NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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HENRY E. FRYE
SARAH PARKER

Retired Chief Justice

SUSIE SHARP

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J. FRANK HUSKINS
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DONALD L. SMITH	Raleigh

1. Appointed and sworn in 1 September 1994.
2. Elected and sworn in 5 December 1994.
3. Retired as Regular Superior Court Judge 30 September 1994.

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	JAMES F. AMMONS, JR.	Fayetteville
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	GREGORY R. HAYES[24]	Lenoir
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30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville

1. Elected and sworn in 5 December 1994.
2. Sworn in as Chief Judge 1 December 1994 to replace Claude W. Allen, Jr. who retired 30 November 1994.
3. Sworn in as Chief Judge 1 December 1994 to replace Robert R. Blackwell who retired 30 November 1994.
4. Elected and sworn in 5 December 1994.
5. Sworn in as Chief Judge 1 December 1994 to replace Sol G. Cherry who retired 30 November 1994.
6. Elected and sworn in 5 December 1994.
7. Elected and sworn in 5 December 1994.
8. Elected and sworn in 5 December 1994.
9. Sworn in as Chief Judge 1 December 1994 to replace Patricia S. Love who retired 30 November 1994.
10. Elected and sworn in 5 December 1994.
11. Sworn in as Chief Judge 1 December 1994 to replace Charles G. McLean who retired 30 November 1994.
12. Elected and sworn in 5 December 1994.
13. Elected and sworn in 5 December 1994.
14. Elected and sworn in 5 December 1994.
15. Sworn in as Chief Judge 1 December 1994 to replace Frank M. Montgomery who retired 30 November 1994.
16. Elected and sworn in 5 December 1994.
17. Elected and sworn in 5 December 1994.
18. Appointed and sworn in 6 October 1994.
19. Elected and sworn in 5 December 1994.
20. Elected and sworn in 5 December 1994.
21. Sworn in as Chief Judge 1 December 1994 to replace Samuel L. Osborne who retired 30 November 1994.
22. Elected and sworn in 5 December 1994.
23. Elected and sworn in 5 December 1994.
24. Elected and sworn in 5 December 1994.
25. Appointed and sworn in 5 December 1994.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

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CASES REPORTED

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

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

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

PETITIONS TO REHEAR

ORDERS

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 15th day of July, 1994 and said person has been issued certificate of this Board:

JAMES BEARL YEAGER ..... Hyde Park, New York
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 1st day of August, 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 was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 5th day of August, 1994 and said persons has been issued certificates of this Board:

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LEE J. VAN DE CARR, JR. ..... Winston-Salem
JENNIFER K. VAN ZANT ..... Winston-Salem
LISA BRADLEY VARNER ..... Dunn
CHRISTOPHER JEROME VAUGHN ..... Hendersonville
DAVID RAY VINES ..... Chapel Hill
MICHELE ROXBURY VROMAN ..... Cary
PAMELA ANN WACHTER ..... Raleigh
DAVID PHILLIP WALEN ..... Coats
TAMELA TRAMELL WALLACE ..... Durham
MICHELE M. WALTON ..... Asheville
LEAH JONES WARD ..... New Bern
NANCY WILLIAMS WARREN ..... Rocky Mount
SUSAN R. WATERS ..... Raleigh
B. GORDON WATKINS III ..... Winston-Salem
LISA KAY WATSON ..... Pinehurst
SHANNON NEAL WEATHERS ..... Chapel Hill
KIMBERLY PAIGE WEAVER ..... Winston-Salem
MARK H. WEBBINK ..... Durham
DAVID RUDOLF WEBER ..... Raleigh
BRYANT DELERON WEBSTER ..... Durham
TIMOTHY DALE WELBORN ..... Purlear
GARY J. WELCH ..... Charlotte
ROCHELLE ANN WESTMAN ..... Raleigh
WILLIAM MARK WHITE ..... Rock Hill, South Carolina
GRETCHEN M. WHITE ..... Arlington, Virginia

HAYWOOD E. WHITE III ..... Elizabethtown
SUNNY M. WILLIAMS ..... Raleigh
BRADLEY PRESTON WILLIAMS ..... Charlotte
NORMAN COLE WILLIAMS ..... Durham
JOSEPH HOWARD WILLIAMS ..... Greensboro
RICHARD PRESTON WILLIAMS ..... Charlotte
ANTHONY R. WILLIAMS ..... Raleigh
JEFFREY SCOTT WILLIAMS-TRACY ..... Gastonia
GREGORY E. WILLS ..... Kitty Hawk
RHONDA BEESON WILSON ..... Chapel Hill
MARGARET KATTERFELDT WINFIELD ..... Raleigh
GEORGE W. WISEMAN III ..... Kannapolis
TANYA WITT ..... Charlotte
WILLIAM D. WOLFE ..... Wilson
MARK HARRIS WOLTZ ..... Henderson
ALAN DALE WOODLIEF, JR. ..... Fuquay-Varina
J. MELISSA WOODS ..... Greensboro
ANDREW WILLIAM BANASICK WRIGHT ..... Charlotte
BENJAMIN ALLEN YARBROUGH ..... Charlotte
JONATHAN WOODWARD YARBROUGH ..... Winston-Salem
CHARLES P. YEZBAK III ..... Columbia, South Carolina
JEFFREY MARK YOUNG ..... Raleigh
JAMES WILSON YOUNG ..... High Point
JULIA FURR YOUNGMAN ..... Durham
SUSAN HYUN JO YU ..... Greensboro
JOSEPH EDWARD ZESZOTARSKI, JR. ..... Greensboro
DAVID LEE ZURAVEL ..... Fayetteville

Given over my hand and seal of the Board of Law Examiners this the 20th day of September, 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 9th day of September, 1994, and said persons have been issued license certificates.

July 1994 North Carolina Bar Examination

PAULA HOWKER AMICK ..... Canada
PHILIP SCOTT ANDERSON ..... Chuckey, Tennessee
LISA MARIE ANDERSON ..... Raleigh
MICHAEL E. ARCHENBRONN ..... Wilkesboro
LADAN ATAI ..... Carrboro
JAMIA LYNN BACHRACH ..... Durham
SCOTT BRIAN BARLOGA ..... Clayton, Georgia
MARY ELIZABETH MEYS BIRD ..... Durham
ANNAMARIE T. BOIKE ..... Charlotte

LICENSED ATTORNEYS

DANIEL THOMAS BRENNAN ..... Raleigh
DOROTHY L. BROOKS ..... Dunn
JANICE ELAINE BRYANT ..... Maggie Valley
REBECCA KENDRICK CLEVELAND ..... Raleigh
JAMIE LANG COLE ..... Selma
FAYE ALSTON COOK ..... Charlotte
SUSAN A. CRABTREE ..... Raleigh
AUDREY LEE CRAWFORD-TURNER ..... Durham
JOHN-PAUL DE BERNARDO ..... Bradford, Massachusetts
RUTH BIZZELL DILLARD ..... Charlotte
LYNNE FAULLING DOBSON ..... Boone
MICHAEL BRUCE DRIVER ..... Winston-Salem
EDWARD F. DUNNAVANT ..... Chapel Hill
SUSAN MORROW FITZGERALD ..... Winston-Salem
KAREN ELIZABETH FOREHAND ..... Raleigh
TERESA ANN FREITAS ..... La Grange
DAVID R. GLENN ..... Chapel Hill
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ANNEMARIE SPADARO HANER ..... Emerald Isle
ROBERT ANTHONY HARTSOE ..... Winston-Salem
BRIAN MITCHELL HITT ..... Charlotte
GEOFFREY W. HOSFORD ..... Raleigh
JAMES JOHN HUTTON ..... Charlotte
LISA ALBRIGHT JURS ..... Gastonia
STEPHEN ANDREW JURS ..... Gastonia
DAVID LAWRENCE KNOWLES ..... Greenville
WILLIAM F. KRAMER ..... Chapel Hill
RACHAEL ANN LECLAIR ..... Hickory
CATHERINE HESSER LESICA ..... Fayetteville
MARILYN LETTMAN ..... Ft. Lauderdale, Florida
MARK JUSTIN LONG ..... Charlotte
ALAN BRADDY MARTIN ..... Morganton
DOUGLAS ALLEN MAYS ..... Charlotte
DONALD FRANKLIN MCCORQUODALE, JR. ..... Raleigh
MARTIN T. MCCRACKEN ..... Asheville
GREG C. MCGIBNEY ..... Durham
KELLY ELIZABETH MOFIELD ..... Chevy Chase, Maryland
JAMES PHILIP MOORE, JR. ..... Chapel Hill
JAMES WILLIS MORGAN, JR. ..... Carrboro
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ROBERT C. REED III ..... Charlotte
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MARK PHILIP SHAUGHNESSY ..... Chelsea, Vermont
CATHERINE REDMAN SHELL ..... Winston-Salem
AVRIL USSERY SISK ..... Charlotte
SHARON LEIGH SMITH ..... Durham
TROY ANTHONY SMITH ..... Lumberton
MELANIE LEE STEVENS ..... Gastonia

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SARAH ALSTON SWEETSER ..... Holly Springs
JEB FRANCIS SYDEJKO ..... Saugus, California
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February 1994 North Carolina Bar Examination

CHRISTOPHER JOHN ALLABASHI ..... Charlotte
ANTHONY EMERSON FLANAGAN ..... Brooklyn, New York
WILLIAM BAIN JONES, JR. ..... Raleigh
MARLENE FAIRON MURDOCK ..... Rock Hill, South Carolina
JOHN ANDERSON NORMAN II ..... Greensboro
LANA PAULETTE POYNER ..... Charlotte
ARJUN RAJARATNAM ..... Raleigh
CHRISTOPHER LLOYD STANLEY ..... Wilmington

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 16th day of September, 1994, and said persons have been issued license certificates.

SCOTT EDWARD ALLEN ..... Chapel Hill
ANTHONY D. SEARLES ..... Silver Spring, Maryland
VICTORIA S. WRIGHT ..... Raleigh

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 23rd day of September, 1994 and said persons have been issued certificates of this Board.

JOANNE KELLER BURGDORFF ..... Plymouth
Applied from the State of Texas
PEARL BADER DOHERTY ..... Cary
Applied from the District of Columbia
PHILIP JOHN GEIB ..... Virginia Beach, Virginia
Applied from the State of Virginia
JOSEPH BART GILBERT ..... Jacksonville
Applied from the State of Indiana
DOUGLAS B. KRAMER ..... Greensboro
Applied from the State of Ohio
HOWARD MARK LABINER ..... Charlotte
Applied from the State of Connecticut
WILLIAM PAUL MCMILLAN ..... Charlotte
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 3rd day of October, 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 9th day of September, 1994 and said person has been issued license certificate.

ORTHARINE WILLIAMS ..... Parkton

Given over my hand and seal of the Board of Law Examiners this the 24th day of October, 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 was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 28th day of October, 1994 and said person has been issued certificate of this Board.

TIMOTHY EDWARD LAW ..... Danbury, Connecticut
Applied from the State of Connecticut

Given over my hand and seal of the Board of Law Examiners this the 1st day of November, 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. RICKY LEE SANDERSON

No. 374A86(2)

(Filed 8 April 1994)

1. Criminal Law § 410 (NCI4th)— murder—sentencing hearing—fairness—prosecutor's obligation

It is the duty of the prosecutor, as much as it is of the trial judge, to uphold defendant's right to a fair hearing; it is especially important that the prosecutor refrain from improper conduct in the context of a capital sentencing hearing, where the issue before the jury is whether a human being should live or die and where this decision involves the exercise of the jury's judgment as to how certain aggravating and mitigating circumstances should be weighed against each other.

