightful disposition. On behalf of the Court, we, with pleasure, accept this portrait. It will hang in the halls of this building to remind us of the great person that it portrays, former Associate Justice I. Beverly Lake, Sr. So we accept the portrait with gratitude to the family and others who made it possible.

A HISTORICAL REVIEW OF THE SUPREME COURT OF NORTH CAROLINA

1919-1994

by Harry C. Martin*

A history of the court covering the first century of its existence from January 1, 1819 until January 1, 1919 was written by Chief Justice Walter Clark and published in volume 177 at page 617 of the North Carolina Supreme Court Reports. This history was updated by Justice Emery B. Denny covering the fifty year period from January 1, 1919 until January 1, 1969. Following that writing, Justice David Britt updated the history of the court from January 1, 1969 until December 31, 1989 in volume 326, page 839 of the Supreme Court Reporter. Basically, the writings have been biographical notes concerning the various persons who have served as members of the court. It would serve no useful purpose to repeat any of that work in this presentation. Since Justice Britt's article there have been several additional persons serving upon the Court about whom I shall make some reference.

On January 31, 1992, your author retired from the Court by reason of the age limitation contained in the Constitution of North Carolina. The then governor appointed I. Beverly Lake, Jr. to the Court. Justice Lake served until the general election in November 1992 when Sarah Parker was elected to serve the remainder of retiring Justice Martin's term of office. Justice Lake, the son of former Justice I. Beverly Lake who had previously served upon the Court from 1965 to 1978, was educated at Wake Forest University and had previously served as a superior court judge. He presently lives in the city of Raleigh.

Sarah Parker from Charlotte, Mecklenburg County, North Carolina attended Meredith College for two years in 1960-62 and graduated from the University of North Carolina at Chapel Hill in 1964 with a B.A. degree. She was born in Charlotte, August 23, 1942, the daughter of Augustus and Elizabeth Parker. Following her graduation from the University of North Carolina, Justice Parker was a volunteer with the Peace Corps serving in Ankara, Turkey

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* The author is presently the Dan K. Moore Distinguished Visiting Professor of Law at the University of North Carolina School of Law, Chapel Hill, NC. Formerly, he was a member of the Supreme Court of North Carolina, 1982-92. Prior to that, he served on the Superior Court and Court of Appeals from 1962 until 1982. The author acknowledges with thanks the contribution of Alex Bryant and Corrine Harrah, Research Assistants to the author at the UNC law school.

from 1964 till 1966. At the conclusion of this overseas duty she returned to the University of North Carolina law school from which she was graduated in 1969. She returned to Charlotte and engaged in the private practice of law until she was appointed by Governor James Hunt to the North Carolina Court of Appeals where she served from 1985 until her election to the Supreme Court in November 1992. Justice Parker is an Episcopalian and maintains residences at Raleigh and Charlotte, North Carolina.

Any historical review of a court of last resort should look to the substantive law pronounced by that court during the period under review. I have attempted to research what I have concluded are some of the leading cases decided by this Court since 1919. This selection has been divided by decades, beginning with the 1920s.

Chief Justice Clark was elected in 1902 and served until his death in 1924. The era of the Clark Court was an active, progressive time for the state, particularly with respect to women's rights and the accountability of industry for its actions. Read the impassioned dissent of Clark in *Weather v. Burdens*, 124 N.C. 610, in which he charges the legislature and Court with treating married women as "infants, idiots, lunatics and convicts."

Justice Stacy authored the opinion in *State v. Wingler* wherein Wingler was convicted of murdering his wife twenty-nine years after the killing. In a glowing tribute to women, Justice Stacy wrote:

> The supreme tragedy of life is the immolation of woman. With a heavy hand, nature exacts from her a high tax of blood and tears. The age of knighthood has passed and is gone, but let us hope that the spirit of chivalry may never die. No civilization can last where women are permitted to be butchered like sheep in the shambles. Surely there is no pleasure to be derived from the punishment of the wicked, but it would seem that this defendant ought to welcome an opportunity to expiate his crime and to make some atonement for it. No doubt, in his own conscience, he has already suffered the agony of remorse. How, through the many years, has it been possible for him to banish from his mind the vision of the woman who, in the days of her youth, put her hand in his, with a promise to forsake all others and to follow him? At the altar she vowed, in substance, that "whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God." Can the defendant ever forget that momentous hour when this woman, with heroic courage, took immortality by the hand and went down into

> the valley of the shadow of death that his child might live? And then, can he for a moment cease to hear her screams of terror as she fled from his murderous hand?

State v. Wingler, 184 N.C. 747, 751-752 (1922).

In *Crowell v. Crowell*, 180 N.C. 516 (1920) this Court held for the first time that a wife could sue her husband for damages resulting from tort, thus removing the bar of interspousal immunity in tort actions. This action by the Court constitutes a giant step forward on behalf of women in fulfilling the state constitution's guarantee of equal protection under the laws.

Although it is a 1918 case, *Grant v. Graham Chero-Coke Bottling Co.*, 176 N.C. 256 (1918) is worthy of mention. In this opinion the Court sustained a challenge to the citadel of privity by holding that a bottler of carbonated beverages is liable for injuries sustained as a consequence of the explosion of such bottle because of the negligence of the bottler, even though there was no privity of contract between the injured person and the bottler.

In *Hipp v. E.I. DuPont deNemours & Co.*, 182 N.C. 9 (1921) the Court held for the first time that a wife had a cause of action for loss of consortium because of a defendant's negligence, and it is now firmly established that a wife may maintain such an action against third parties.

Upon the retirement of Chief Justice Hoke in 1925, Walter P. Stacy succeeded him. Under Chief Justice Stacy, the Court built upon the Clark years and resumed the position it had enjoyed during the pre-Civil War era as one of the leading Courts of our nation. Stacy occupied the center seat of Chief Justice until his death September 13, 1951, the longest tenure of any Chief Justice of the Court.

In the decade of the 1930s we find *Bullock v. Mutual Life Insurance Co.*, 200 N.C. 642 (1931) in which the Court construed a policy provision which required total disability before benefits were payable. The Court held that total disability did not require that the claimant be unable to work in any occupation whatsoever and that although the claimant could do odd jobs of comparatively trifling nature, this did not preclude him from recovery under the policy. This decision deviated from prior holdings of the Court which required that in order for a claimant to recover he must be unable to work in any occupation whatsoever.

In *Broadway v. Grimes*, 204 N.C. 623 (1933) the Court extended the doctrine of *Grant v. Graham Chero-Coke Bottling Co.* to cases in which the plaintiff was injured from the drinking of a beverage which was unfit for human consumption because of negligence on the part of the manufacturer or bottler, this being so even though there was no privity of contract between the plaintiff and the manufacturer or bottler.

The 1940s brought the decision of *State v. Harris*, 216 N.C. 746 (1940) in which the Court held unconstitutional a statute regulating dry cleaners on the ground that the statute was too broad. This opinion began in North Carolina the modern state constitutional doctrine of economic due process, and also held that a legislative determination as to what businesses justify public regulation is not binding upon the courts, but the courts may make such determination independently. This case also stated the Court's interest in defending the constitutional guarantees of individual rights and that they should be read broadly and enforced vigorously.

In *Bullington v. Angel*, 220 N.C. 18 (1941) this Court held that the statute proscribing deficiency judgments barred an action for a deficiency judgment upon a foreclosure where the statute had been enacted prior to the transaction in question. This case then went to the United States Supreme Court for further review on the question of whether the North Carolina Court's decision precluded the right to recover a deficiency judgment in the federal courts. The United States Supreme Court held in a 6-3 decision that the North Carolina judgment barred recovery in the federal court based upon the same cause of action, thus holding that the claim was barred by the principles of res judicata.

Following the death of Stacy, the Court came under the leadership of Chief Justice Devin (an ancestor of Justice Webb), Barnhill and Winborne, during the 1950s. Chief Justices Denny and Parker served in the decade of the 1960s.

In the 1950s the Court reestablished the common law prohibition against a police officer arresting a person without a warrant on a charge of a misdemeanor, except when a breach of the peace had been committed in the officer's presence or the officer had reasonable grounds to believe that a breach of the peace was about to be committed in his presence. *State v. Mobley*, 240 N.C. 476 (1954). In so doing, the Court overruled previous holdings and dicta which had chipped away the common law prohibition against such arrest.

In the 1960s this Court in *Rabon v. Rowan Memorial Hospital*, 269 N.C. 1 (1967) abolished charitable immunity as a defense to tort claims against hospitals in North Carolina.

In *Galloway v. Lawrence*, 263 N.C. 433 (1965) the Court held that a general release executed in favor of one responsible for an original injury did not foreclose an action against a physician on a claim based upon negligent treatment of the injury. This holding modified the previous rule that physicians were automatically protected when such a general release was signed.

From 1969 to 1979, Chief Justices Bobbitt and Sharp guided the Court. Chief Justice Sharp became the first woman in the United States to be elected Chief Justice of a Supreme Court.

In the 1970s the Court in *Gore v. George J. Ball, Inc.*, 279 N.C. 192 (1971) held that a clause in a contract limiting the amount of damages that could be recovered against a seller of seeds by a farmer was void as contrary to the public policy of North Carolina. At the time of this opinion by the Court the Uniform Commercial Code had not been enacted in North Carolina and apparently the *Gore* case would prohibit a contractual limitation of damages, at least if the damages were limited to the purchase price. This may be an issue later to be resolved by this Court.

Chief Justice Joseph Branch ushered in the decade of the 80s. He was one of the most likeable persons to hold this high office and brought harmony and a sense of strong collegiality to the Court. Upon his retirement in 1986, the second woman to serve as Chief Justice, Rhoda Billings, was appointed. She held office until the election in November 1986, when the present Chief Justice, James G. Exum, Jr., was elected.

In the 1980s, this Court covered a wide spectrum of substantive legal issues. In *Delconte v. North Carolina*, 313 N.C. 384 (1985) the Court held that the compulsory school attendance statute did not prevent a parent from giving his children home instruction. This instruction must comply with the standards for qualification as a non-public school pursuant to our statutes. This case was not based upon constitutional principles but rather upon the construction of the statute in question.