Am Jur 2d, Trial §§ 189 et seq.

2. Criminal Law § 473 (NCI4th)— murder—sentencing hearing—prosecutorial misconduct—conduct toward opposing counsel

The prosecutor in a first-degree murder resentencing hearing persistently engaged in improper conduct toward opposing counsel where he pointedly refused properly to address opposing counsel, often succeeded in preventing defendant's lawyers from finishing their sentences through continual interruptions,

directed comments to counsel rather than to the court, and these comments often contained angry denunciations or expressions of incredulity. It cannot be concluded that the abuse of counsel was harmless because the comments may have diminished defense counsel in the eyes of the jury and may have undermined the ability of defense counsel to provide effective representation by wearing down counsel.

Am Jur 2d, Trial §§ 192 et seq., 307 et seq.

3. Criminal Law § 471 (NCI4th)— murder—sentencing hearing—prosecutorial misconduct—improprieties in cross-examination

The prosecutor in a first-degree murder resentencing hearing employed abusive tactics in cross-examining defendant's principal expert witness, a clinical psychologist, by insulting and degrading the witness and attempting to distort her testimony. She was insulted, maligned, continually interrupted and bullied. It cannot be concluded that there was no prejudice because the net result may have been a less than complete, or a less than accurate, statement of her opinion.

Am Jur 2d, Trial §§ 192 et seq., 307 et seq.

4. Criminal Law § 468 (NCI4th)— murder—sentencing hearing—prosecutorial misconduct—closing arguments

The prosecutor during closing arguments in a first-degree murder resentencing hearing improperly misstated the evidence, suggested personal knowledge of inflammatory facts not of record, and placed before the jury an aggravating circumstance that the trial judge had specifically declined to submit.

Am Jur 2d, Trial §§ 251 et seq.

Propriety and prejudicial effect of prosecuting attorney's arguing new matter or points in his closing summation in criminal case. 26 ALR3d 1409.

Propriety and prejudicial effect of prosecutor's argument to jury indicating that he has additional evidence of defendant's guilt which he did not deem necessary to present. 90 ALR3d 646.

5. Criminal Law § 473 (NCI4th)— murder—sentencing hearing—prosecutorial misconduct—prejudice

The prosecutor's misconduct in a capital sentencing hearing, taken as a whole, deprived defendant of his due process

right to a fair sentencing hearing and the trial court's rulings did not deter the misconduct and did little to prevent it from influencing the jury.

Am Jur 2d, Trial §§ 479 et seq.

Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 896.

6. Criminal Law § 1323 (NCI4th)— murder—sentencing—aggravating circumstances—avoidance of arrest—engaged in kidnapping—separate evidence

The submission of the aggravating circumstances that a murder was committed to avoid arrest and while engaged in a kidnapping was not redundant because the circumstances were supported by different evidence. N.C.G.S. § 15A-2000(e)(4); N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Trial §§ 888 et seq.

Justice MEYER concurring.

Justices MITCHELL and PARKER join in this concurring opinion.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a sentence of death imposed by John, J., presiding at the 20 May 1991 Special Criminal Session of Superior Court, Iredell County. Heard in the Supreme Court 12 April 1993.

Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, for the State.

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

EXUM, Chief Justice.

In April 1986, defendant pled guilty to first-degree kidnapping and first-degree murder of Sue Ellen Holliman and was sentenced to death. This Court overturned his sentence in *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990), finding that the judge's instructions to the jury contained error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). After a new sentencing proceeding, defendant was again sentenced to death. He now ap-

peals, raising numerous assignments of error. We conclude that the second sentencing proceeding was thoroughly tainted and defendant unfairly prejudiced by the prosecutor's improper conduct; therefore, we grant defendant a new sentencing proceeding.

I

At defendant's second sentencing proceeding, the State introduced a videotape of a confession he made some months after the crime. The substance of that confession was as follows. In need of money to supply his drug habit, defendant, on 14 March 1985, drove to the Supona area of Davidson County looking for a house to rob. He chose one that was surrounded by trees so he would not be seen. Parking his car in the driveway, he first tried the back door. Finding this door locked, he rang the bell and then returned to the front of the house. As he was opening the glass door, the inside door was opened by the victim, sixteen-year-old Sue Ellen Holliman, who had stayed home sick from school. Surprised to find the house occupied, defendant mumbled something about looking for a dog and then asked to use the phone. When he was refused, he barged inside and asked where the money was. Informed that there was no money in the house, defendant decided to "just get out of there" rather than search the house. He also decided to take the victim with him to prevent her from reporting his license plate number. Making sure not to leave any fingerprints, defendant led the victim out of the house, placed her on the passenger-side floorboard of his car and drove away.

Defendant drove around with the victim in his car for over two hours trying to decide what to do with her. During this time, he injected drugs—for the second time that day. Finally, he decided to kill the victim and pulled off the road in a rural area outside Lexington. After injecting more drugs, he placed the victim in the trunk of his car and dug a grave. After again injecting drugs, he removed the victim from the trunk, choked her until she was unconscious and then stabbed her twice in the chest. Her shirt was up when he was stabbing her and her sweat pants got "drug down to her ankles" when later he dragged her by her hands to the grave. After burying her, he smoothed out the excess dirt to conceal the grave and drove home. On the way, he threw his knife in a creek.

By further testimony, the State showed the following. The victim's body was found on 15 April 1985, lying in a shallow grave

with clothing in disarray: T-shirt pulled up and bra partially torn, panties at mid-thigh, and sweat pants around the ankles. An autopsy revealed three stab wounds in the area of the sternum, no evidence of strangulation and no evidence of sexual molestation.

On 15 May 1985, Elwood "Woody" Jones, an employee of a business managed by the victim's family, confessed to the murder. His confession reflected details of the crime that had not yet been made public. He was later indicted for first-degree murder and was awaiting trial when defendant, who was then in prison for another crime, confessed to the same murder. The SBI then, for the first time, analyzed the victim's clothing and found carpet fibers and paint chips which matched samples taken from the passenger-side floor board and trunk of defendant's car. With this finding, the case was dismissed against Jones and proceeded instead against defendant.

Defendant presented evidence at the sentencing hearing tending to show the following. Defendant, the youngest of four children, lived with his family in Tarboro, N.C., for the first few years of his life. His parents fought frequently and his father beat his mother. When defendant was three, his mother took the children to Florida with another man. The family then moved to Texas, where the children were often left alone in the home at night. Soon the mother was jailed. The children spent a month in separate foster homes and were then returned to their father in North Carolina.

Upon their return, the father began raping defendant's six-year-old sister, Brenda. Brenda slept in the father's bed every night and was forced to have sex with him in many locations throughout the house, including on the couch and in the hallway, and quite often in view of defendant and the other children. These rapes were sometimes preceded by beatings, and continued until they resulted in Brenda becoming pregnant at the age of twelve. The children also witnessed the father making love with adult women.

The father regularly abused defendant's oldest brother, Douglas, stripping him and then beating him as hard as he could with electrical cords, all the while asking defendant whether he should beat Douglas harder. Defendant witnessed "thousands" of such beatings. Though he was not beaten himself, he was punished, along with the other children, by being made to kneel in a corner with his hands behind his back for five to six hours at a time.

There were no family meals, and seldom was there store-bought food in the house. The children bought food for themselves with the money they made from mowing lawns, but also had to resort to stealing chickens and raiding gardens. Because the father did not provide them with clothing, the children wore rags they found or whatever clothes people gave them. The father remarried at one point, but the marriage lasted only two weeks.

Defendant was ten years old when his father was convicted of incest and sentenced to fifteen years in prison. After spending two years in a foster home, he was reunited with his mother and siblings in Texas. Having by this time developed behavior problems, defendant was in desperate need of affection from his mother. She responded by breaking "belt after belt" on him and threatening to kick him out of the house or force him to go live with his father.

By the age of thirteen or fourteen, defendant was "heavily" into substance abuse. He started injecting drugs two years later. This habit, a way of coping with the pain and neglect of his childhood, continued. By the time of the murder, when defendant was twenty-five or twenty-six, he was injecting an amphetamine called "crank" every three or four hours. This drug, which impairs good judgment and creates paranoid and erratic thinking, caused a profound behavioral change in defendant. He stopped going home to his wife, stopped working every day and started gambling. He also started acting "radical . . . and just feisty," according to his brother Douglas. Given the frequency of his drug use, he would have been acutely intoxicated at the time he killed Sue Ellen Holliman and experiencing "irresistible impulses." By contrast, when interviewed in prison several years later by an expert on forensic psychiatry and addictionology, he demonstrated none of the mental defects associated with his previous addiction.

At the time of the killing, defendant was also suffering from a mental and emotional disturbance secondary to his violent and deprived childhood. This disturbance contributed significantly to his violent behavior.

Once in prison, defendant became deeply interested in religion. He met with The Reverend Derry Barnhardt on numerous occasions and corresponded with him regularly for five years. He had many religious discussions with the chaplain of Central Prison, participated in several of the chaplain's seminars, and was ultimately selected with only six others to undergo six months of discipleship training

in the Master Life Program. Defendant was a positive influence on the other men in his cell block, never engaging in misconduct, and tried to bring religion into their lives. He continually expressed deep feelings of remorse about his crime, but never blamed anyone but himself.

At the close of the evidence, the jury found beyond a reasonable doubt the existence of two aggravating circumstances: 1) that the murder was committed for the purpose of avoiding lawful arrest, and 2) that the murder was committed while the defendant was engaged in the commission of a kidnapping. Of the thirty-one mitigating circumstances submitted, one or more jurors found only one: that the defendant's confession was responsible for the release from custody of an innocent man who had been charged with the murder. The jury found this mitigating circumstance insufficient to outweigh the aggravating circumstances, and the aggravating circumstances sufficiently substantial, when considered with the found mitigating circumstance, to call for the imposition of the death penalty. Upon this recommendation, the judge sentenced defendant to death.

II

Defendant contends, and we agree, that his death sentence cannot stand because the prosecutor's persistent misconduct deprived him of a fair sentencing hearing. Because the trial court allowed much of it to go uncorrected, and because the jury almost totally rejected defendant's evidence in mitigation, we cannot assume that the prosecutor's misconduct was without effect on the jury. We, therefore, order a new sentencing proceeding.

A. *Prosecutor's Duty to Ensure Fair Trial*

[1] "Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment." *State v. Britt*, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975); *accord State v. Levitt*, 36 N.J. 266, 270, 176 A.2d 465, 467 (1961) (defendant has right to trial in which jury's decision is " 'obedient to the court's charge based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences' ") (quoting *Wright v. Bernstein*, 23 N.J. 284, 294-95, 129 A.2d 19, 25 (1957)). This

right exists "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L. Ed. 2d 751, 755 (1961).

Our courts have consistently held that it is the duty of the prosecutor, as much as it is of the trial judge, to uphold the defendant's right to a fair hearing. *See State v. Barfield*, 298 N.C. 306, 331, 259 S.E.2d 510, 530-31 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980); *Britt*, 288 N.C. at 710-11, 220 S.E.2d at 291-92; *State v. Miller*, 288 N.C. 582, 598, 220 S.E.2d 326, 337 (1975); *State v. Westbrook*, 279 N.C. 18, 38, 181 S.E.2d 572, 583-84 (1971), *vacated on other grounds*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972); *State v. Phillips*, 240 N.C. 516, 522, 82 S.E.2d 762, 766 (1954). As stated in the oft-quoted case of *Berger v. United States*:

> The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88, 79 L. Ed. 2d 1314, 1321 (1935). "The district attorney's performance of his duties as public prosecutor is tempered by his obligation to the defendant to assure that he is afforded his right to a fair trial." *Barfield*, 298 N.C. at 331, 259 S.E.2d at 531.