In *Azzolino v. Dingfelder*, 315 N.C. 103 (1985) the Court held in a 4-3 decision that parents did not have a claim against a treating physician based upon the alleged negligence of the physician in failing to properly inform the parents as to the dangers and risks involved in allowing a pregnancy to go to term with respect to

the possibility of the child being afflicted with Down's Syndrome. The majority decided the case upon what is essentially a moral basis in holding that the existence of a human life cannot constitute an injury or loss no matter how deformed or crippled that life may be. The three dissenters were united in their analysis of the parents' claim that on a purely tort basis where a doctor negligently fails to properly inform his patient as to the risks attendant to a medical condition, an action for such negligence may be maintained.

The case of *DiDonato v. Wortman*, 320 N.C. 423 (1987) presented to the Court the question of whether a viable fetus was a "person" within the meaning of the wrongful death statute of North Carolina. The Court held that such an action could be prosecuted under our laws. The Court was united, except for one dissent, in the substantive holding but had differences of opinion with respect to the damages recoverable.

In the current decade, the Court in *Johnson v. Ruark Obstetrics*, 327 N.C. 283 (1990) established that a plaintiff could recover for the negligent infliction of emotional distress. As in many opinions of recent years this decision drew the fire of two dissents.

In *State v. Carter*, 322 N.C. 709 (1988) the Court refused to adopt the good faith exception to the exclusionary rule with respect to evidence obtained by officers in violation of a defendant's state constitutional rights with respect to search and seizure.

The Court held that a plaintiff has a direct cause of action under the state constitution for alleged violations of his rights of freedom of speech in *Corum v. University of North Carolina*, 330 N.C. 761 (1992). The Court had previously found a direct cause of action in cases where state constitutional rights were violated by the taking of property without payment of just compensation.

Two cases which illustrate the effect of dissents upon the development of the law were recently decided by the Court. In *Alford v. Shaw*, 320 N.C. 465 (1987) and 327 N.C. 526 (1990) the Court adopted in the latter opinion the dissent filed in the first opinion to the effect that corporate directors who are defendants in a derivative shareholders action may not confer upon a special committee, named by the directors, the power to bind a corporation as to such derivative shareholders action.

Likewise in *Woodson v. Rowland*, 329 N.C. 330 (1991) the Court adopted the dissent in *Barrino v. Radiator Specialty Co.*, 315 N.C. 500 (1986). In *Barrino*, a 4-3 decision with two concurring opinions (perhaps making *Barrino* a 2-2-3 opinion), the dissent urged the adop-

tion by the Court of the rule that an employee covered by Workers' Compensation could sue his employer for damages based upon the intentional tortious acts by the employer which proximately caused the death of the employee. This rationale was subsequently adopted by the majority in the *Woodson* opinion.

In conclusion, may I comment upon some of the changes that the passage of time since 1919 has brought to the Court. In 1936 the composition of the Court was increased from five members to seven and Justices Barnhill and Winborne were named to the bench on July 1, 1937.

In 1962 the people adopted a new Article 4 as an amendment to our state constitution. This Article established a new court system. The courts of the state were the Court for Trial of Impeachments and the General Court of Justice. The General Court of Justice was constituted of an Appellate Division and a Superior Court Division and a District Court Division. The appellate division was made up of the Supreme Court and the newly created Court of Appeals. The Court of Appeals, as will be recognized by many members of the Supreme Court, has relieved the high court of much of its workload which it previously was obligated to carry. The Court of Appeals has also provided a training ground for judges who subsequently became members of the Supreme Court. Of the present court, Justices Mitchell, Webb, Whichard and Parker formerly served upon the Court of Appeals. Other justices with prior service upon the Court of Appeals were Justices Carlton, Vaughn, Brock, Britt, and your speaker.

By the new uniform court system in North Carolina the full administrative responsibilities have evolved upon the Chief Justice, thus making the Chief Justice, in effect, the Chief Justice of North Carolina. To be sure, he is the Chief Justice of the Court, but his additional duties also place him as the Chief Justice of our state.

Another important development adopted in 1973 was the Uniform Judicial Retirement Act which allowed justices to protect their families through the retirement procedures and as your speaker is well aware, a constitutional bill has been adopted delineating the maximum age of a justice for service upon the Court.

In addition, the rules of appellate procedure have been revised making appellate procedure more workable.

One of the great additions to the Court was the appropriation of funds to provide law clerks to the justices in 1957. In 1985

this was expanded by authorizing each justice to have two law clerks for assistance.

Just one note about humor on the Court. Not everything that goes on in the life of the Court is dull and drab and humorless. Many times what may be perceived by the casual observer as something of a businesslike nature may, in truth, be an inside bit of humor enjoyed by the Court. An example of this occurred when I was the Junior Justice of the Court. Chief Justice Branch was presiding during oral arguments. We were listening to the argument in a drug conspiracy case and a lawyer from Miami, Florida was appearing pro hac vice. This lawyer had on a $700 suit and $200 shoes and the most dazzling gold cuff links the Court had seen in some time. During his argument the Chief Justice wrote a note, folded it and passed it amongst the brethren. Being the Junior Justice, I was the last to receive the note, which upon opening, I read: "This fellow did not get here on no chicken truck, did he?" The collegiality of the Court has always been very strong and there has always been a welcome for each justice to visit the chambers of their colleagues for the purpose of working on decisions and opinions or just to sit and talk about ACC basketball.

Finally, I would like to point out some predictions made by The Honorable T.T. Hicks which are set forth in Reporter 176 at page 791 as a part of the Centennial Celebration of the Supreme Court. Mr. Hicks opined that the Supreme Court would, in a short time, no longer have the authority or the painful duty to declare that a human being shall be put to death by law. As stated by Mr. Hicks, "Will not the conscientious men and women who meet to celebrate the next centennial of this court blush, as they turn these pages, to think that their ancestors in 1919 condemned human beings to death by law in North Carolina?" Mr. Hicks' prediction in this respect failed. This Court now spends at least fifty percent of its working time involved with death penalty appeals.

Mr. Hicks also had a cloudy crystal ball when he predicted that we would soon go from the popular election of judges to a system of appointment which would remove the selection of judges from politics.

Further, Mr. Hicks predicted that the Court lawyers and litigants could look forward to the time when opinions would be short and succinctly stated with clear exposition as to the rule of law. I shall leave it to the judgment of my listeners today to decide whether the Court has arrived at this desirable state.

This grand old Court has stood the test of time for 175 years bringing blessings upon the people of our great state. So shall it continue in the future. I look forward to being with you in spirit, if not in person, in the year 2019 when this Court shall celebrate its 200th anniversary. Thank you, Mr. Chief Justice.

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IDENTIFY FACTORS IN MITIGATION OF DISCIPLINARY OFFENSES

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 14, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 14, be amended by adding five new subsections, designated as (i) through (m), to Section (W) (2) as appears in boldface type below:

Section 14. Formal Hearing.

. . .

W. If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

. . .

2. The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case including the following factors:

a. absence of a prior disciplinary record;

b. absence of a dishonest or selfish motive;

c. personal or emotional problems;

d. timely good faith efforts to make restitution or to rectify consequences of misconduct;

e. full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

f. inexperience in the practice of law;

g. character or reputation;

h. physical or mental disability or impairment;

i. delay in disciplinary proceedings through no fault of the defendant attorney;

j. interim rehabilitation;

k. imposition of other penalties or sanctions;

l. remorse;

m. remoteness of prior offenses.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 14, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 1994.

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 3rd day of March, 1994.

JAMES G. EXUM, JR.
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 3rd day of March, 1994.

PARKER, J.
For the Court

AMENDMENTS TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IMPROVE PROCEDURES IN THE HANDLING OF MEMBERSHIP QUESTIONS

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 14, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II be amended by striking each section in its entirety and by substituting in lieu thereof the attached provisions identified as Sections 1-7.

Art. II

Membership—Annual Membership Fees.

Section 1. Classes of Membership.

A. Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes as follows: 1) active members and 2) inactive members.

B. Active Members

The active members shall be all persons who have obtained a license entitling them to practice law in North Carolina, including persons serving as a justice or judge of any state or federal court in this state, unless classified as an inactive member by the Council. All active members must pay the annual membership fee.

C. Inactive Members

The inactive members shall include all persons who have been admitted to the practice of law in North Carolina but who the Council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law. Inactive members of the North Carolina State Bar may not practice law and are exempt from payment of membership dues during the period in which they are inactive members.

For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

1. Retired/non-practicing—

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

2. Disability inactive status—

This subcategory includes members who suffer from a mental or physical condition which significantly impairs

the professional judgment, performance or competence of an attorney, as determined by the courts, the Council or the Disciplinary Hearing Commission.

3. Disciplinary suspensions/disbarments—

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the Council or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

4. Administrative suspensions—

This subcategory includes those members who have been suspended from the practice of law for failure to comply with the regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules.

Section 2. Register of Members.

A. Initial Registration with State Bar

Every member shall register by completing and returning to the N.C. State Bar a signed registration card containing the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney in North Carolina.
5. Date and place of birth.
6. List of all other jurisdictions where the member has been admitted to the practice of law and date of admission.
7. Whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

B. Membership Records of State Bar

The Secretary-Treasurer shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made

showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Section 3. Annual Membership Fees; When Due.

A. Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the Secretary-Treasurer of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid on or before July 1 of each year.

B. Waiver of All or Part of Dues

No part of the annual membership fee shall be prorated or apportioned to fractional parts of the year, and no part of the membership fees shall be waived or rebated for any reason with the following exceptions:

1. A person licensed to practice law in North Carolina for the first time by examination or comity shall not be liable for dues during the year in which the person is admitted.

2. A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues so long as the member is on active duty in the military service.

3. A person licensed to practice law in North Carolina who files a petition for inactive status before December 31 of a given year shall not be liable for the membership fee for the following year if the petition is granted.

Section 4. Transfer of Member to Inactive Status.

A. Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a duly verified petition with the Secretary-Treasurer addressed to the Council setting forth fully:

1. Name and current address.

2. Date of admission to the North Carolina State Bar.

3. Reasons why the applicant desires transfer to inactive status.

4. That the applicant is at the time of filing the petition a member in good standing having paid all fees required and without any grievances or disciplinary complaints undisposed of against him.