That a prosecutor refrain from improper conduct is especially important in the context of a capital sentencing hearing, where the issue before the jury is whether a human being should live or die and where this decision involves the exercise of the jury's judgment as to how certain aggravating and mitigating circumstances should be weighed against each other. *See Caldwell v. Mississippi*, 472 U.S. 320, 323, 86 L. Ed. 2d 231, 236 (1985) (Eighth Amendment imposes "heightened 'need for reliability in the determination that death is the appropriate punishment . . .' "); *see also Hance v. Zant*, 696 F.2d 940, 951 (11th Cir.) (In capital case, "it is most

important that the sentencing phase of the trial not be influenced by passion, prejudice, or any other arbitrary factor. [Citation omitted]. With a man's life at stake, a prosecutor should not play on the passions of the jury"), *cert. denied*, 463 U.S. 1210, 77 L. Ed. 2d 1393 (1983); N.C.G.S. § 15A-2000(d)(2) (1988) (death sentence may not stand if "imposed under the influence of passion, prejudice, or any other arbitrary factor").

B. *Conduct Toward Opposing Counsel*

[2] The prosecutor persistently engaged in improper conduct toward opposing counsel, Mr. McMillan and Ms. Simon. He pointedly refused properly to address Mr. McMillan, referring to him derisively either as "McMillan" or "Lawyer Mac Millan."[1] He responded to Ms. Simon's suggestion that a prospective juror was hard of hearing by saying, "Maybe he just doesn't care what you're talking about." When Mr. McMillan incorrectly stated that the defense had used only nine peremptory challenges, the prosecutor said, "You been asleep, McMillan." Later, he said, "Do you want to learn how to read?! 5 and 7 is what she says that she did not object to. Do you object to them, Lawyer M—a—c Millan?!" And when Mr. McMillan strenuously objected to a clearly improper line of questioning, the prosecutor retorted, "You're getting your exercise, Lawyer Mac Millan."

The prosecutor also, through continual interruptions, often succeeded in preventing defendant's lawyers from finishing their sentences. Moreover, he directed comments—styled as objections or points of law—to counsel rather than to the court. These comments often contained angry denunciations or expressions of incredulity. For instance, the following occurred when the prosecutor learned that neither of defendant's expert witnesses had prepared written reports.

> MR. ZIMMERMAN: If your Honor please, let me just say for the record, there's all this talk about what's right and what's proper, and what's—and this fellow who is a psychiatrist is also a lawyer, and that's exactly why they don't prepare any written report. Because you know you won't have to give me

1. "Well, speak up, McMillan!"; "Ha! . . . Why don't you say that in front of the jury, McMillan"; "And McMillan looks at me and says . . ."; "And you said that Lawyer Mac Millan over here called you back in February . . . ."

one when he testifies and—so I'll know what he's testifying from. And!! that!!—

MR. MCMILLAN: Your Honor!!

MR. ZIMMERMAN: —does not seem to me to be fair!!! (Mr. Zimmerman has directed this comment toward Mr. McMillan.)

MR. MCMILLAN: Your Honor, would you please have Mr. Zimmerman address the Court?

THE COURT: I have asked you all to address the Court and I do ask you again—

MR. ZIMMERMAN: Yes, sir.

THE COURT: —Mr. Zimmerman, to address the Court.

Later, the prosecutor described a defense motion as "the biggest bunch of hogwash I ever heard!" and called defendant's lawyers "cowards!" Also, he responded to an objection made by Mr. McMillan during cross-examination of a defense witness by saying, "I'm sick and tired of him jumping up and running his mouth at a point in time when there's been absolutely nothing said that's improper . . . ."[2]

It is well-established that a trial attorney may not make uncomplimentary comments about opposing counsel, and should "refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives." *State v. Miller*, 271 N.C. 646, 658-59, 157 S.E.2d 335, 346 (1967). *See also* Rule 12, Superior and District Court Rules (1993) ("All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.").

While acknowledging the impropriety of the prosecutor's behavior, the State argues that this behavior was harmless on

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2. The prosecutor also engaged in what may be best described as gamesmanship. He responded to the court's ruling prohibiting him from eliciting certain testimony on direct examination by saying, "No, I might just put Captain Johnson up there and ask him to tell about it anyway!" Later, when defense counsel moved for a mistrial on the ground that the prosecutor had purposely attempted to elicit testimony already declared inadmissible by the court, the prosecutor first *joined* the motion then recanted, having in the interim held forth at length about the unfairness of having to "try the case with one hand tied behind your back."

the ground that much of it occurred out of the presence of the jury. Though it is true that many of the prosecutor's abusive comments were made outside the jury's hearing, many were made within its hearing. These comments—particularly the derisive references to Mr. McMillan—certainly had the potential to bias the jury against defendant's counsel and, thereby, prejudice his case. Of no less concern, however, is the effect the prosecutor's conduct may have had on defendant's counsel. Indeed, the prosecutor's abuse, if not designed to do so, at least had the effect of wearing them down, or, as defendant put it in his brief, of making it "so painful for [them] to do their jobs that they would do less."

Halfway through the hearing, Mr. McMillan indicated to the court that, "I've never been through anything like this before and I'm getting exhausted of trial by insult . . . ." Near the end of the hearing, after one of the prosecutor's more vehement tirades, Ms. Simon was reduced to tears. She told the judge: "I'm . . . nauseated to the pit of my stomach. I don't know if the Court has been able to tell, but I've lost a tremendous amount of weight during this trial. I do not sleep, I cannot eat." She indicated further that, though she would not allow herself to be "beaten down" by the prosecutor, the trial of defendant's case had caused her "considerable pain" such that she fully intended never again to try a capital case.

Thus, we cannot conclude that the prosecutor's abuse of defendant's counsel was harmless. Those comments made before the jury may have diminished defendant's counsel in the eyes of the jury. The prosecutor's entire course of conduct, including the comments he made out of the presence of the jury, may have undermined the ability of defendant's counsel to provide effective representation.

C. *Improprieties in Cross-Examination*

[3] The prosecutor employed similarly abusive tactics in cross-examining defendant's principal expert witness, Dr. Faye Sultan, a clinical psychologist. He insulted her, degraded her, and attempted to distort her testimony, all in violation of well-settled rules governing cross-examination. Unfortunately, the trial court did not do enough to protect her.

From the start, the prosecutor undertook to discredit Dr. Sultan through insults and unwarranted personal attacks rather than through legitimate cross-examination. He opened his cross-examination with the following:

Q. Mrs. Sultan?

(No response from the witness.)

Q. Mrs. Sultan; is that right?

A. No, sir.

Q. Ms. Sultan?

(No response.)

Q. Dr. Sultan, did you . . .

This tactic, which conveyed the impression that the witness was not worthy of respect as a professional, was employed repeatedly. During the course of his questioning, the prosecutor referred to Dr. Sultan as "that lady," "this gal," and even "dear."

After Dr. Sultan indicated that she could not name, off the top of her head, the many diagnostic scales of a test she had administered to defendant, the prosecutor asked her: "Ma'am, did you go to school to learn to be a psychologist?!!" The court overruled defendant's objection. Later in the same line of questioning, the prosecutor stated: "Well, I know about as much as this gal does." Though the court did instruct the jury to disregard this comment, the prosecutor was undeterred. Shortly thereafter, he suggested that Dr. Sultan's testing methods were akin to "having a crystal ball" and asked: "You don't wear a cape or anything or one of them pointed hats and do kind of voodoo around it and something comes up and . . . just tells you what the theme is; do you?" Again, the trial court responded with a weak instruction.

This sort of personal abuse has no place in cross-examination. As we have long held, a witness " 'should not be subjected unjustly to abuse, which is calculated to degrade him or to bring him into ridicule or contempt.' " *Lamborn v. Hollingsworth*, 195 N.C. 350, 353, 142 S.E. 19, 21 (1928) (quoting *Massey v. Alston*, 173 N.C. 215, 225, 91 S.E. 964, 968 (1917)); *see also Phillips*, 240 N.C. at 528, 82 S.E.2d at 771 ("the law forbids the prosecuting attorney to put to a witness for the defense an impertinent and insulting question which he knows or should know cannot possibly elicit

any competent or relevant testimony"). The prosecutor's questions were not designed to elicit competent evidence. More in the nature of rhetorical assertions, their likely effect was unfairly to prejudice the jury against this witness.

The prosecutor also attempted to distort Dr. Sultan's testimony. He insisted on yes or no answers to compound, convoluted questions, then cut her off before she could explain. For instance:

> Q. Well, I'm kind of interested in that because like these other tests—who is it that tells you that somebody else didn't tell him the answers, or answer it for him, or was laughing while he was doing it, or was crying while he was doing it? You don't know, yourself, any of those things; do you?
>
> A. No, sir, I do not. I trust my exam—
>
> Q. Thank you.
>
> MR. MCMILLAN: Please, finish—let her finish!
>
> MR. ZIMMERMAN: Oh, yes, she can answer!

By this technique, the prosecutor sometimes mischaracterized the meaning of the answer given, as in the following exchange:

> Q. Well, when somebody is projecting something into something—I'm projecting myself into something, okay? Would not it be nice for you to be there to see how I projected, rather than have some clinician do it? Isn't the way the man reacts, or the woman reacts to what they're projecting, isn't that something that any good psychologist would consider; isn't it?
>
> A. No, sir, they—
>
> Q. Oh, they don't consider how you react?! You—
>
> A. I'd like to finish my answer.
>
> Q. Just a minute.
>
> MR. MCMILLAN: She's entitled to finish her answer, Your Honor.
>
> MR. ZIMMERMAN: Just a minute.

Q. You're telling me that how somebody reacts to these projections in these two tests is not, not—help you form an opinion about your themes and thoughts?

A. No, sir, I wasn't telling you that at all.

Q. Well, tell me, does it make a difference then how he reacts to it?

A. The answer depends entirely upon how you're going to use the material that's elicited. It was—

Q. Well, very obviously—

MR. MCMILLAN: Your Honor, please let her finish her answer.

MR. ZIMMERMAN: Go ahead.

By posing questions which assumed facts not in evidence, the prosecutor succeeded in testifying to his own knowledge or beliefs through the witness. For instance, though there was no evidence that Dr. Sultan had been present in the courtroom during the testimony of defendant's brother, the prosecutor nonetheless queried: "I could basically tell you what his profile was after hearing his brother testify. And that's exactly what you did, parrot what his brother said; isn't that right?" With this sort of question, the very asking of it sufficed to convey the prosecutor's personal opinion to the jury, regardless of the witness' answer.

Though leading questions are entirely appropriate in the cross-examination of an adverse witness, N.C.G.S. § 8C-1, Rule 611(c) (1992), the questioner may not distort the witness' testimony by purposely misconstruing answers and cross-examining the witness on the basis of the misconstruction. *Berger*, 295 U.S. at 84, 79 L. Ed. 2d at 1319; *see also* Rule 12, Superior and District Court Rules ("Counsel shall not knowingly misinterpret . . . the testimony of a witness"). Nor may the cross-examiner inject into questions "his own knowledge, beliefs, and personal opinions not supported by the evidence." *Britt*, 288 N.C. at 711, 220 S.E.2d at 291. The prosecutor is not a sworn witness subject to cross-examination. His personal knowledge and opinions are therefore incompetent. *See Phillips*, 240 N.C. at 524, 82 S.E.2d at 767-68.