5. Any other matters pertinent to the petition.

No member may be voluntarily transferred to disability-inactive status or retired/non-practicing inactive status until 1) the member has paid all membership fees, late fees and other costs assessed against the member by the N.C. State Bar and 2) all grievances and disciplinary matters pending against the member have been finally resolved.

B. Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Section 4(A), the Council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the Council. A copy of the order shall be served on the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

Section 5. Application for Reinstatement from Inactive Status.

Any person who has been transferred to inactive status may petition the Council for an order reinstating the member as an active member of the North Carolina State Bar.

A. Contents of Reinstatement Petition

The petition shall set out facts showing the following:

1. that the member has provided all information requested in an application form prescribed by the Council and has signed the form under oath.

2. that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the State of North Carolina, and that the member's resumption of the practice of law within this State will be neither detrimental to the integrity

and standing of the Bar or the administration of justice nor subversive to the public interest.

3. that the member has paid a $125.00 reinstatement fee, the membership fees for the current year in which the application is filed and all costs incurred by the North Carolina State Bar in investigating and processing the application. The reinstatement fee and costs shall be retained by the North Carolina State Bar but the membership fees shall be refunded if the petition is denied.

B. Service of Reinstatement Petition

The petitioner shall contemporaneously serve a copy of the petition on the Secretary-Treasurer and upon each member of the Membership & Fees Committee. The Secretary-Treasurer shall transmit a copy of the petition to the counsel.

C. Response by Counsel

The counsel will conduct any necessary investigation regarding the petition. The counsel may file a response to the petition with the Secretary-Treasurer within 15 days after service of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The counsel will serve a copy of any response upon the petitioner and the members of the Membership & Fees Committee.

D. Response by Membership & Fees Committee

1. Any member of the Membership & Fees Committee may file an objection to the petition with the Secretary-Treasurer within 15 days after receipt of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The objecting member will serve a copy of any response filed upon the petitioner and upon the counsel. The objecting member shall not participate in any vote on the petition.

2. Any member of the Membership & Fees Committee may file a request for additional investigation of the petition within 15 days after the member receives the petition.

E. Uncontested Petitions

If no timely objection to the petition is filed within the time set out herein by the counsel or a member of the Membership & Fees Committee, the Membership & Fees Committee will consider the petition at its next meeting and shall make a recommendation to the Council regarding whether the petition should be granted.

F. Contested Petitions for Reinstatement

1. Hearing Procedure—

If a timely objection to the petition is filed by the counsel or a member of the Membership & Fees Committee, the Secretary-Treasurer will refer the matter to the Chair of the Membership & Fees Committee of the N.C. State Bar for hearing. Within 14 days after the objection is filed, the Chair will appoint three members of the Membership & Fees Committee to serve as a Hearing Panel. The Chair may appoint him or herself as a member of a Hearing Panel. The Chair will schedule a time and place for a hearing before the Hearing Panel and will notify the counsel and the petitioner of the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless the parties agree otherwise.

2. Hearing Panel Recommendation—

Following the hearing on a contested reinstatement petition, the Hearing Panel will make a written recommendation to the full Membership & Fees Committee regarding whether the petitioner's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law in support of its recommendation.

3. Record to Membership & Fees Committee—

(a) The petitioner will compile a record of the proceedings before the Hearing Panel to the Membership & Fees Committee, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the petitioner and counsel agree in writing to shorten the

record. Any agreements regarding the record shall be included in the record transmitted to the Membership & Fees Committee.

(b) The petitioner shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the Chair of the Committee for good cause shown.

(c) The petitioner will transmit a copy of the record to each Committee member who did not sit on the Hearing Panel no later than 30 days before the meeting at which the petition is to be considered.

(d) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the Membership & Fees Committee.

(e) If the petitioner fails to comply fully with any of the provisions of Section 3(a) through (d) of this rule, the counsel may file a motion to the Secretary-Treasurer to dismiss the petition.

4. Committee Recommendation—

(a) In his or her discretion, the Chair of the Committee may permit counsel for the State Bar and the petitioner to present oral or written argument, but the Committee will not consider additional evidence not in the record transmitted from the Hearing Panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(b) After considering the record and the arguments of counsel, if any, the Membership & Fees Committee will make a written recommendation regarding whether the petition should be granted. The Chair of the Committee shall sign the recommendation for the Committee members.

5. Record to Council—

(a) Following entry of the written recommendation of the Membership & Fees Committee, the petitioner will transmit a copy of the record of the proceedings before the Hearing Panel and the Membership & Fees Committee to each Council member no later

than 30 days before the Council meeting at which the petition is to be considered.

(b) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the Council.

6. Order by Council—

The Council will review the record and the recommendations of the Hearing Panel and the Membership & Fees Committee and will determine whether and upon what conditions the petitioner will be reinstated. The Council may tax the costs attributable to the proceeding against the petitioner.

Section 6. Suspension for Non-Payment of Membership Fees.

A. Notice of Overdue Fees

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee, the Secretary-Treasurer shall prepare a written notice 1) directing the member to show cause within 60 days of the date of the notice why he or she should not be suspended from the practice of law and 2) demanding payment of a $75 late fee. The notice shall be served on the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

B. Entry of Order of Suspension for Nonpayment of Dues

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee and any late fees imposed pursuant to Section 6(A), and that more than 60 days have passed from service of the notice to show cause, the Council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the Council. A copy of the order shall be served on the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

C. Late Tender of Membership Fees

If a member tenders the annual membership fee and the $75 late fee to the N.C. State Bar after July 1 of a given year, but before a suspension order is entered by the Council, no order of suspension will be entered.

Section 7. Reinstatement After Suspension for Non-Payment of Dues.

A. Reinstatement Within 30 Days of Entry of Suspension Order

A member who has been suspended for nonpayment of annual membership fees and/or late fees may petition the Secretary-Treasurer for an order of reinstatement of the member's license at any time up to 30 days after entry of the suspension order. The Secretary-Treasurer shall enter an order reinstating the member to active status upon receipt of a timely petition and satisfactory showing by the member of payment of all membership fees, late fees and costs.

B. Reinstatement More than 30 Days After Entry of Suspension Order

At any time more than 30 days after entry of an order of suspension, a member who has been suspended for nonpayment of dues and/or late fees may petition the Council of the N.C. State Bar for an order of reinstatement. The petition will be filed with the Secretary-Treasurer, who will transmit a copy to the counsel.

1. Contents of Reinstatement Petition—

The petition shall set out facts showing the following:

(a) that the member has provided all information requested in a form to be prescribed by the Council and has signed the form under oath.

(b) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the State of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive to the public interest.

(c) that the member has paid a $125 reinstatement fee, a $75 late fee, all past and current membership fees,

plus all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

2. Procedure—

The petition for reinstatement shall be handled as provided for in Section 5(B)-(F), governing petitions for reinstatement from inactive status.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 14, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 1994.

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 3rd day of March, 1994.

JAMES G. EXUM, JR.
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 3rd day of March, 1994.

PARKER, J.
For the Court

AMENDMENTS TO THE PROCEDURES FOR RULING ON QUESTIONS OF LEGAL ETHICS TO PERMIT THE ISSUANCE OF ADVISORY OPINIONS BY THE ASSISTANT EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BAR

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 quarterly meeting on January 14, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that the procedures for ruling on questions of legal ethics be amended as follows:

1. In the section entitled "(A) Definitions":

(a) By adding a new subsection (1) as follows:

(1) "Assistant Executive Director" shall mean the Assistant Executive Director of the Bar.

(b) By renumbering the remaining subsections with the numbers (2) through (14).

(c) By amending the subsection defining the term "Executive Director" (which shall be renumbered as subsection (9)) to delete the phrase ". . . or, in his absence, his designee" in order that the amended subsection shall read in its entirety as follows:

(9) "Executive Director" shall mean the Executive Director of the Bar.

2. In the section entitled "(B) Requests for Legal Ethics Opinions and Ethics Advisories (General Provisions)":

(a) By amending subsection (1) to add "Assistant Executive Director" in the second sentence following the words "Executive Director" in order that the amended subsection shall read in its entirety as follows:

(1) Any attorney or citizen may request the Bar to rule on actual or contemplated professional conduct of an attorney in the form and manner provided hereinafter. The grant or denial of the requests rests with the discretion of the Executive Director, Assistant Executive Director, Committee or the Council.

(b) By amending subsection (3) to add "Assistant Executive Director" to the first sentence following the words "Executive Director or" in order that the amended subsection shall read in its entirety as follows:

> (3) A request for an Ethics Advisory, Ethics Decision or Legal Ethics Opinion shall present in detail to the Executive Director or Assistant Executive Director all operative facts upon which the request is based. All requests for either a Legal Ethics Opinion or an Ethics Decision shall be made in writing.

3. In the section entitled "(C) Ethics Advisories":

(a) By amending subsection (2) to add "Assistant Executive Director" to the first and second sentences following the words "the Executive Director or" in order that the amended subsection shall read in its entirety as follows:

> (2) Upon receipt of either a written or verbal request from an attorney for an Ethics Advisory, the Executive Director or Assistant Executive Director acting under the supervision and direction of the Ethics Committee, may either honor the request or deny it. If the Executive Director or Assistant Executive Director honors the request, he or she shall communicate the ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.

(b) By amending subsection (3) to add "Assistant Executive Director" following the words "the Executive Director or" in order that the amended subsection shall read in its entirety as follows:

> (3) An Ethics Advisory issued by the Executive Director or Assistant Executive Director shall be promulgated under the authority of the Ethics Committee and in accordance with such guidelines as the Ethics Committee may establish and prescribe from time to time.

(c) By amending subsection (5) to add "Assistant Executive Director" to the second sentence following the words "the Executive Director or" in order that the amended subsection shall read in its entirety as follows:

> (5) Ethics Advisories shall be reviewed periodically by the Committee. If, upon review, a majority of the Committee

present and voting decides that an Ethics Advisory should be withdrawn, the requesting attorney shall be notified in writing of the Committee's decision by the Executive Director or Assistant Executive Director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he acts pursuant to the Ethics Advisory which is later withdrawn.

(d) By amending subsection (7) to add "Assistant Executive Director" following the words "the Executive Director or" in order that the amended subsection shall read in its entirety as follows:

(7) If the Executive Director or the Assistant Executive Director declines to issue an Ethics Advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the Committee, an attorney has the right to proceed de novo under the procedures delineated in section (D).

4. In the section entitled "(D) Legal Ethics Opinions and Decisions":

(a) By amending subsection (1) to add "Assistant Executive Director" following the words "the Executive Director or" in order that the amended subsection shall read in its entirety as follows:

(1) Requests for Legal Ethics Opinions or Ethics Decisions shall be made in writing and submitted to the Executive Director or Assistant Executive Director who, after determining that the request is in compliance with section (B), shall transmit the requests to the Chairman of the Ethics Committee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 14, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 1994.

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 3rd day of March, 1994.

JAMES G. EXUM, JR.
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 3rd day of March, 1994.

PARKER, J.
For the Court

AMENDMENTS
TO
RULES GOVERNING ADMISSION
TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on April 15, 1994.

BE IT RESOLVED that Rules .0206, .0405, .1203(4), and .1207 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742, and amended in 293 N.C. 759, 295 N.C. 747, 296 N.C. 746, 304 N.C. 746, 306 N.C. 793, 307 N.C. 707, 310 N.C. 753, 312 N.C. 838, 326 N.C. 809, 329 N.C. 808, and 331 N.C. 819, be amended as shown by the RESOLUTION of the Board of Law Examiners attached hereto.

RESOLUTION

WHEREAS, the Board of Law Examiners of the State of North Carolina held a meeting in Myrtle Beach, South Carolina, on March 19, 1994; and

WHEREAS, at this meeting, the Board considered amendments to Rules .0402, .0404(2), .0501(7), and .0502(5) of the Rules Governing Admission to the Practice of Law in the State of North Carolina; and,

WHEREAS, on motion by Richard S. Jones, Jr., seconded by Thomas W. Steed, Jr., it was RESOLVED that Rules .0402, .0404(2), .0501(7), and .0502(5) in the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as follows:

.0402 APPLICATION FORM

(1) The Application For Admission to Take the North Carolina Bar Examination form requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, mental treatment and bar admission and discipline history. Applicants must list references and submit as part of the application:

(the remaining portion of this paragraph was not changed by the amendment)

(2) An applicant who has aptly filed a complete Application For Admission to Take the North Carolina Bar Examination ~~with the Board within the past twelve (12) month period immediately preceding the filing deadline specified in Rule .0402 of this Chapter~~ for a particular bar examination may file a Supplemental Application on forms supplied by the Board, along with the applicable fees for the next subsequent bar examination. An applicant who has filed a Supplemental Application as provided by this rule ~~within the past seven (7) month period~~ immediately preceding the filing deadline specified in Rule .0403 of this Chapter may file a subsequent Supplemental Application ~~on forms supplied by the Board~~, along with the applicable fees for the next bar examination. The Supplemental Application will update the information previously submitted to the Board by the applicant. Said Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter.

.0404 FEES

Every application by an applicant who:

(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of $800.00.

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(7) if the applicant is or has been a licensed attorney then the applicant be in good Professional standing and entitled to practice in every state or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law and not under any pending charges of misconduct. An applicant may be inactive and in good standing in any state in which the applicant has been licensed.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(5) Be **at all times**, in good Professional standing and entitled to practice in every state, or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law, and not under pending charges of misconduct **while the application is pending before the Board**; except that the applicant may be inactive in any jurisdiction as to which the applicant is not relying to meet the Board's comity rule:

NOW, THEREFORE BE IT RESOLVED by unanimous vote of the Board of Law Examiners of the State of North Carolina that Rules .0402, .0404(2), .0501(7), and .0502(5) of the Rules Governing Admission to the Practice of Law in the State of North Carolina be amended to read as set out above; and that the action of this Board be certified to the Council of the North Carolina State Bar and to the North Carolina Supreme Court for approval.

Enacted at a regularly scheduled meeting of the Board of Law Examiners of the State of North Carolina on March 19, 1994.

Given over my hand and seal of the Board of Law Examiners this the 22nd day of March, 1994.

FRED P. PARKER III
Executive Director

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 Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 15, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 26th day of April, 1994.

L. THOMAS LUNSFORD II
Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of May, 1994.

JAMES G. EXUM, JR.
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 5th day of May, 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION AS A CRIMINAL LAW SPECIALIST

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 quarterly meeting on April 15, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Standards for Certification as a Specialist in the Criminal Law Specialty as appear in 326 N.C. 829 be amended as follows:

Paragraph 5.C. is deleted in its entirety and the following is inserted in lieu thereof:

C. Continuing Legal Education

1. In the specialty of Criminal Law, the State Criminal Law subspecialty, and the Criminal Appellate Practice subspecialty, an applicant must have earned no less than forty (40) hours of accredited continuing legal education credits in Criminal Law during the three years preceding the application, which forty (40) hours must include the following:

a. At least thirty-four (34) hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics and appellate advocacy; and

b. At least six (6) hours in the area of ethics and criminal law.

2. In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than forty-six (46) hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which forty-six (46) hours must include the following:

a. At least forty (40) hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics and appellate advocacy; and

b. At least six (6) hours in the area of ethics and criminal law.

By adding a new paragraph 3. to section 5., "Examination," as follows:

3. Requirement of Criminal Law Examination for Criminal Appellate Practice

Any applicant for certification in criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 15, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of June, 1994.

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 16th day of June, 1994.

JAMES G. EXUM, JR.
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 16th day of June, 1994.

PARKER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

ASSAULT AND BATTERY

BURGLARY AND UNLAWFUL BREAKINGS

were proven by the State, and the jurors found defendant guilty of premeditated and deliberated murder. **State v. Gibbs**, 1.

§ 165 (NCI4th). Nonfelonious or misdemeanor breaking or entering as lesser included offense of first-degree burglary; instruction not required

The trial court did not err by refusing to instruct on misdemeanor breaking or entering as a lesser offense to first-degree burglary where there was no evidence from which a rational trier of fact could have concluded defendant did not possess the intent to commit murder. **State v. Gibbs**, 1.

CONSPIRACY

§ 14 (NCI4th). Criminal conspiracy; no express agreement required

There was no plain error in the court's instructions on conspiracy to commit first-degree murder and first-degree burglary where the court told the jury that defendant had to have agreed with at least one other person to commit each crime instead of the person named in the indictment. **State v. Gibbs**, 1.

§ 38 (NCI4th). Sufficiency of evidence; other conspiracies

The trial court did not err by failing to dismiss a charge of conspiracy to commit burglary where defendant was also charged with conspiracy to commit first-degree murder and defendant contended that the evidence showed one agreement to commit multiple offenses, but the evidence, taken in the light most favorable to the State, showed a separate agreement to commit burglary. **State v. Gibbs**, 1.

§ 39 (NCI4th). Instructions as to requisite elements generally

There was no prejudice where defendant contended that the trial court erroneously instructed the jury that it could convict him of conspiracy to commit murder if they found an agreement to commit felony murder, but the jurors eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which they convicted defendant when they found an agreement to kill. **State v. Gibbs**, 1.

§ 43 (NCI4th). Instructions; other matters

There was no plain error where the trial court, when instructing on conspiracy to commit first-degree burglary, twice referred to conspiracy to commit first-degree murder, with which defendant was also charged, but acknowledged the error and gave a correct instruction. **State v. Gibbs**, 1.

CONSTITUTIONAL LAW

§ 166 (NCI4th). Ex post facto laws; court decisions

Depriving defendant of the defense of the "year and a day rule" based on the prospective abrogation of that rule by *State v. Vance*, 328 N.C. 613, violates the prohibition against ex post facto laws where the murderous acts occurred prior to the abrogation and the victim's death occurred after the abrogation but more than a year and a day after the murderous acts. **State v. Robinson**, 146.

§ 189 (NCI4th). Former jeopardy; armed robbery and larceny

Separate convictions of defendant for armed robbery and larceny of a firearm did not violate defendant's right to be free of double jeopardy where the armed robbery and the larceny involved separate takings. **State v. Barton**, 741.

CONSTITUTIONAL LAW—Continued

§ 346 (NCI4th). Right to call witnesses and present evidence generally

The trial court did not err in a noncapital first-degree murder prosecution by excluding pretrial statements of a codefendant who had not yet been tried and who invoked the Fifth Amendment when called by defendant. **State v. Brown**, 477.

CRIMINAL LAW

§ 47 (NCI4th). Aiders and abettors; necessity of determining guilt of principal in first degree

Defendant could properly be convicted of assault with a deadly weapon with intent to kill inflicting serious injury under the theory that he acted in concert with the codefendant even though the codefendant was acquitted of that crime. **State v. Reid**, 647.

§ 78 (NCI4th). Circumstances insufficient to warrant change of venue

The trial court did not err by denying defendant's motions for a change of venue in a first-degree murder prosecution. **State v. Moore**, 567.

§ 107 (NCI4th). Reports not subject to disclosure by State

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to compel the Forsyth County District Attorney to abide by the prior agreement between defendant and the Alamance County District Attorney for an open file policy. **State v. Moore**, 567.

The trial court did not err in a first-degree murder prosecution by failing to conduct a voir dire examination of the District Attorney's files to determine whether the State had complied with discovery. **Ibid.**

§ 109 (NCI4th). Information subject to disclosure by defendant; reports of examinations and tests

The trial court did not err by requiring a psychologist who testified as an expert for defendant in a capital sentencing proceeding to prepare and furnish to the State a written report of his examination of defendant. **State v. Lee**, 244.

§ 113 (NCI4th). Regulation of discovery; failure to comply

There was no prejudicial error in a noncapital first-degree murder prosecution where the State violated discovery statutes in that it omitted the essence of the first version of events proffered by defendant and thus failed to disclose the substance of defendant's custodial statement. **State v. Patterson**, 437.