The State argues that the prosecutor's questioning, though inappropriate, did not result in prejudice to defendant because

Dr. Sultan ultimately succeeded in giving a complete answer to every question and in correcting any misimpressions. We are not persuaded by this argument. The prosecutor managed to distort Dr. Sultan's testimony on several occasions without provoking curative instructions. In the absence of such instructions, that Dr. Sultan strove to correct the record herself does not negate the possibility that the jury chose to accept the prosecutor's distortions. Furthermore, we do not assume that the prosecutor's improper behavior had no chilling effect on the witness. She was insulted, maligned, continually interrupted and bullied. Though she weathered it all with considerable fortitude, the net result may still have been a less than complete, or less than accurate, statement of her opinion. Thus, we cannot conclude that the prosecutor's improper conduct toward this witness caused no prejudice to defendant.

D. *Improprieties in Closing Argument*

[4] During closing argument, the prosecutor misstated the evidence, suggested personal knowledge of inflammatory facts not of record and placed before the jury an aggravating circumstance that the trial judge had specifically declined to submit. Again, the trial court's response to these abuses was inadequate to guard against the potential for prejudice.

In both the guilt-innocence and the sentencing phases of a capital trial, counsel is permitted wide latitude in his argument to the jury. *Britt*, 288 N.C. at 711, 220 S.E.2d at 291 (guilt phase); *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979) (sentencing phase). He may argue the facts in evidence and all reasonable inferences therefrom as well as the relevant law. "Language may be used *consistent with the facts in evidence* to present each side of the case." *Britt*, 288 N.C. at 711, 220 S.E.2d at 291; *see also* N.C.G.S. § 15A-1230(a) (1988). Jury argument, however, is not without limitations. As we stated in *Britt*: " 'The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*.' " 288 N.C. at 712, 220 S.E.2d at 291 (quoting *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975)). In the context of a capital sentencing hearing, counsel's argument must also comport with the requirements of the capital

sentencing statute, N.C.G.S. § 15A-2000 (1988). *See State v. Jones*, 296 N.C. 495, 500-03, 251 S.E.2d 425, 428-29 (1979).

The prosecutor often disregarded these limitations. First, he distorted the evidence. In addressing the proposed mitigating circumstance that the crime was committed while defendant was under the influence of a mental or emotional disturbance, the prosecutor proclaimed it "a bunch of hogwash" and stated: "There've been plenty of people and you heard what the psychologist said, 'Yeah, there are about 10,000 folks in the county that are walking around with borderline—[defendant objects]—personality syndrome.' " In fact, Dr. Sultan had specifically rejected this contention on cross-examination:

> Q. A borderline personality disorder. Are there fully ten to fifteen thousand people right here in Iredell County that suffer from that; aren't there?
>
> A. No, sir.
>
> Q. This isn't any serious problem, is it?
>
> A. Yes, sir, it is a quite serious problem.
>
> Q. And you're saying that that problem right there is not suffered by a large number of people in the population today . . . ?
>
> A. Yes, sir, there are many people who have, who would fall in these categories, yes.

The trial court should have sustained defendant's objection and instructed the jury to disregard the erroneous statement. *Britt*, 288 N.C. at 712, 220 S.E.2d at 291. Instead, the trial court overruled defendant's objection and simply advised the jury to "remember my instructions," i.e., that the statements of counsel were not evidence. This ruling could have left the impression that the jury was free to accept the prosecutor's incorrect version of Dr. Sultan's testimony. The jury may well have done so as it rejected the mitigating circumstance at issue.

Second, the prosecutor insinuated personal knowledge of facts not in evidence. In addressing the fourth proposed mitigating circumstance, the prosecutor stated:

> Number Four: 'At the time he confessed he was not a suspect in the murder of Sue Ellen Holliman.' Well, at the time he

confessed, that's right. I submit to you that the evidence was there in the SBI Laboratory to convict him. And until that person came down there [to the prison] and talked to him, that's right, he was not a suspect in **that** killing.

MS. SIMON: Objection.

MR. MCMILLAN: Objection!

THE COURT: Overruled.

MR. ZIMMERMAN: Thank you.

THE COURT: Again, remember my instruc—

MR. MCMILLAN: There is no other killing, Your Honor.

MR. ZIMMERMAN: Well, you've just brought it up. I just said that killing.

THE COURT: Members of the Jury, don't consider this as referring to any other killing. Go ahead, Mr. District Attorney.

The prosecutor's insinuation was without support in the record. It was also erroneous. The defendant had not been a suspect in another murder.

The State argues that the prosecutor's reference to "**that** killing" was entirely innocent and that he did not intend to suggest the existence of another murder. Even if innocent, the effect on the jury was the same. Given the prosecutor's special emphasis on the word "that," which appears in the trial transcript itself, the statement clearly implies that the defendant, though not a suspect in the murder of Sue Ellen Holliman, **was** a suspect in another murder. We note, too, that this was not the first time the prosecutor had made such an insinuation. During his case-in-chief, the prosecutor questioned Sheriff Jim Johnson about a photograph of defendant's car as follows:

Q. And so the jury will understand this State's [exhibit] 17, the car, we had not had State's 17 in our possession at any time prior to that, with reference to this particular homicide; is that right?

A. Yes, sir.

Q. It wasn't until after Mr. Sanderson had confessed—

MR. MCMILLAN: Your Honor, I'm going to object to the phrase, "this particular homicide."

MR. ZIMMERMAN: Well, let me finish my question.

THE COURT: Well, disregard "this particular homicide," Members of the Jury. Go ahead, Mr. District Attorney.

MR. ZIMMERMAN: Well, we're only talking about one homicide so—but it's this one as opposed to some other one.

THE COURT: Disregard that, Members of the Jury. Just ask your question please, Mr. Zimmerman.

Also, the jury knew facts which, with the prosecutor's argument, could have caused it to believe that defendant had in fact committed another murder. The jury knew that defendant had been in jail at the time he confessed, but not for the murder of Sue Ellen Holliman. Thus, it knew he had committed, or at least been charged with, another crime. It was in this context that the prosecutor twice insinuated that the other crime was a killing. Upon these statements, the trial court neither confirmed nor denied the prosecutor's insinuation, stating merely, "don't consider this as referring to any other killing." The jury being left with a plausible suggestion that defendant had committed at least one other murder and a mild instruction from the judge not to consider it as such, it may well have accepted the prosecutor's suggestion and been influenced by it in its sentencing determination. We are instructed in this conclusion by the words of Mr. Justice Sutherland:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [of fairness], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88, 79 L. Ed. 2d at 1321.

The State argues that the improprieties in the prosecutor's statements were cured by the trial court's prompt instruction. We are not persuaded by this argument. This Court has held that some forms of misconduct are so inherently prejudicial that they may not be considered "cured" even though the trial court has given a strong corrective instruction. In *Britt* for instance, a case

involving a capital murder trial, the prosecutor insinuated during cross-examination that the defendant had already once been convicted of first-degree murder for the same crime. 288 N.C. at 707-08, 220 S.E.2d at 288-89. Though the trial court sustained the defendant's objection and twice instructed the jury to disregard the defendant's prior conviction and focus solely on the evidence adduced, we held that, "no instruction by the court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case." *Id.* at 713, 220 S.E.2d at 292.

As in *Britt*, we do not believe the prosecutor's misstatements could have been cured by the trial court's instruction. If the jury believed that defendant had committed another murder, or perhaps several other murders, it must necessarily have considered him not only more culpable but also more of a threat to society. In such case the prosecutor's repeated contention, "[t]he only way you can be sure that he'll never do this again . . . is to give him death," would have appeared even more compelling.

The prosecutor also made improper use of the evidence that defendant said he raped his victim before killing her. The evidence adduced was as follows. Defendant's brother testified on cross-examination that defendant had told him he raped the victim but had not gone into how he raped her. Defendant's brother also read aloud a religious tract written by defendant from prison. The tract, which described defendant's journey from sinner to convert, contained the following statement: "I also started going to pornographic movies and tried to fill the sex drive these drugs would give me. One day I broke into a house and a girl was home. I found myself in a place where I could act out all the rape scenes I had been watching in these movies, I did on this girl." Later, Dr. Sultan testified on direct that defendant had told her he raped the victim. Casting doubt on defendant's claim was the autopsy report, which showed no evidence of sexual molestation whatsoever.

At the close of the evidence, the trial court determined that it would submit only two aggravating circumstances to the jury: 1) that the murder was committed for the purpose of avoiding lawful arrest, and 2) that the murder was committed while the defendant was engaged in the commission of a kidnapping. In addition, the court specifically refused the prosecutor's request that

it submit rape as a third aggravating circumstance, undoubtedly because of the lack of forensic evidence supporting this circumstance. Despite this ruling, the prosecutor asserted on three separate occasions during his closing argument that the defendant deserved to die, at least in part, because he had raped the victim. This line of argument was improper. As we stated in *State v. Zuniga*, 320 N.C. 233, 267, 357 S.E.2d 898, 919, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), counsel may not in his argument "attempt to put before the jury a[n aggravating] factor that the trial court ha[s] found not to be supported by the evidence." Though the argument called for stern rebuke and prompt curative instructions, *Britt*, 288 N.C. at 712, 220 S.E.2d at 291; *see also Berger*, 295 U.S. at 85, 79 L. Ed. 2d at 1320, the trial court overruled defendant's objections and merely instructed the jury to "take the facts from your own recollection of the evidence." The jury was presumably left with the impression that it could consider rape in aggravation of the murder.

E. *Prejudice to Defendant*

[5] We conclude that the prosecutor's conduct, taken as a whole, deprived defendant of his due process right to a fair sentencing proceeding. The trial court's rulings did not deter the misconduct, and did little to prevent it from influencing the jury. Despite defendant's evidence in mitigation, the jury found the existence of only one of the thirty-one submitted mitigating circumstances. We note that the jury in the first sentencing proceeding found four of six submitted mitigating circumstances. Three of those found were among the circumstances rejected by the jury in the second sentencing hearing. We conclude that the prosecutor's misconduct resulted in a denial of " 'that fundamental fairness essential to the very concept of justice.' " *Donnelly v. De Christoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 436 (1974) (quoting *Lisenba v. California*, 314 U.S. 219, 236, 86 L. Ed. 166, 180 (1941)).

III

[6] We now address one further issue raised by the parties since it is likely to arise again at defendant's new sentencing hearing.

Defendant argues that, under the rule announced in *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), *cert. denied*, 373 S.E.2d 554 (1988), the trial court should not have permitted the jury to find as separate statutory aggravating circumstances that

the murder was committed for the purpose of avoiding lawful arrest, N.C.G.S. § 15A-2000(e)(4), and that the murder was committed while the defendant was engaged in a kidnapping, N.C.G.S. § 15A-2000(e)(5). According to defendant, these circumstances were redundant. We do not agree.

In *Quesinberry*, we held that the trial court erred in submitting the aggravating circumstances 1) that the murder was committed during the course of a robbery and 2) that the murder was committed for pecuniary gain. Because the evidence showed that the defendant committed the robbery for the purpose of pecuniary gain, as opposed to some other purpose, the circumstances were redundant. 319 N.C. at 238, 354 S.E.2d at 452. In effect, the trial court permitted the jury to use the same evidence—that the defendant killed for pecuniary gain—to aggravate the murder twice. *Id.* at 239, 354 S.E.2d at 452-53.

The trial court's submission of (e)(4) and (e)(5) in the case at bar did not violate *Quesinberry*. The evidence underlying these circumstances was not the same. The (e)(4) circumstance was based on the evidence that the murder itself was effected for the purpose of avoiding lawful arrest. The (e)(5) circumstance was based on the evidence that the murder occurred during the commission of a kidnapping. Because these circumstances were supported by different evidence, they cannot be considered redundant. *See State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 602 (1993) (held: aggravating circumstances will not be considered redundant absent "complete overlap" in the evidence supporting them).

IV

Having found that the prosecutor's persistent misconduct deprived defendant of his right to a fair hearing, we vacate his death sentence and remand for a new capital sentencing proceeding.

Because the jury found the existence of both submitted aggravating circumstances, *see State v. Silhan*, 302 N.C. 223, 270, 275 S.E.2d 450, 482-83 (1981), and because these circumstances were not redundant, we hold that they may be resubmitted at the next sentencing proceeding.

DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

Justice MEYER concurring.

I concur with the majority that the sum of all the prosecutor's statements and actions warrants a new sentencing proceeding in this case. I wish to make it clear, however, that I do not attribute the conduct of the prosecutor to any intentional course of conduct on his part. I consider the actions and statements of the prosecutor to be a natural, though unrestrained, manifestation of the high emotion of this capital trial.

The majority opinion, of necessity, addresses and examines only examples of conduct on the part of the prosecution in this case that represent a crossing of the line of fairness. I fear, however, that in focusing our attention so carefully on these incidents only and in our failure to allude to any example of propriety or fairness exhibited by the prosecutor, it may appear to the reader that this Court believes that the prosecutor intentionally engaged in a bad faith effort to subvert the fairness of the trial. I do not believe that this was the case.

Justices MITCHELL and PARKER join in this concurring opinion.

STATE OF NORTH CAROLINA v. ROBERT LEE MITCHELL, JR.

No. 560A91

(Filed 8 April 1994)

1. Narcotics, Controlled Substances, and Paraphernalia § 101 (NCI4th) — misdemeanor or felony marijuana possession — proof of amount possessed

To prove defendant guilty of more than simple possession of marijuana and to prove misdemeanor possession, the State must offer evidence that the measured weight of the marijuana exceeded one-half ounce or show that the quantity of marijuana was so large that it could be reasonably inferred that its weight exceeded one-half ounce. To prove felony possession the State must offer evidence that the measured weight of the marijuana exceeded one and one-half ounces or show that the quantity

of marijuana was so large that it could be reasonably inferred that its weight exceeded one and one-half ounces.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Minimum quantity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law. 4 ALR5th 1.

2. Narcotics, Controlled Substances, and Paraphernalia § 101 (NCI4th)— felonious possession of marijuana—insufficient evidence of weight of marijuana

The quantity of marijuana introduced into evidence was insufficient to permit the jury reasonably to infer that it weighed more than one and one-half ounces so as to support defendant's conviction of felonious possession or that it weighed more than one-half ounce so that the jury's verdict could be considered a conviction of the general misdemeanor where the State introduced two rolled bags of marijuana which were observed to be protruding from defendant's shirt pocket by approximately four inches; there was no evidence of the measured weight of the marijuana; and the record contains no description of the actual size of the bags, the extent to which they were "rolled," or the extent to which the bags were filled with marijuana. The jury could not find the weight of the marijuana based on its in-court observations since the weight of a given quantity of marijuana is not a matter of general knowledge and experience, and the jury did not possess the requisite knowledge and experience necessary to infer the weight from the evidence reflected in the record. Therefore, the case is remanded for resentencing as if defendant had been convicted of simple possession of marijuana. N.C.G.S. § 90-95(d)(4).

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Minimum quantity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law. 4 ALR5th 1.

3. Narcotics, Controlled Substances, and Paraphernalia § 136 (NCI4th)— maintaining vehicle for keeping or selling drugs—meaning of "keeping"

As used in the statute which prohibits the maintaining of a vehicle used for "keeping or selling" controlled substances,

N.C.G.S. § 90-108(a)(7), the word "keeping" denotes not just possession, but possession that occurs over a duration of time. The statute, therefore, does not prohibit the mere temporary possession of marijuana within a vehicle.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

4. Narcotics, Controlled Substances, and Paraphernalia § 136 (NCI4th)— maintaining vehicle for keeping or selling drugs— insufficient evidence

The State's evidence was insufficient to show that defendant's vehicle was "used for keeping or selling" a controlled substance and thus failed to support his conviction for unlawfully maintaining a vehicle in violation of N.C.G.S. § 90-108(a)(7) where it tended to show only that defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that drug paraphernalia and two marijuana cigarettes were found in defendant's home the following day.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.

Justice MITCHELL dissenting.

Justice MEYER joins in this dissenting opinion.

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

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) and on discretionary review of additional issues pursuant to N.C.G.S. § 7A-31(a), from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 514, 410 S.E.2d 211 (1991), finding no error in defendant's trial before Stephens, J., presiding at the 20 July 1989 Criminal Session of the Superior Court, Wake County. Heard in the Supreme Court on 13 January 1993.

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

A. Larkin Kirkman for defendant appellant.

EXUM, Chief Justice.

Upon one two-count bill of indictment (89 CRS 58682) defendant was convicted as charged of felonious possession of marijuana (more

that one and one-half ounces) (Count I) and unlawfully maintaining a vehicle for keeping or selling a controlled substance (Count II), the date of both offenses being 6 September 1989. Upon another five-count indictment (89 CRS 51901), he was charged with possession of cocaine with intent to sell, possession of cocaine with intent to deliver, possession of drug paraphernalia, misdemeanor possession of marijuana, and unlawfully maintaining a dwelling for keeping or selling a controlled substance, the date of these offenses being 7 September 1989. The charge in the second bill of possession of cocaine with intent to sell was dismissed for insufficiency of the evidence at the close of the evidence for the State. On the remaining charges in the second bill, the jury found defendant guilty of misdemeanor possession of cocaine and guilty as charged on all remaining counts. Defendant was sentenced to two years imprisonment in 89 CRS 58682 and to two years to run consecutively in 89 CRS 51901.

A divided panel of the Court of Appeals found no error in the convictions. Judge Johnson, dissenting, concluded the evidence was insufficient in 89 CRS 58682 to convict of felonious possession of marijuana and would have remanded this count for resentencing on a conviction of simple possession.

By his appeal, petition for discretionary review and brief defendant has brought forward six issues. We address only two: (1) Whether the Court of Appeals correctly affirmed the trial court's denial of defendant's motion to dismiss for insufficiency of evidence the charge of felonious possession of marijuana in 89 CRS 58682; and (2) whether the Court of Appeals correctly affirmed the trial court's denial of defendant's motion to dismiss for insufficiency of evidence the charge of unlawfully maintaining a vehicle in 89 CRS 58682. As for the remaining four issues, we conclude discretionary review was improvidently granted.

I.

On 6 September 1989, at about 9:30 p.m., defendant and Bob Kennedy drove to Jimmy's Pic-Up Store in Zebulon in a black vehicle. Kennedy is disabled and he compensates defendant for transporting him to various places. Defendant entered the convenience store alone. Defendant and the clerk were the only individuals in the store. Defendant selected several items for purchase and approached the clerk.

The clerk, Iris Williams, was an off-duty Bunn police officer. Williams gave the following account: Defendant had two bags of what appeared to be marijuana in his shirt pocket. She inquired of the bags, and defendant identified them as containing marijuana. She requested the bags, and he gave them to her. She then identified herself as a police officer and proceeded to call the police, at which time the defendant left without his marijuana.

Defendant testified that he did not enter the store with marijuana. According to defendant, the bags were on the counter when he approached Williams and Williams asked him to hand the bags to her. Defendant then left the store when Williams called the police. Upon entering his vehicle, Kennedy asked defendant what happened and defendant responded that Williams had accused him of possessing marijuana.

Kennedy corroborated defendant's version. He testified that he saw no marijuana in defendant's pocket and that he would have noticed if defendant had marijuana in his pocket. Kennedy testified that he saw Williams gesticulating in the store, and that defendant told him of Williams' accusation.

The next day defendant was arrested for possession of marijuana. He was taken to jail. A search of his car revealed a marijuana cigarette.

At 6:46 p.m. on that same day, a warrant to search defendant's home was obtained. When the police arrived at the defendant's home, his adult stepdaughter was present. Defendant was still in jail at this time. During the search, defendant's wife and adult stepson arrived. In a kitchen cabinet officers found a scale with a residue of cocaine and small plastic bags. In a dresser in the master bedroom officers found two marijuana cigarettes and rolling papers.

II.

On the charge of felonious possession of marijuana, relating to the two bags in defendant's pocket on 6 September 1989, we conclude the evidence was insufficient to convict defendant of the felony for the reasons stated in Judge Johnson's dissent. We remand the case, as Judge Johnson would have done, for resentencing as if defendant had been convicted of simple possession of marijuana.

Defendant was charged and convicted of felonious possession of marijuana under N.C.G.S. § 90-95(d)(4), which states:

> [Any person possessing] a controlled substance classified in Schedule VI shall be guilty of a misdemeanor and sentenced to a term of imprisonment of not more than thirty days or fined not more than $100.00, or both, in the discretion of the court, but any sentence of imprisonment imposed must be suspended. If the quantity of the controlled substance exceeds one-half of an ounce of marijuana, the violation shall be punishable as a general misdemeanor. If the quantity exceeds one and one-half ounces of marijuana, the violation shall be punishable as a Class I felony.

In order for the State to convict defendant under this statute of a crime more serious than simple possession, it must prove that the marijuana which defendant possessed weighed more than one-half ounce to convict of the general misdemeanor and more than one and one-half ounces to convict of the felony. In order to prove the element of weight the State must, as with other elements, offer substantial evidence that this element exists. *See State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986); *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). The evidence is to be considered in the light most favorable to the State, and the State is to be given the benefit of every reasonable inference which it raises. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983).

> In ruling on a motion to dismiss, the trial court must consider all the evidence admitted in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom, and it must decide whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury." *State v. Artis*, 325 N.C. 278, 301, 384 S.E.2d 470,

483 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

State v. Pigott, 331 N.C. 199, 207, 415 S.E.2d 555, 559 (1992).

[1] Under these familiar principles the State, in order to prove the element of weight of the marijuana in question, must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element. In other words, to prove defendant guilty of more than simple possession and to prove misdemeanor possession, the State must offer evidence that the measured weight of the marijuana exceeded one-half ounce or show that the quantity of marijuana was so large that it could be reasonably inferred that its weight exceeded one-half ounce. To prove felony possession the State must offer evidence that the measured weight of the marijuana exceeded one and one-half ounces or show that the quantity of marijuana was so large that it could be reasonably inferred that its weight exceeded one and one-half ounces.

Here the State introduced into evidence only the two bags of marijuana seized by the store clerk, State's Exhibits Nos. 1 and 2, together with the clerk's testimony that she observed the bags sticking out of defendant's shirt pocket by approximately four inches. There was no evidence as to the measured weight of the marijuana.

After the close of the State's evidence defendant moved to dismiss the felonious possession charge on the ground that the weight of the marijuana had not been proven. The State moved to reopen its case "for the purpose of determining the weight of the marijuana." The trial court denied both motions, saying "State's Exhibits 1 and 2 have already been received into evidence and . . . visually and quantitatively the jury could obviously infer from that evidence that the marijuana contained therein exceeds one and a half ounces in weight."