§ 133 (NCI4th). Acceptance of guilty plea

The trial court was not required to accept defendant's plea of guilty to first-degree murder based solely on the felony murder rule since this might preclude the use of the underlying felony as an aggravating circumstance. **State v. Howell**, 457.

§ 338 (NCI4th). Severance of multiple defendants; defendants' defenses antagonistic

The trial court erred in a prosecution for first-degree murder and discharging a firearm into occupied property by denying defendants' motion to sever where various joinder-driven evidentiary rulings, and the exchanges that occurred between defendants related to these rulings, demonstrate that the joinder of these defendants for trial yielded an evidentiary contest more between the defendants themselves than between the State and the defendants. **State v. Pickens**, 717.

The trial court erred in a murder prosecution by not allowing defendant's attorney to argue to the jury the severity of the sentence where the argument did not question the appropriateness of the punishment or suggest that the defendant should be acquitted because of the severity of the punishment, but did encourage the jury to give careful consideration to the case. **State v. Smith**, 539.

§ 455 (NCI4th). Argument and conduct of counsel; comment on deterrent effect of death penalty

There was no gross impropriety in a first-degree murder sentencing proceeding from the prosecutor's argument that the jurors should recommend death because "[i]t's the only way that you can be assured that he won't do it again." **State v. Gibbs**, 1.

It was not improper for the prosecutor to argue to the jury in a capital sentencing proceeding that a recommendation of death would be a signal to others that capital felons would be dealt with severely and that the only way to prevent defendant from killing again was for the jury to return a recommendation of death. **State v. Lee**, 244.

§ 460 (NCI4th). Argument and conduct of counsel; permissible inferences

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to the prosecutor's closing argument where defendant introduced alibi evidence that he had been in a motel when the shooting occurred and the prosecutor attempted to discredit defendant's alibi by arguing that money could buy a lot of things, including a motel record. **State v. Wilson**, 220.

§ 461 (NCI4th). Argument and conduct of counsel; comment on matters not in evidence

The prosecutor's closing arguments in a capital trial, including a statement allegedly unsupported by evidence that the victim's wife knew something was wrong because the victim hadn't called that night, were not so grossly improper as to require the trial court to intervene ex mero motu. **State v. Howell**, 457.

§ 465 (NCI4th). Argument and conduct of counsel; explanation of applicable law

There was no prejudicial error in a sentencing proceeding for first-degree murder where two of the mitigating circumstances were that the capital felony was committed while defendant was under the influence of mental or emotional disturbance and that defendant had an I.Q. of 61, and the prosecutor argued that low mentality is not a defense to a criminal charge, that evidence of low mentality is irrelevant, and that the test of accountability is whether a defendant has the ability to distinguish right from wrong. **State v. Gibbs**, 1.

There was no prejudice in a first-degree murder sentencing proceeding where the judge remained silent after the prosecutor asked, "You don't think that's the law? Ask the Judge. He'll tell you," when defendant objected to the prosecutor's argument that the test of accountability does not depend on intelligence or general mental capacity. **Ibid.**

§ 468 (NCI4th). Argument and conduct of counsel; miscellaneous

There was no prejudice in a first-degree murder sentencing proceeding where the prosecutor's argument linked defendant and a codefendant; the capital sentencing statute does not provide for an aggravating circumstance based on a defendant associating others in the capital felony, but this does not mean that no mention may be made of a codefendant actively involved at the scene of the crime. **State v. Gibbs**, 1.

There was no gross impropriety in a first-degree murder-sentencing proceeding where the prosecutor argued that the jurors had found the existence of the aggravating circumstance that the murder was committed during a burglary by finding defendant guilty of first-degree burglary. **Ibid.**

There was no gross impropriety in a first-degree murder sentencing proceeding where defendant contended that the prosecutor misstated the law by arguing that evidence of premeditation and deliberation also constituted evidence that the murders were especially heinous, atrocious, or cruel, but the prosecutor did not mention premeditation and deliberation and the thrust of the argument was that the cold calculation with which defendant executed the victims tended to prove defendant's cruelty and depravity of mind and his intention that the victims be subjected to mental suffering. **Ibid.**

§ 473 (NCI4th). Conduct of counsel during trial; miscellaneous

The trial court did not abuse its discretion in a first-degree murder prosecution by denying defendant's motion for a mistrial where the prosecutor burst into tears and after some 30 seconds fled the courtroom. **State v. Moore**, 567.

§ 481 (NCI4th). Conduct affecting jury; communications between jurors

The trial court did not err in failing to conduct a hearing to question a juror whom the courtroom clerk overheard tell two other jurors he did not believe a defense witness and then in replacing the juror prior to deliberations without prior consultation with defendant. **State v. Harrington**, 105.

§ 496 (NCI4th). Jury deliberations; review of testimony

The trial court did not abuse its discretion by denying the jury's request in a capital sentencing proceeding to have a copy of the testimony of two expert witnesses. **State v. Lee**, 244.

§ 500 (NCI4th). Conduct affecting jury; deliberations; miscellaneous

The trial court did not err in a first-degree murder prosecution by denying defendant's motions for a new trial, that a new jury be impaneled or that a voir dire be conducted of the jury where the jury returned a guilty verdict in ten minutes. **State v. Rose**, 301.

§ 507 (NCI4th). Record of proceedings generally

The trial court's denial of defendant's pretrial motion to record all bench conferences in a capital sentencing proceeding did not violate the statute requiring that an "accurate record of all statements from the bench and all other proceedings" be kept by the court reporter. **State v. Lee**, 244.

§ 537 (NCI4th). Misconduct of victim or victim's family during trial

The trial court did not err in a noncapital first-degree murder prosecution by denying a mistrial where the victim's daughter displayed a photograph of the victim during the defendant's cross-examination. **State v. Brown**, 477.

§ 540 (NCI4th). Conduct or statements involving jurors; replacement of juror

The trial court did not err in replacing a juror prior to deliberations without consulting defendant when the juror informed the court that he had "overheard something about the case." **State v. Harrington**, 105.

CRIMINAL LAW—Continued

§ 542 (NCI4th). Conduct or statements involving prosecutor; inflammatory conduct

The prosecutor's tactic of tapping or pounding a stick near an expert witness in a manner which caused the witness to believe he might be struck and for the purpose of irritating or provoking the witness amounted to prosecutorial misconduct but was not prejudicial error. **State v. Adams**, 401.

§ 543 (NCI4th). Conduct or statements involving prosecutor; examination or cross-examination of witnesses generally

It was improper for the prosecutor in a capital trial to ask a psychologist who testified for defendant questions on cross-examination designed merely to belittle and insult the witness and to make declaratory responses to the witness's answers which were designed merely to produce laughter in the courtroom, but such conduct did not constitute prejudicial error. **State v. Adams**, 401.

§ 629 (NCI4th). Sufficiency of evidence; corpus delicti requirement

The corpus delicti rule for confessions did not apply in a capital sentencing proceeding to render inadmissible defendant's uncorroborated statement to a witness that the victim had died a slow and painful death where defendant's plea of guilty to first-degree murder established that a crime had been committed. **State v. Lee**, 244.

§ 681 (NCI4th). Instructions on mitigating circumstances; defendant's ability to appreciate the character of his conduct

The trial court properly refused to give the jury in a capital sentencing proceeding a peremptory instruction that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired at the time of the murder because this mitigating circumstance was not supported by uncontroverted evidence. **State v. Lee**, 244.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

There was no error in a first-degree murder prosecution where the trial court denied defendant's requested instruction pertaining to uncontradicted evidence but gave the requested charge essentially verbatim. **State v. Moore**, 567.

§ 732 (NCI4th). Manner of instructing jury; framing of summary of evidence

The trial court's use of the phrase "tending to show" in reviewing the evidence in a capital sentencing proceeding did not constitute an expression of judicial opinion on the evidence. **State v. Lee**, 244.

§ 738 (NCI4th). Opinion of court on evidence; general instructions to the jury

The trial court did not express an opinion on the weight of the evidence by its statement that "it is unusual for us to hear so much evidence on one side" where the court was admonishing the jurors pursuant to G.S. 15A-1236(a)(3) that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. **State v. Harrington**, 105.

§ 751 (NCI4th). Instructions on reasonable doubt; viewing charge in context

The trial court's instruction that the highest aim of every legal contest is the ascertainment of the truth could not have misled a reasonable juror concerning the reasonable doubt standard and was not improper. **State v. Conner**, 618.

§ 793 (NCI4th). Instruction as to acting in concert generally

Any errors in the trial court's instructions on acting in concert which allegedly permitted the jury to convict defendant without finding that he possessed the specific intent to commit the crimes charged did not amount to plain error where the court told the jury in its instructions on each of the crimes that it could convict defendant only if it found that he himself acted, alone or with others, to commit the crime in question and shared a common purpose with others to commit that crime. **State v. Barton**, 741.

§ 824 (NCI4th). Instruction on lay and expert witnesses

The trial court did not commit plain error by instructing the jury that an expert is one who "purports to have specialized skill or knowledge." **State v. Lee**, 244.

§ 832 (NCI4th). Accomplices, accessories, and codefendants; particular charges found not erroneous or not prejudicial

There was no plain error in a first-degree murder prosecution where the prosecutor asked several questions related to accomplice testimony during jury selection, the court gave an erroneous instruction which equated the interest of an accomplice with that of any other witness, and the court subsequently twice gave the correct instruction. **State v. Gibbs**, 1.

§ 865 (NCI4th). Instructions on jury's deliberations; instruction on reasoning together

The trial court did not invade the province of the jury or violate the jurors' free speech rights by instructing the jury that "it is important that you not go to the jury room and immediately take a vote or immediately stake yourself out on a strong position." **State v. Harrington**, 105.

§ 874 (NCI4th). Requests for additional instructions; particular instructions found not erroneous or prejudicial

There was no plain error in a first-degree murder sentencing hearing where the jury requested further instruction on "the wording of mitigating circumstance and/or value or weight" and it seems clear that the jury understood the trial court's reinstruction and gave it proper application. **State v. Rose**, 301.