[2] The issue before us then becomes whether the record supports the proposition that the quantity of the marijuana itself, as introduced into evidence and described by the testimony, is so large as to permit a reasonable inference that it weighed more than one-half or more than one and one-half ounces. We think in this case the record does not support that proposition.

First, the description of the quantity of marijuana introduced is quite sparse. The record shows simply that it was contained in two rolled bags which were observed to be in defendant's shirt and protruding from the pocket by about four inches. The record contains no description of the actual size of the bags, the extent to which they were "rolled" nor the extent to which the bags were filled with the marijuana. Were the bags full, half full or a quarter full? How large were the bags? The record does not say. The trial court found that the quantity of marijuana was sufficient to permit the jury reasonably to infer that it weighed more than one and one-half ounces; but there is nothing in the record before us to support that finding. The marijuana was not brought forward on appeal, and we have not been able to see it for ourselves.

The State contends that the jury's ability to handle and observe the two bags is sufficient to prove that its weight exceeds one and one-half ounces. The State relies on the principle that, "whatever the jury may learn through the ear from descriptions given by witnesses, they may learn directly through the eye from the objects described." *State v. Brooks*, 287 N.C. 392, 407, 215 S.E.2d 111, 122 (1975). The State contends that the jurors could rely on their own personal knowledge and experience which they have acquired in everyday life, as well as an opportunity to observe the evidence at trial, in order to determine for themselves whether the marijuana exceeded one and one-half ounces in weight.

When determining whether an element exists, the jury may rely on its common sense and the knowledge it has acquired through everyday experiences. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 248 (4th ed. 1993). Thus, the jury may, based on its observations of the defendant, assess whether the defendant is older than twelve. *State v. Barnes*, 324 N.C. 539, 540, 380 S.E.2d 118, 119 (1989) (jury may conclude that defendant is older than twelve and at least four years older than rape victim in order to convict of statutory rape). The jury's ability to determine the existence of a fact in issue based on its in-court observations, however, is not without limitation. The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.

Applying the foregoing, we conclude that the State failed to meet its burden of producing substantial evidence that the defendant possessed more than one-half ounce of marijuana on 6 September 1989. The jury saw the two bags of marijuana, which would fit in a shirt pocket. Williams also testified that she saw "two bags sticking up approximately four inches out of his pocket." A juror's finding that the amount of marijuana as reflected by this record exceeds one-half ounce is unreliable. Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. Every adult has had experience dealing with and estimating the age of others. Human characteristics associated with various ages are matters of common knowledge. The same cannot be said regarding the weight of various quantities of marijuana. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce. The average juror does not fall into any of these categories. As Judge Johnson noted below:

> While jurors may and do rely on their five senses and their life experience in deciding the facts from the evidence placed before them, I would not place a defendant in jeopardy of a felony conviction based on the jury's perception of the total weight of dried vegetable material contained in two small plastic bags—material with which the jurors presumably have little or no experience, either in handling generally or in the weighing of it. Most people, in fact, do not have experience dealing in ounces of anything, much less a substance with the specific density and bulk of marijuana.

Since the record does not reflect that the State produced sufficient evidence that the marijuana exceeded one and one-half ounces, the conviction for possession of more than one and one-half ounces of marijuana is reversed. The case is remanded to the Court of Appeals for further remand to the trial court for resentencing as if defendant had been convicted of simple possession of marijuana.

III.

The next question is whether the evidence is sufficient to support defendant's conviction under N.C.G.S. § 90-108(a)(7). This statute makes it unlawful for any person:

> To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

There are thus two theories under which the State may prosecute a defendant under N.C.G.S. § 90-108(a)(7). Under the first statutory alternative the State must prove that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is resorted to (5) by persons unlawfully using controlled substances (6) for the purpose of using controlled substances. Under the second statutory alternative, the State must prove that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is used for the keeping or selling (5) of controlled substances.

With respect to the charge under N.C.G.S. § 90-108(a)(7), the jury found defendant guilty only of "unlawfully, willfully, and knowingly maintaining a vehicle for illegally keeping drugs," the second alternative theory set out above. Thus we do not address whether the evidence would have been sufficient to convict defendant under the first alternative theory.

A review of the evidence against defendant, as elicited from the testimony of the store clerk, reveals that the clerk did not see either the defendant or the bags of marijuana before the defendant got out of the vehicle. The store clerk testified that:

> [At a]pproximately 9:30 a black male walks inside the store. The reason I noticed this man is because he got out of a dark vehicle with dark tinted windows. In his left pocket he had two bags sticking up approximately four inches out of his pocket. I let him get inside the store. He went to the beer box, brought beer back—I don't remember what kind—and then he—he come up to the counter and he asked for some rolling papers I had never heard of. And I asked him, I said, Well, what have you got in your pocket there, Buddy?
>
> He says, It's dope or marijuana.
>
> I says, Let me see it. On that he took it out and handed it to me and I kept it and called the police.

On cross-examination when asked to describe the events that occurred in the store, the store clerk stated,

> When he came in the door, I noticed him because he drove up on [sic] the car with the windows blacked out. That's the only reason I noticed that. He walked in. I saw something sticking out of his pocket approximately four inches. When he come back I asked him what it was and he told me it was marijuana. And I said, May I see it, please? And he handed it to me.

On this state of the evidence both defendant and the State focus their sufficiency arguments on whether the store clerk's testimony is sufficient to support an inference that defendant had the marijuana in his possession while he was in the vehicle. Defendant argues it was not and that "unless the State can show that defendant had marijuana in his vehicle . . . the charge of maintaining a vehicle should be dismissed." The State argues that the testimony does permit an inference that defendant possessed the marijuana while he was in the vehicle and, therefore, the evidence is sufficient to support defendant's conviction.

We think the evidence, taken in the light most favorable to the State, is enough for a jury reasonably to infer that defendant possessed the marijuana while he was in his vehicle. The more fundamental issue is whether the evidence produced by the State is enough to prove, under the second statutory alternative, that his vehicle was used for keeping or selling marijuana.

[3] N.C.G.S. § 90-108(a)(7) makes it illegal to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of" controlled substances. This statute prohibits the maintaining of a vehicle only when it is used for "keeping or selling" controlled substances, such as marijuana. The word "keep" is variously defined as follows: "[to] have or retain in one's power or possession; not to lose or part with; to preserve or retain . . . . To maintain continuously and methodically . . . . To maintain continuously and without stoppage or variation . . . [; t]o take care of and to preserve . . . ." *Black's Law Dictionary* 868 (6th ed. 1990). "Keep" therefore denotes not just possession, but possession that occurs over a duration of time. By its plain meaning, therefore, this statute does not prohibit the mere temporary possession of

marijuana within a vehicle.[1] The meaning of "a vehicle . . . which is used for . . . selling controlled substances" is self-evident.[2] The issue is then whether the State produced sufficient evidence that the vehicle was used for the keeping or selling of marijuana.

[4] The evidence, taken in the light most favorable to the State and giving the State every reasonable inference, indicates that defendant possessed marijuana while in his car. The State's evidence also shows that on the following day drug paraphernalia, consisting of small plastic bags and scales, were found at defendant's home. On that same day authorities found one marijuana cigarette in defendant's car and two marijuana cigarettes at defendant's home.

We find that this evidence is insufficient to establish that defendant's vehicle was "used for the keeping or selling of" a controlled substance. At most, the State has shown that on 6 September 1989 defendant possessed marijuana while in his car and that on the following day his car contained a marijuana cigarette. The State also presented evidence of the presence of drugs and drug paraphernalia at defendant's home. This evidence raises at most only a suspicion that defendant's car was used for either keeping or selling marijuana.

That an individual within a vehicle possesses marijuana on one occasion cannot establish that the vehicle is "used for keeping" marijuana; nor can one marijuana cigarette found within the car establish that element. This evidence clearly would support a conviction for possession of marijuana, but we do not believe that our legislature intended to create a separate crime simply because the controlled substance was temporarily in a vehicle.

The State also has not produced sufficient evidence that the vehicle was "used for . . . selling" a controlled substance. The evidence, including defendant's actions, the contents of his car, and the contents of his home, are entirely consistent with drug use, or with the sale of drugs generally, but they do not implicate the car with the sale of drugs.

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1. Clearly, if the defendant possesses the controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If the vehicle contains the controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession.

2. We note that this portion of the statute does not require that the controlled substance ever actually be in the vehicle.

The focus of the inquiry is on the *use*, not the contents, of the vehicle. Although the contents of a vehicle are clearly relevant in determining its use, its contents are not dispositive when, as here, they do not establish that the use of the vehicle was a prohibited one. The determination of whether a vehicle, or a building, is used for keeping or selling controlled substances will depend on the totality of the circumstances. Where, for example, the defendant, found with twelve envelopes containing marijuana in his vehicle, together with more than four hundred dollars, admits to selling marijuana, *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87-88 (1985), *disc. review denied*, 315 N.C. 591, 341 S.E.2d 31 (1986), or the defendant has title to, and makes payments relating to the maintenance of, a barn which contains marijuana plants, *State v. Allen*, 102 N.C. App. 598, 608-09, 403 S.E.2d 907, 914 (1991), *rev'd on other grounds*, 332 N.C. 123, 418 S.E.2d 225 (1992), or it is shown that the defendant finances and supervises a game room in which drugs are regularly sold, *State v. Thorpe*, 94 N.C. App. 270, 274, 380 S.E.2d 777, 779 (1989), *rev'd on other grounds*, 326 N.C. 451, 390 S.E.2d 311 (1990), the defendant may be convicted of maintaining a vehicle or building which is used for keeping or selling a controlled substance. *See also State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 322 (1987) (where evidence showed that defendant's home contained 20 grams of cocaine along with numerous items of drug paraphernalia, evidence was sufficient to maintain a conviction under N.C.G.S. § 90-108(a)(7)). But where the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance.

The Court of Criminal Appeals of Oklahoma faced a similar issue in *Howard v. State*, 815 P.2d 679 (Okla. 1984). In *Howard*, the defendant was arrested for public intoxication. The police took the defendant to his motel room where the police found a small package on the bedside table containing a white powder later found to contain 0.1 grams of methamphetamine. Also on the table were a broken cigarette, a syringe and a piece of damp cotton which tested positive for methamphetamine. The defendant was convicted under a statute making it illegal to "maintain any . . . place whatever . . . which is used for the keeping or selling" of controlled substances.

Id. at 682 (referring to Okla. Stat. Ann. tit. 63 § 2-404(A)(6) (1984)). The appellate court reversed the conviction, stating:

> While this evidence is certainly sufficient to justify a conviction for Possession of a Controlled Dangerous Substance, . . . we do not find any evidence which even remotely tends to prove that the motel room rented by Appellant was maintained . . . for "the keeping or selling of [controlled substances]."

Id.

The Supreme Court of Georgia reversed a conviction under a statute similar to N.C.G.S. § 90-108(a)(7) where the court found the evidence insufficient. *Barnes v. State*, 255 Ga. 396, 339 S.E.2d 229 (1986). The court reasoned:

> [W]e hold that in order to support a conviction . . . for maintaining a residence or other structure or place used for keeping controlled substances, the evidence must show that one of the purposes for maintaining the structure was the keeping of the controlled substance; thus, the *mere possession of limited quantities of a controlled substance* within the residence of structure is insufficient to support a conviction[ ].
>
> [We further] hold that in order to support a conviction under this statute for maintaining a residence or other structure or place used for selling controlled substances, the evidence must be sufficient to support a finding of more than a single, isolated instance of the proscribed activity . . . .