§ 1053 (NCI4th). Sentencing hearing generally; mandate, waiver, and time

Where the trial court announced at the time defendant entered a plea of guilty to DWI that prayer for judgment would be continued for thirty days without conditions, the trial court did not lose jurisdiction to impose a sentence after that thirty-day period had passed. **State v. Absher**, 155.

§ 1068 (NCI4th). Evidence at sentencing hearing; incompetent or hearsay evidence

The trial court did not err in a sentencing hearing for first-degree murder by admitting hearsay statements of the victim of an attempted rape in Mississippi. **State v. Rose**, 301.

§ 1135 (NCI4th). Statutory aggravating factors; severability of leadership and inducement factors

The trial court did not err when sentencing defendant for first-degree burglary, conspiracy to commit burglary, and conspiracy to commit murder by finding in aggravation that defendant induced others to participate in the commission of the offense and occupied a position of leadership or dominance of other participants where there was separate evidence to support each factor. **State v. Gibbs**, 1.

§ 1314 (NCI4th). Competence of evidence of aggravating and mitigating circumstances

The trial court did not err by allowing the State to ask a neurosurgeon in a capital sentencing proceeding whether defendant's flat emotional state could have been caused by defendant's prolonged use of marijuana and alcohol rather than by a brain aneurysm and surgery as defendant contended. **State v. Lee**, 244.

§ 1318 (NCI4th). Capital sentencing; instructions generally

There was no error in the sentencing stage of a first-degree murder prosecution where the court had failed to give defendant's requested instruction on reasonable doubt in the guilt-innocence phase of the trial. **State v. Moore**, 567.

§ 1320 (NCI4th). Capital sentencing; instructions; consideration of evidence

The trial court did not err in a sentencing proceeding for a first-degree murder by instructing the jury that it could consider all of the evidence received during the guilt phase on the sentencing issues, then subsequently instructing the jury that evidence of burning of the body after the murder should not be considered as an especially heinous, atrocious or cruel factor. **State v. Rose**, 301.

§ 1322 (NCI4th). Capital sentencing; instructions on parole eligibility

When the jury in a capital sentencing proceeding asked the court whether defendant could ever be eligible for parole from sentences imposed for crimes against a second victim, the trial court did not err by failing to inform the jury that defendant would not be eligible for parole in the other case for eighty years and by instructing the jury that it should not consider eligibility for parole in reaching a verdict. **State v. Lee**, 244.

§ 1323 (NCI4th). Instructions on aggravating and mitigating circumstances generally

The trial court did not err in its instructions defining aggravating and mitigating circumstances. **State v. Lee**, 244.

§ 1325 (NCI4th). Unanimous decision as to mitigating circumstances

The trial court's pattern capital sentencing instructions which informed the jury in Issue Three that it must weigh any mitigating circumstances it found to exist against the aggravating circumstances and that each juror "may" consider any mitigating circumstance or circumstances that he or she determined to exist by a preponderance of the evidence did not allow jurors to disregard properly found mitigating circumstances and fully comported with the McKoy decision. **State v. Lee**, 244.

§ 1326 (NCI4th). Aggravating and mitigating circumstances; burden of proof

The trial court did not err during a sentencing proceeding for first-degree murder by not explaining to the jury that the standard of beyond a reasonable doubt applies to mitigating circumstances as well as to aggravating circumstances. **State v. Moore**, 567.

§ 1327 (NCI4th). Capital sentencing; instructions; duty to recommend death sentence

The trial court did not err by instructing the jurors in the penalty phase of a first-degree murder prosecution that they were to consider whether to recommend death if they found the aggravating and mitigating circumstances in equipoise. **State v. Gibbs**, 1.

The pattern jury instruction imposing upon the jury a duty to return a recommendation of death if it finds the mitigating circumstances insufficient to outweigh

CRIMINAL LAW—Continued

A sentence of death for first-degree murder was upheld where the evidence supports the jury's finding of each aggravating circumstance, 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 the sentence was not disproportionate. **State v. Rose**, 301.

There was no proportionality error in a death sentence for a first-degree murder by poisoning. **State v. Moore**, 567.

§ 1457 (NCI4th). Power to continue prayer for judgment

Where the trial court announced at the time defendant entered a plea of guilty to DWI that prayer for judgment would be continued for thirty days without conditions, the trial court did not lose jurisdiction to impose a sentence after that thirty-day period had passed. **State v. Absher**, 155.

DAMAGES

§ 29 (NCI4th). Compensable injuries or losses; emotional distress

Assuming that plaintiff may recover damages for emotional distress in an action for retaliatory discharge for filing a workers' compensation claim, the evidence was insufficient to show any mental or emotional disturbance on the part of plaintiff resulting from defendant's actions. **Abels v. Renfro Corp.**, 209.

DIVORCE AND SEPARATION

§ 288 (NCI4th). Changed circumstances as ground for modification or termination of alimony; jurisdiction

A trial court has the discretion to modify an alimony award for changed circumstances as of the date the motion to modify was filed, and it follows that the trial court's order increasing plaintiff's alimony award effective from the date the motion to modify was first noticed for hearing was not a retroactive modification of alimony. **Hill v. Hill**, 140.

EMBEZZLEMENT

§ 4 (NCI4th). Lawfulness of possession

The evidence was sufficient to show that defendant attorney came into possession of a draft lawfully so far as his client was concerned and to support defendant's conviction of embezzlement where the attorney accepted the draft from a tortfeasor's insurance company in settlement of an automobile accident claim, forged the client's signature on both the release and the draft, and deposited the proceeds of the draft into his personal account. **State v. Johnson**, 509.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 117 (NCI4th). Low-Level Radioactive Waste Management Authority Act of 1987

The Low-Level Radioactive Waste Management Authority may not be preliminarily enjoined in its process of site selection for a low-level radioactive waste disposal facility until the permitting process has been completed and the final site selection has been made. **Richmond Co. v. N.C. Low-Level Radioactive Waste Mgmt. Auth.**, 77.

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES—Continued

§ 694 (NCI4th). Offer of proof; necessity for making record of excluded evidence

Defendant failed to preserve for appellate review any issue concerning the exclusion of testimony where he made no offer of proof and the significance of the excluded testimony is not obvious from the record. **State v. Barton**, 741.

§ 712 (NCI4th). Withdrawal of evidence; need for instruction where instruction not requested

The trial court did not err by failing to strike a witness's testimony in a first-degree murder trial that defendant's accomplice had stated that "they had shot the man" and by failing to give a curative instruction where the court sustained defendant's objection and defendant made no motion to strike the objectionable testimony and no request for a curative instruction. **State v. Barton**, 696.

§ 740 (NCI4th). Prejudicial error in the admission of evidence; victim's family, lifestyle, or other personal matters

There was no prejudicial error in a first-degree murder prosecution from the admission of two Bibles found in the victim's apartment where the fact that the victim kept two Bibles in her apartment was not probative of any issue, but defendant failed to show that the admission of the Bibles was prejudicial. **State v. Rose**, 301.

The admission of testimony by a murder victim's wife and daughter describing the victim's physical condition and work history was not plain error. **State v. Howell**, 457.

§ 754 (NCI4th). Cure of prejudicial error by admission of other evidence; evidence resulting from illegal search or seizure

There was no prejudicial error in a first-degree murder prosecution in the admission of the allegedly illegally seized handgun used in the killings where admission of the gun was of such insignificant probative value in light of other evidence that its admission was harmless. **State v. Carter**, 422.

§ 757 (NCI4th). Cure of prejudicial error by admission of other evidence; statements by defendant

There was no prejudicial error when trying defendant for the first-degree murder of his wife in allowing the State to question defendant about statements he had made to a co-worker in which he allegedly threatened to kill his wife because there was plenary other evidence that defendant had threatened his wife's life on a number of occasions. **State v. Collins**, 729.

§ 761 (NCI4th). Cure of prejudicial error by admission of other evidence; miscellaneous evidence; substantially similar evidence admitted without objection

There was no prejudice in a first-degree murder prosecution, assuming error, where the court excluded testimony from a defense witness that a State's witness to the murder had been on drugs at the time but the defense witness also testified that the State's witness was not at the scene and the State's witness herself testified on direct examination that she was addicted to heroin and cocaine at the time of the murder and used drugs on that day. **State v. Wilson**, 220.

§ 870 (NCI4th). Hearsay evidence; statements to explain conduct or actions taken by criminal defendant

Testimony by an assault victim that defendants' companion yelled "shoot the mother f---er" just before defendants drew their guns and began shooting was not

inadmissible hearsay since the testimony was admitted to establish why defendants began shooting. **State v. Reid**, 647.

§ 942 (NCI4th). Excited utterances; statement made shortly before crime occurred

Testimony by an assault victim that defendants' companion yelled "shoot the mother f--er" just before defendants drew their guns and began shooting was admissible under the excited utterance exception to the hearsay rule. **State v. Reid**, 647.

§ 981 (NCI4th). Exceptions to hearsay rule; declarant unavailable generally

The trial court did not err in a noncapital prosecution for first-degree murder by excluding statements made by a codefendant where the codefendant, who had not yet been tried, repeatedly invoked the Fifth Amendment when called by defendant, and the trial court ruled that the codefendant was unavailable as a witness, that the statements were against his penal interest when made and that they were made voluntarily, but that they bore insufficient indications of trustworthiness. **State v. Brown**, 477.

§ 983 (NCI4th). Statement under belief of impending death generally

The trial court did not err in a first-degree murder prosecution by not giving defendant's requested instruction on dying declarations. **State v. Moore**, 567.

§ 1080 (NCI4th). Admissions by conduct or silence; relationship to constitutional right to remain silent

The trial court did not err in a murder prosecution by admitting testimony by a detective that defendant was advised of his rights in the interrogation room at the police department, where the detective was not asked whether defendant exercised his right to remain silent. **State v. Carter**, 422.

§ 1113 (NCI4th). Admissions by party opponent generally

Statements made by defendant to a kidnapping and rape victim concerning his killing and sexual assault of a murder victim were admissible in a capital sentencing proceeding for the murder as admissions of a party opponent which were relevant to prove the especially heinous, atrocious, or cruel aggravating circumstance. **State v. Lee**, 244.

The trial court did not err in a noncapital murder prosecution by admitting a detective's testimony concerning statements made on defendant's behalf by his interpreter. **State v. Mlo**, 353.

The trial court did not err when trying defendant for the first-degree murder of his wife by allowing the State to question defendant about statements he had made to a co-worker in which he allegedly threatened to kill his wife. **State v. Collins**, 729.

§ 1218 (NCI4th). Confessions and other inculpatory statements by criminal defendants; matters affecting admissibility or voluntariness generally

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress his statements to officers. **State v. Rose**, 301.

§ 1252 (NCI4th). What constitutes invocation of right to counsel; extent of invocation

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to suppress confessions on the ground that the confessions were admitted in violation of defendant's Fifth Amendment right to counsel where,

based on the entire context in which defendant's inquiry was made, he did not invoke the right to counsel. **State v. Gibbs**, 1.

Defendant did not invoke her right to counsel when, in response to warnings as to her Miranda and juvenile rights, she asked the interrogating officer whether she needed a lawyer since this inquiry constituted an ambiguous or equivocal invocation of her right to counsel which was clarified by responses to the narrow questions thereafter posed by the officer, and those responses made it clear that defendant was not asking for the assistance of counsel. **State v. Barber**, 120.

§ 1278 (NCI4th). Waiver of constitutional rights; miscellaneous circumstances as affecting validity of waiver

The trial court did not err in a noncapital first-degree murder prosecution by determining that defendant, a Montagnard, waived his rights knowingly, intelligently and voluntarily where he was questioned through an interpreter; when the waiver of rights form was read to defendant both in English and in Vietnamese, he was asked if he understood his rights and he answered "yes" in English; defendant did not indicate at any time that he did not understand the questions; and a review of the written transcript of the statement itself indicates that defendant was able to respond logically and appropriately to the questions presented to him in English. **State v. Mlo**, 353.

§ 1331 (NCI4th). Confessions and other inculpatory statements; findings as to warnings and waiver of rights; juvenile defendant

The evidence supported the trial court's findings, and those findings supported the court's conclusion that defendant voluntarily waived his juvenile and Miranda rights before making a statement to the police. **State v. Reid**, 647.

§ 1483 (NCI4th). Physical evidence generally; bullets removed from victim's body

There was no plain error in a first-degree murder prosecution in the admission of a .9-millimeter bullet where defendant contended that the State failed to establish the bullet's connection to the crime. **State v. Sierra**, 753.

§ 1486 (NCI4th). Knives generally

The trial court did not err in a first-degree murder prosecution by admitting into evidence knives taken from defendant's residence where no murder weapon was discovered in the course of the investigation, the evidence did not produce a clearly identified murder weapon, a pathologist testified to the numerous knife wounds the victim had sustained, and defendant introduced another knife which he presented as the murder weapon. **State v. Rose**, 301.

§ 1497 (NCI4th). Admission of real evidence used in or otherwise related to crime; poison

The trial court did not err in a first-degree murder prosecution involving poisoning by admitting into evidence a bottle of Anti-Ant even though it was not the bottle used to poison the victim. **State v. Moore**, 567.

§ 1548 (NCI4th). Admission of real evidence used in or otherwise related to crime; miscellaneous items

The trial court did not err during a first-degree murder prosecution involving poisoning by admitting into evidence medical devices which defendant contended were used merely to inflame the passions of the jury. **State v. Moore**, 567.

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

EVIDENCE AND WITNESSES—Continued

§ 3127 (NCI4th). Corroborating evidence in particular type of cases; murder

There was no prejudice in a first-degree murder prosecution from the admission of testimony that more than fifty people had been interviewed who knew nothing of a relationship between defendant and the victim. **State v. Rose**, 301.

HIGHWAYS, STREETS, AND ROADS

§ 2 (NCI4th). Utilities within right of way

The trial court correctly denied defendant's motion for a directed verdict, and the Court of Appeals erred by reversing that denial, where plaintiff was injured when she was struck by one of the vehicles in an automobile accident as she was using a telephone booth which was inside the public right-of-way in violation of DOT regulations. **Baldwin v. GTE South, Inc.**, 544.

HOMICIDE

§ 5 (NCI4th). Applicability of year and a day rule

Depriving defendant of the defense of the "year and a day rule" based on the prospective abrogation of that rule by *State v. Vance*, 328 N.C. 613, violates the prohibition against ex post facto laws where the murderous acts occurred prior to the abrogation and the victim's death occurred after the abrogation but more than a year and a day after the murderous acts. **State v. Robinson**, 146.

§ 135 (NCI4th). Effect of compliance with short-form indictment

There was no error in a first-degree murder prosecution where the indictment complied with the short form indictment for murder authorized by G.S. 15-144 and was identical, except for the name of the victim, to the indictments approved in *State v. Harris*, 323 N.C. 112, and *State v. Avery*, 315 N.C. 1. **State v. Collins**, 729.

§ 226 (NCI4th). Evidence of identity linking defendant to crime sufficient

There was substantial evidence to support the inference that defendant was the perpetrator of a first-degree murder. **State v. Mlo**, 353.

§ 246 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; circumstances to be considered

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss for insufficient evidence. **State v. Patterson**, 437.

The trial court did not err in denying defendant's motion to dismiss in a first-degree murder prosecution where defendant argued that there was insufficient evidence to support a jury finding that defendant killed the victim with specific intent after premeditation and deliberation. **State v. Sierra**, 753.

§ 251 (NCI4th). Sufficiency of evidence; malice, premeditation and deliberation; intent to kill; effect of statements of intent to kill victim

The evidence in a first-degree murder prosecution, including threats by defendant to kill the victim, was sufficient to submit first-degree murder to the jury on the theory of premeditation and deliberation. **State v. Collins**, 729.

HOMICIDE – Continued

§ 253 (NCI4th). Malice, premeditation and deliberation; intent to kill; nature and execution of crime; severity of injuries, along with other evidence

There was substantial evidence of premeditation and deliberation in a first-degree murder prosecution and thus the trial court did not err by refusing to grant defendant's motion for a directed verdict where defendant contended that evidence of manual strangulation and blows to the victim's body were not sufficient. **State v. Rose**, 301.

The State presented sufficient evidence of premeditation and deliberation to support defendant's conviction of first-degree murder committed in a bar. **State v. Reid**, 647.

§ 256 (NCI4th). Malice, premeditation, and deliberation; intent to kill; evidence concerning planning and execution of crime

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss where the evidence presented in the present case clearly supports the inference that the crime was committed in a premeditated and deliberated manner. **State v. Mlo**, 353.

§ 259 (NCI4th). Sufficiency of evidence; poisoning

There was sufficient evidence to submit first-degree murder by poisoning to the jury even though no poison was ever positively placed in defendant's hands. **State v. Moore**, 567.

§ 378 (NCI4th). Effect of state's evidence supporting plea of self-defense

The trial court did not err by submitting to the jury first-degree murder based on premeditation and deliberation where defendant contended that the State was bound by defendant's claim of self-defense because the State introduced the claim during its direct examination of two officers but there was evidence which, while not directly contradictory, raised the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense. **State v. Carter**, 422.

§ 439 (NCI4th). Nature or application of presumptions from use of deadly weapon

The trial court did not commit plain error by failing to expressly instruct the jury that while the intentional use of a deadly weapon may give rise to a presumption that a killing was malicious, it will not alone sustain a finding of premeditation and deliberation. **State v. Barton**, 696.

§ 475 (NCI4th). Propriety of instructions on particular matters; malice

The trial court did not err in a first-degree murder prosecution by giving the pattern jury instruction on malice where defendant contended that the instruction permitted the jury to find the element of malice based on a theory not supported by the evidence and created the possibility that the jury considered defendant's burning of the victim's body as evidence of depravity of mind. **State v. Rose**, 301.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

There was sufficient evidence in a first-degree murder trial for the court to instruct on lack of provocation as circumstantial evidence of premeditation and deliberation. **State v. Howell**, 457.

The trial court's lapsus linguae in instructing the jury that it could infer premeditation and deliberation from lack of provocation by the "defendant" rather than by the "victim" did not constitute plain error. **State v. Reid**, 647.

HOMICIDE—Continued

The trial court's instruction that the jury could infer premeditation and deliberation from lack of provocation by the victim was supported by the evidence. **Ibid.**

§ 490 (NCI4th). Necessity of instruction on mental condition or disorder in relation to premeditation and deliberation

The trial court should have instructed the jury in a first-degree murder trial with regard to defendant's personality disorder as it related to his capacity to premeditate and deliberate and to form a specific intent to kill, but the court's failure to do so was not plain error. **State v. Adams**, 401.

§ 493 (NCI4th). Instructions on matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

There was no plain error in a first-degree murder prosecution from the trial court's instruction that the jury could infer deliberation from lack of provocation. **State v. Rose**, 301.

The trial court's instruction that premeditation may be proven by lack of provocation, when coupled with the court's subsequent charge on voluntary manslaughter and the definition of legal provocation which will reduce murder to manslaughter, could not have misled the jurors to believe that they must find legal provocation to negate premeditation and deliberation. **State v. Reid**, 647.

§ 496 (NCI4th). Matters considered in proving premeditation and deliberation; defendant's conduct

The trial court did not err in a first-degree murder prosecution in instructing the jury that defendant's conduct after the killing could be considered on the question of premeditation and deliberation. **State v. Rose**, 301.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of premeditated and deliberated murder generally; lack of evidence of lesser crime

There was no evidence of a lack of premeditation and deliberation in a prosecution for first-degree murders of a store owner and her daughter which would require the trial court to instruct the jury on second-degree murder. **State v. Conner**, 618.

§ 557 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder; murder by poisoning, lying in wait, starvation, or torture

The trial court did not err in a first-degree murder prosecution arising from a poisoning by refusing to submit the lesser included offense of second-degree murder to the jury; any murder committed by means of poison is automatically first-degree murder. **State v. Moore**, 567.

§ 571 (NCI4th). Instructions; involuntary manslaughter as lesser included offense of higher degrees of homicide

The trial court did not err in a first-degree murder prosecution by failing to instruct on the lesser included offense of involuntary manslaughter where there was no evidence to support a verdict of involuntary manslaughter. **State v. Rose**, 301.