Id. at 402, 339 S.E.2d at 234 (emphasis added).

Based on the foregoing, we conclude that the State did not produce sufficient evidence that defendant's vehicle was "used for keeping or selling" a controlled substance. His conviction under N.C.G.S. § 90-108(a)(7) is therefore reversed.

IV.

As to the remaining issues presented, we conclude that discretionary review was improvidently granted.

The result is: In 89 CRS 58682 the Court of Appeals' decision finding no error in the trial court's denial of defendant's motion to dismiss Count I (felony possession of marijuana) is reversed, and defendant stands convicted on Count I of simple possession of marijuana. This conviction is remanded to the Court of Appeals

for further remand to the trial court for a new sentencing hearing. Also in 89 CRS 58682 the Court of Appeals' decision finding no error in the trial court's denial of defendant's motion to dismiss Count II (unlawfully maintaining a vehicle) for insufficiency of the evidence is reversed. In 89 CRS 51901 the decision of the Court of Appeals remains in effect.

89 CRS 58682, Count I, REVERSED AND REMANDED;

89 CRS 58682, Count II, REVERSED;

89 CRS 51901, DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Justice MITCHELL dissenting.

I believe the trial court properly denied the defendant's motion to dismiss the charge of felonious possession of marijuana. The testimony at trial was to the effect that the two bags of marijuana seized from the defendant were long enough to extend four inches above the top of his shirt pocket. Those bags of marijuana were received into evidence and before the jury for its examination. Like the trial court and the majority in the Court of Appeals, I believe that North Carolina jurors of average intelligence could view and handle such bags of marijuana and conclude beyond a reasonable doubt whether the defendant had possessed more than one and one-half ounces of marijuana and, as a result, was guilty of felonious possession of marijuana. Members of the jury were entitled to rely on their common sense and the knowledge they had acquired through everyday life experiences. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 248 (4th ed. 1993). Accordingly, I believe that the Court of Appeals was correct in affirming the trial court's denial of the defendant's motion to dismiss that charge and that the majority errs in holding to the contrary.

I also believe that the majority errs in holding that the State's evidence was not sufficient to support the defendant's conviction, under N.C.G.S. § 90-108(a)(7), for keeping or maintaining a vehicle used for the keeping of a controlled substance. Although the State's

evidence was by no means overwhelming in this regard, I believe that the evidence tending to show that the defendant had two bags of marijuana while he was in the car and that a marijuana cigarette was located in the car amounted to substantial evidence that the vehicle was "used for the keeping" of marijuana.

For the foregoing reasons, I believe that the majority errs in reversing the decision of the Court of Appeals which affirmed the defendant's convictions for felonious possession of marijuana and for maintaining a vehicle used for keeping marijuana. Therefore, I respectfully dissent from the opinion of the majority.

Justice Meyer joins in this dissenting opinion.

HOMEBUILDERS ASSOCIATION OF CHARLOTTE, INC. v. THE CITY OF CHARLOTTE

No. 133PA93

(Filed 8 April 1994)

1. **Municipal Corporations § 148 (NCI4th)— grants of power to municipalities—statutory rule of construction**

The proper rule of construction of grants of powers to municipalities is the broad rule set forth in N.C.G.S. § 160A-4. Therefore, such grants of power should be construed to include any additional or supplementary powers that are reasonably necessary or expedient to carry them into execution or effect.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 193 et seq.

2. **Municipal Corporations § 346 (NCI4th)— regulatory user fees—authority of city to charge**

The City of Charlotte had the authority to charge reasonable user fees to cover the costs of regulatory services provided by the City since the fees were reasonably necessary or expedient to the execution of the City's express power to regulate the land development activities for which the services are provided. Furthermore, the fees imposed by the City of Charlotte are reasonable where the trial court found that they are based on data from the preceding year and are

reasonably related to the expenses involved in providing the services for which the fees are charged.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 579 et seq.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 109 N.C. App. 327, 427 S.E.2d 160 (1993), reversing judgment entered 18 July 1991 by Lewis, J., in Superior Court, Mecklenburg County. Heard in the Supreme Court 15 October 1993.

Murchison & Paulson, by Alton G. Murchison, III, David F. Paulson, Jr., and C. Phillip Wells, for plaintiff-appellant and -appellee.

Office of the City Attorney, by Henry U. Underhill, Jr., City Attorney, and Cynthia Cline Reid, Assistant City Attorney, for defendant-appellant and -appellee City of Charlotte.

J. Michael Carpenter, for North Carolina Homebuilders Association, amicus curiae.

S. Ellis Hankins, and Robert E. Hagemann, for North Carolina League of Municipalities, amicus curiae.

FRYE, Justice.

In this appeal The City of Charlotte [hereinafter the City] contends that the Court of Appeals erred in reversing the trial court's order of declaratory judgment in its favor and remanding for entry of declaratory judgment in favor of Plaintiff, Homebuilders Association of Charlotte, Inc. [hereinafter the Association]. The Court of Appeals held that the City had no authority to impose "user fees" absent enabling legislation from the General Assembly. "There being no such authority here, user fees shall not be collected under the authority of § 2-4 of the Code of the City of Charlotte from and after the certification date of this opinion." *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 109 N.C. App. 327, 336, 427 S.E.2d 160, 165 (1993). The Association agrees with the Court of Appeals' decision and argues that it should be applied

retroactively. We conclude that the trial court correctly held that the City had authority to impose the fees in question and that the Court of Appeals erred in reversing that decision. Accordingly, we need not reach the question of retroactivity.

In February of 1986, a fifteen-member Joint City-County Citizens' Revenue Committee was appointed by the Mayor of the City and the Chairperson of the Mecklenburg County Commission. The Committee requested that the City and Mecklenburg County consider the implementation of user fees for a variety of governmental regulatory services and for the use of public facilities. In response to this request, the City and County hired Arthur Young and Company, an accounting and management consulting firm, to conduct a comprehensive study to determine the cost of certain regulatory services provided by the City and County and to recommend fees for those services where appropriate. On 22 August 1988, the City Council passed a resolution implementing a policy whereby user fees would be charged for a number of city regulatory services and rental of publicly owned facilities. The fee schedule was codified in Section 2-4 of the Code of the City of Charlotte which provides:

> There is hereby established a schedule of user fees for services performed by city departments. Fees shall be set by user fee policies established by the city council and shall be computed in accordance with the methodology set forth in the Arthur Young "User Fees Study of August, 1987," a copy of which is available for inspection in the city's budget and evaluation office. This schedule may be revised from time to time by the city manager, or his designee, to reflect additional costs to the city for providing these services.
>
> Whenever any user fee on the schedule referred to above may be found to be in conflict with a fee for the same or a similar service set out elsewhere, the fees in the user fee schedule shall supersede any prior existing fee.
>
> The complete schedule of user fees shall be available for inspection in the office of the city clerk, and a schedule of user fees for each department shall be conspicuously posted in the appropriate department. (Ord. No. 2553, §1. 12-12-88).

On 25 May 1990, the Association filed a complaint seeking declaratory relief pursuant to N.C.G.S. § 1-253 *et seq.* to declare

invalid and unenforceable Section 2-4 of the Code of the City. The Association also sought to permanently enjoin the City from collection of the fees until and unless the North Carolina General Assembly expressly granted such power to the City. Both parties moved for summary judgment and a hearing was held before Judge Robert D. Lewis at the 18 April and 16 May 1991 Civil Sessions of Superior Court, Mecklenburg County. A declaratory judgment order in favor of the City was entered on 18 July 1991 from which the Association appealed. The Court of Appeals reversed the trial court's declaratory judgment order and remanded the cause for entry of declaratory judgment in favor of the Association. On 3 June 1993, we allowed both parties' petitions for discretionary review.

For purposes of this appeal, the parties stipulated the following:

> 6. User Fees have been imposed and are being collected by the City, on, among others, the following City services:
>
> (a) Commercial Driveway Permit Review
>
> (b) Commercial Drainage Plan Review and Inspection
>
> (c) Commercial Inspection (Building Permit Site Inspection)
>
> (d) Erosion Control Review and Inspection and Issuance of Grading Permit
>
> (e) 100 + 1 Floodplain [sic] Analysis
>
> (f) Rezoning Review
>
> i. Single-family districts
>
> ii. Multi-family districts
>
> iii. All other districts
>
> (g) Right-of-Way Abandonment (Permanent Street Closing)
>
> (h) Right-of-Way Encroachment
>
> (i) Special Use Permit (Minor)
>
> (j) Special Use Permit (Major)
>
> (k) Storm Drainage Problem Study

(l) Subdivision Reviews

i. Preliminary Review:
Single family (No Streets)

ii. Preliminary Review and Inspection:
Single Family (With Streets)

iii. Preliminary Review and Inspection:
(Non-residential)

iv. Planned Multi-Family Review and Inspection

v. Final Plat Review

vi. Final Plan Revisions

vii. Final Condominium Plat Review

(m) Tree Ordinance Review

(n) UMUD Review

The amount of user fees assessed varies depending upon the type of service provided. For example, the fee schedule with an effective date of 1 July 1990 provides that the cost for commercial drainage plan review and inspection is a flat fee of $80 while a sliding fee based on acreage is charged for services such as grading permits.

The parties have also stipulated that the City has the following express authority:

8. The City has express authority pursuant to N.C.G.S. §160A-371 and 381 to regulate the zoning and subdivision of land.

9. The City has express authority pursuant to N.C.G.S. §160A-296 and 299 to regulate its streets and alleys.

10. The City has express authority pursuant to N.C.G.S. §160A-458 to enact and enforce erosion and sedimentation control ordinances as authorized by Article 4 Chapter 113A of the General Statutes.

11. The City has express authority pursuant to Chapter 115 of the 1975 Session Laws to enact and enforce ordinances regulating removal, replacement, and preservation of trees.

The law is well-settled that "a municipality has only such powers as the legislature confers upon it." *Koontz v. City of Winston-*

Salem, 280 N.C. 513, 520, 186 S.E.2d 897, 902 (1972). In the instant case, the extent of municipal powers granted to the City is at issue; thus, a brief history of the construction of legislative grants of authority to municipalities is in order.

A long-standing rule of construction, generally known as "Dillon's Rule," was applied as early as the mid-1870's by North Carolina courts. *See, e.g., Smith v. New Bern*, 70 N.C. 14 (1874); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 276 S.E.2d 443 (1981), *appeal after remand*, 61 N.C. App. 682, 301 S.E.2d 530, *rev. denied*, 308 N.C. 675, 304 S.E.2d 757 (1983). Judge John F. Dillon stated the rule in his treatise on municipal corporations as follows:

> [*A*] *municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Dillon, *Commentaries on the Law of Municipal Corporations*, § 237 (5th ed. 1911).

The generally accepted rule today seems to be that the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation. Lawrence, *Local Government Finance in North Carolina*, § 311, at 67 (2d ed. 1990); Eugene McQuillen, *The Law of Municipal Corporations*, § 26.27 (3d ed. 1986 rev. ed.); *see also Oak Park Trust & Savings v. Mount Prospect*, 127 Ill. App. 3d 10, 536 N.E.2d 763, *appeal denied*, 127 Ill. 2d 621, 545 N.E.2d 115 (1989); *Counter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983).