§ 609 (NCI4th). Self-defense; effect of lack of apprehension of death or great bodily harm

Defendant was not entitled to an instruction on either perfect or imperfect self-defense in a first-degree murder trial because he presented no evidence that

INSURANCE

JUDGES, JUSTICES, AND MAGISTRATES

§ 36 (NCI4th). Censure or removal; conduct prejudicial to the administration of justice; particular illustrations

A district court judge is censured for conduct prejudicial to the administration of justice for comments which could reasonably be interpreted as threats of professional reprisal against members of the district attorney's office and an attorney practicing in the district court for what the judge perceived to be disloyalty to and a betrayal of him in his divorce case. **In re Hair**, 150.

A superior court judge is censured for conduct prejudicial to the administration of justice based upon findings that the judge gave legal advice and counsel to an individual with regard to her discharge from employment with the Iredell County DSS, undertook in his official capacity to intervene on her behalf, and conveyed and permitted others to convey the impression that the discharged individual had special influence with him. **In re Cornelius**, 198.

JUDGMENTS

§ 270 (NCI4th). Res judicata and collateral estoppel; necessity of final judgment on merits

Neither res judicata nor collateral estoppel applied to a state action for refund of taxes paid on federal pensions where there was no final adjudication in the federal case. **Swanson v. State of North Carolina**, 674.

JURY

§ 96 (NCI4th). Voir dire examination; effect of judge having questioned jury on matters sought to be examined by counsel

The trial court's pretrial order in a capital trial forbidding defense counsel, under penalty of contempt, to repeat on voir dire any questions previously asked by the court unless the answer given made further questioning relevant violated G.S. 15A-1214(c), but this error did not result in prejudice entitling defendant to a new trial. **State v. Conner**, 618.

The trial court did not abuse its discretion in a first-degree murder prosecution by conducting the voir dire during the initial screening process. **State v. Moore**, 567.

§ 102 (NCI4th). Voir dire examination; effect of preconceived opinions, prejudices, or pretrial publicity

The trial court did not err during jury selection in a first-degree murder prosecution by failing to give a cautionary instruction to the remaining venire after a prospective juror with an opinion on guilt or innocence was excused. **State v. Gibbs**, 1.

The trial court did not err during jury selection in a first-degree murder prosecution by excusing a prospective juror for cause on its own motion where the juror stated that she had formed an opinion about the case and defendant contended that the court failed to exercise its discretion by failing to determine whether the juror could lay aside her opinion and render a verdict based on the evidence. **Ibid.**

§ 111 (NCI4th). Examination of veniremen individually; grounds for motion; prejudice from exposure to pretrial publicity

The trial court did not abuse its discretion in refusing to allow individual voir dire of prospective jurors in a capital sentencing proceeding to enable defend-

§ 147 (NCI4th). Voir dire examination; propriety of prosecutor's statement to jurors describing case as death penalty case

There was no gross impropriety during jury selection in a first-degree murder prosecution where defendant argues that language prefacing some of the prosecutor's questions constituted a comment that there was a good possibility the defendant would be found guilty. **State v. Gibbs**, 1.

§ 148 (NCI4th). Propriety of prohibiting voir dire or inquiry into attitudes toward capital punishment

The trial court did not err by refusing to allow defendant to ask prospective jurors in a capital sentencing proceeding questions as to why they held their death penalty beliefs, whether they believed the death penalty has a deterrent effect, whether they believed human life is sacred, and whether they believed the death penalty should be reserved for the worst cases. **State v. Lee**, 244.

Defendant's due process right to a capital sentencing proceeding by a qualified, impartial jury was violated by the trial court's refusal to permit defense counsel to ask some of the prospective jurors whether their support for the death penalty was such that they would find it difficult to consider voting for life imprisonment for a person convicted of first-degree murder and whether their belief in the death penalty would make it difficult for them to follow the law and consider life imprisonment for first-degree murder. **State v. Conner**, 618.

The trial court did not err by refusing to permit defense counsel to ask prospective jurors in a capital trial whether they felt that the death penalty is the appropriate penalty for someone convicted of first-degree murder. **Ibid.**

§ 190 (NCI4th). Waiver of right to challenge for cause; necessity of exhausting peremptory challenges

A defendant cannot show prejudice by the denial of a challenge for cause until he has exhausted his peremptory challenges, has been denied a renewed challenge for cause, and has been denied an additional peremptory challenge. **State v. Conner**, 618.

§ 192 (NCI4th). Effect of refusal to permit challenges for cause where jurors were excused by peremptory challenges

There was no error in a murder prosecution where the trial court denied defendant's challenge for cause of a prospective juror and defendant did not renew his challenge for cause after exhausting his peremptory challenges as mandated by G.S. 15A-1214(h) and (i). **State v. Carter**, 422.

§ 217 (NCI4th). Exclusion of veniremen based on opposition to capital punishment generally

The trial court did not err during jury selection in a first-degree murder prosecution by excusing for cause a Pentecostal minister whose bias against the death penalty was shown with unmistakable clarity. **State v. Gibbs**, 1.

A defendant's constitutional rights were not violated in a first-degree murder prosecution where jurors opposed to the death penalty were challenged for cause. **State v. Rose**, 301.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

The trial court did not err during jury selection for a first-degree murder trial by denying defendant the opportunity to rehabilitate two prospective jurors

NEGLIGENCE

§ 5 (NCI4th). Violation of statute or ordinance; negligence per se

The trial court correctly denied defendant's motion for a directed verdict, and the Court of Appeals erred by reversing that denial, where plaintiff was injured when she was struck by one of the vehicles in an automobile accident as she was using a telephone booth which was inside the public right-of-way in violation of DOT regulations. **Baldwin v. GTE South, Inc.**, 544.

§ 6 (NCI4th). Negligent infliction of emotional distress

Defendants were entitled to judgment as a matter of law on plaintiff's claim for negligent infliction of emotional distress, and the Court of Appeals erred in reversing the trial court's entry of summary judgment for defendants, in an action arising from an automobile collision involving defendant Marilyn Baccus and plaintiff's pregnant wife where plaintiff did not witness the accident but was brought to the scene before his wife was freed from the wreckage. **Andersen v. Baccus**, 526.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 96 (NCI4th). *Liability of primary physician for those assisting him*

A surgeon should no longer be presumed to enjoy the authoritative control of a master over all who assist in an operation merely because he is in charge of the operation; rather, the hospital must be presumed to retain the right of control over operating room employees. **Harris v. Miller**, 379.

A surgeon may be held liable under the doctrine of respondeat superior for the negligence of even a skilled assistant if the surgeon in fact possessed the right to control that assistant at the time of the assistant's negligent act regardless of whether the surgeon could reasonably have been aware of the negligent conduct sought to be imputed to him. **Ibid.**

Whether a surgeon may be held vicariously liable for the negligence of one assisting in an operation depends on whether the surgeon had the right to control the manner in which the assistant performed. **Ibid.**

Plaintiff's evidence of a temporary master-servant relationship between defendant surgeon and a nurse anesthetist was sufficient to present a question for the jury as to the surgeon's vicarious liability for the nurse anesthetist's negligence under the borrowed servant doctrine. **Ibid.**

The release of a servant no longer operates to release a vicariously liable master unless the terms of the release so provide. **Ibid.**

RAILROADS

§ 13 (NCI4th). Abandonment of rights of way

Where the right-of-way for a public road was entirely within an abandoned railroad easement, the railroad easement did not "adjoin" the public road right-of-way within the meaning of the second sentence of G.S. 1-44.2(a) so that the statute does not apply to vest title to a strip of land between the center of the railroad tracks and the edge of the public road right-of-way in defendant church as adjacent property owner. **Nelson v. Battle Forest Friends Meeting**, 133.

ROBBERY

§ 88 (NCI4th). Aiding and abetting armed robbery; motion for nonsuit, submission to jury

The evidence supported the trial court's instruction permitting the jury to convict defendant of armed robbery on the basis of acting in concert. **State v. Barton**, 696.

§ 117 (NCI4th). Jury instructions; mandatory presumption that victim's life is endangered or threatened when defendant has committed robbery with firearm or other dangerous weapon

The trial court did not err in a prosecution for armed robbery and attempted armed robbery by instructing the jury that it was to apply the mandatory presumption that the implement employed by defendant was a firearm where two victims testified that defendant appeared to have a firearm and defendant testified that he did not own a gun or mess with guns. **State v. Williams**, 518.

§ 126 (NCI4th). Jury instructions; acting in concert generally

The trial court's instructions on acting in concert did not amount to plain error where they could only have been understood by the jury to allow conviction of defendant for armed robbery if defendant himself acted alone or together with others and the defendant himself intended that the robbery from the victim result from such action. **State v. Barton**, 696.

SEARCHES AND SEIZURES

§ 4 (NCI4th). Expectation of privacy; particular places or things—motor vehicles

There was no error in a first-degree murder prosecution from the introduction of evidence seized from the victim's automobile where defendant was in possession of the automobile when it was seized. The record tends to show that defendant did not have any authority to use the car, defendant's self-serving comments wherein he claimed permission to use the car are not sufficient to meet his burden of showing a legitimate possessory interest in the automobile, and it cannot fairly be said that defendant conferred upon himself any reasonable expectation of privacy by driving the car. **State v. Mlo**, 353.

§ 63 (NCI4th). Consent to vehicle search

The trial court's conclusion that defendant knowingly, voluntarily and intelligently consented to the search of his truck was supported by evidence and findings. **State v. Howell**, 457.

§ 150 (NCI4th). Release of seized property to owner

There was no violation of a first-degree murder defendant's due process rights where the rules concerning the safekeeping of potential evidence were violated but defendant did not allege or demonstrate bad faith by the police in the release of the automobile and the exculpatory value of any tests defendant wished to perform was speculative at best. **State v. Mlo**, 353.

TAXATION

§ 25.3 (NCI3d). Property subject to discovery

A county's business personal property audit agreement with a private auditor which compensated the auditor at the rate of thirty-five percent of taxes owed on discovered property did not violate public policy, and the resulting discov-

WORD AND PHRASE INDEX