In 1971, the North Carolina General Assembly enacted a comprehensive rewrite of the municipal statutes, codified as North Carolina General Statutes Chapter 160A, effective 1 January 1972. 1971 N.C. Sess. Laws ch. 698. Article 8 of this Chapter is entitled "Delegation and Exercise of the General Police Power." Section 160A-174 of Article 8 sets out the general ordinance-making power of municipalities as follows:

> (a) a city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health,

> safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.

N.C.G.S. § 160A-174(a) (1987).

In section 160A-175, municipalities are given specific powers to enforce their ordinances and section 160A-177 provides that the enumeration of "specific powers to regulate, restrict or prohibit acts, omissions, and conditions shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities by G.S. 160A-174." N.C.G.S. § 160A-177 (1987). Other provisions of Chapter 160A grant municipalities specific authority to regulate the subdividing and zoning of land (N.C.G.S. §§ 160A-371 to -381); use (including closure) of public streets, sidewalks, and alleys (N.C.G.S. §§ 160A-296 to -299); and by subsequent enactments, the authority to enact and enforce certain erosion and sedimentation control ordinances (N.C.G.S. § 160A-458). Additionally, the City of Charlotte was authorized to adopt ordinances regulating removal, replacement and preservation of trees by Chapter 115 of the 1975 Session Laws. Thus, in this case, the services for which user fees are charged are all related to some express authority of the City to regulate the development of land.

As part of the enactment of Chapter 160A, the General Assembly provided the following rule for construing legislative grants of power under this chapter and city charters:

> *Broad Construction.* It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be *broadly construed* and grants of power shall be construed to include *any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect*; Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C.G.S. § 160A-4 (1987) (emphasis added).

[1] This statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and

supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. We treat this language as a "legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A." *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 109, 388 S.E.2d 538, 543 (1990); *see also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 205-06, *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E.2d 407, 412-13 (1985); *City of Durham v. Herndon*, 61 N.C. App. 275, 278, 300 S.E.2d 460, 462 (1983). In contrast to N.C.G.S. § 160A-4, Dillon's Rule suggests a narrow construction, allowing a municipal corporation only those powers "granted in *express words*, . . . *necessarily or fairly implied* in or *incident* to the powers expressly granted, . . . and those *essential* to the accomplishment of the declared objects and purposes of the corporation." Dillon, *Commentaries on the Law of Municipal Corporations*, § 237 (5th ed. 1911). The City contends that the imposition of user fees should be upheld even under application of Dillon's Rule. We find it unnecessary to decide that question since we conclude that the proper rule of construction is the one set forth in the statute.

In its brief, the Association contends that this Court has applied a narrow rule of construction in analyzing a municipality's powers even after the enactment of N.C.G.S. § 160A-4 in 1971. In *Porsh Builders*, 302 N.C. 550, 276 S.E.2d 443, this Court addressed the question of whether a city, under N.C.G.S. § 160A-514(d), had discretion to consider whether a potential buyer's bid for real estate best complied with the redevelopment plan in determining if he was the "highest responsible bidder." Relying on traditional Dillon analysis, a majority of the Court held that the city did not have the authority in question. In *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975), the Court faced the question of whether a city ordinance requiring sprinkler systems in high-rise buildings was a building regulation ordinance subject to the approval of the State Building Code Council or a fire protection ordinance emanating from the police power of the City and therefore not requiring such approval. Although the Court quoted Dillon's Rule of construction in the opinion, the basis of its decision that the city did not have the authority to enact the ordinance was that the General Assembly had provided a complete and integrated regulatory scheme to the exclusion of local regulation.

In neither case was N.C.G.S. § 160A-4 discussed or cited by the Court and the issue of the interplay between Dillon's Rule of construction and N.C.G.S. § 160A-4 was, therefore, not addressed. Thus, we do not consider *Porsh* and *Greene* as determinative on the issue squarely presented in the instant case: the proper rule of construction of grants of powers to municipalities in light of N.C.G.S. § 160A-4.

[2] Here, the Association challenges the City's authority to charge user fees to cover the costs of regulatory services provided by the City. The City argues *inter alia* that applying the broad rule of construction of N.C.G.S. § 160A-4, it possesses the authority to charge regulatory user fees as an additional and supplementary power that is reasonably necessary or expedient to carry a regulatory program into execution and effect. We agree with the City and hold that the establishment of the user fee schedule codified in Section 2-4 of the Code of the City was reasonably necessary or expedient to the execution of the City's power to regulate the activities for which the services are provided.

As support for the position that the City did not have the authority to charge these fees, the Association argues, and the Court of Appeals based its decision—in part—on the fact that the General Assembly has expressly provided a means by which to meet the costs of regulating development, *i.e.*, levying of taxes. N.C.G.S. § 160A-209(c) (1993). There is, however, no language in the statute which restricts the municipalities to this method and the imposition of these fees does not appear to be contrary to State or federal law or the public policy of this State. The City has chosen a reasonable alternative by requiring that those who desire a particular service bear some of the costs associated with the provision of that service.

Similarly, the Court of Appeals noted that the General Assembly has expressly authorized county water and sewer districts to charge user fees for furnished services while it has remained silent on the authority to impose user fees for other services. *See* N.C.G.S. § 162A-88 (1987); *McNeil v. Harnett County*, 327 N.C. 552, 398 S.E.2d 475 (1990). Here again, the General Assembly did not specify that sewer services were the only services for which user fees could be charged and we find no basis for such a strained reading of this statute. To the contrary, we consider the enumeration in N.C.G.S. § 162A-88 of specific powers of a county water and sewer

district to "establish, revise and collect rates, fees or other charges and penalties for the use of or the services furnished or to be furnished by any . . . sanitary sewer and water system of the district" as a recognition by the General Assembly that such powers are reasonably necessary or expedient to the district's execution of its duties. In fact, the very purpose of § 162A-88, entitled "District is a Municipal Corporation," is to clarify that a county water and sewer district created pursuant to § 162A-86 is effectively a municipal corporation. N.C.G.S. § 162A-88 (1991).

Even though we conclude that the City does have the authority to assess user fees to defray the costs of regulation, such fees will not be upheld if they are unreasonable. *See State v. Moore*, 113 N.C. 698, 18 S.E. 342 (1893), *rev'd on other grounds*, 129 N.C. 686, 40 S.E.2d 216 (1901); *State v. Bean*, 91 N.C. 499 (1884). *See generally* McQuillen, *The Law of Municipal Corporations*, § 26.27 (3d ed. 1986 rev. ed.); Lawrence, *Local Government Finance in North Carolina*, § 311, at 68 (2d ed. 1990) ("Because the purpose of such a fee or charge is to place the cost of regulation on those being regulated, a rough limit to 'reasonableness' is the amount necessary to meet the full cost of the particular regulatory program.").

The Association contends that the fees as imposed are unreasonable. We reject this contention on the basis of the trial court's findings of fact as follows:

> 14. Although the services are regulatory measures designed to protect the public, the primary beneficiaries of the services provided by the City are the consumers of the service, including members of the Association.
>
> 15. The City's recovery of some of the cost of providing the services from those individuals or groups who both necessitate the regulations and benefit from the services, is a reasonable method of financing the services and providing an effective level of regulation.
>
> 16. As set forth in the ordinance, the City determines the cost of providing a service based upon the methodology established by Arthur Young and Company in its comprehensive "User Fee Study" dated August 26, 1987.
>
> 17. The methodology recommended by Arthur Young and Company involves four steps, namely, identification and evaluation of services for which user fees could be charged; determination

of the cost of providing the services; allocation of costs to specific service areas and determinations of the cost of a service per occurrence. The fourth step, determination of cost per occurrence, requires annual review and adjustment of user fees and the City has followed the recommended methodology by reviewing the demand for services and making adjustments in staffing as necessary.

18. The user fees charged by the City for its services are inherently conservative because they are calculated to recover reasonably anticipated costs based on data from the preceding year and, therefore, actual increases in salaries, equipment costs, benefits, etc., are not calculated in the "cost per service."

19. The City has attempted to take into account social and economic fluctuations which may occur in a given year by its policy decision to recover only the direct costs of providing services and by limiting those costs to 80%.

20. The amount of the user fees is reasonably related to the expenses involved in providing the services for which the fees are charged.

21. The user fees are for the sole purpose of defraying the cost of regulation and do not restrict the development of land nor do they significantly impact the Association or its members' ability to develop property.

A trial court's findings of fact are binding on appeal when supported by competent evidence. *See In re Estate of Trodgon*, 330 N.C. 143, 409 S.E.2d 897 (1991). The trial court's findings of fact are adequately supported by competent evidence in the form of essentially uncontradicted affidavits by a partner of Arthur Young and Company, as well as several City employees, including an internal consultant, a civil engineer, and a strategic planning and research manager. The Association does not contend that the fees exceed the actual cost of regulation but insists that any amount above the minimal cost of a license or permit should be borne by the community at large. The Association cites no authority for this proposition. We believe that this argument is better addressed to the elected members of the City Council. We, therefore, conclude that the fees as imposed are not unreasonable.

For the reasons stated herein, we reverse the decision of the Court of Appeals and remand to that court for further remand

to the Superior Court, Mecklenburg County, for reinstatement of the judgment of the Superior Court.

REVERSED AND REMANDED.

Justice MITCHELL dissenting.

For reasons thoroughly explained in the thoughtful opinion of the Court of Appeals in this case, I would hold that the City of Charlotte is without authority to impose user fees. Further, I do not believe that the fees at issue here are "user fees." I had always understood that matters such as review of plans for subdivisions and condominiums, storm drainage problem studies, tree ordinance reviews, erosion control reviews, and similar activities were for the benefit of and equally "used" by the entire public. Further, I had thought that to single out any small segment of the public to pay the full costs of such activities was to risk violating constitutional prohibitions on taking the property of such individuals without due process of law. Apparently the General Assembly of North Carolina shares such concerns since it has expressly provided that cities may pay for the "regulation of development" within their boundaries *by levying general property taxes on all citizens.* N.C.G.S. § 160A-209(c)(25) (1987); *see also* N.C.G.S. § 160A-209(c)(30) (streets), (34) (watershed improvements, *e.g.*, drainage). As the activities to be paid for in this case are activities benefiting all citizens of the city equally, fees to pay for them are not "user fees" in any proper sense of that term. That being the case, I believe that the intent of the legislature in passing statutes such as N.C.G.S. § 160A-209 and others was to require that cities levy general taxes to pay for such services. If this were not the case, the legislature would have expressly authorized such fees, just as it did with regard to services furnished by sewer districts. N.C.G.S. § 162A-88 (1991).

For the foregoing reasons, I believe that the General Assembly of North Carolina intended that cities not have the authority to impose fees such as those at issue here upon small groups of the public that the cities have arbitrarily deemed to be "users." Accordingly, I respectfully dissent from the decision of the majority.

Justice Webb joins in this dissenting opinion.

JEFFERSON-PILOT LIFE INSURANCE COMPANY v. ANN L. SPENCER

No. 224PA93

(Filed 8 April 1994)

1. **Unfair Competition § 1 (NCI3d)— life insurance—insurer's statements as to identity of beneficiary—not an unfair trade practice**

The action of plaintiff insurance company was not an unfair or deceptive practice within the meaning of N.C.G.S. § 58-63-15 where a predecessor in interest issued a life insurance policy to John Spencer with Ann Spencer, his wife, as beneficiary on 18 April 1974; John Spencer changed the beneficiary to Winston Steam Laundry, Inc. on 21 June 1974 and shortly thereafter transferred ownership of the policy to the corporation; 570 shares of the corporation's stock were owned by John Spencer, the rest by members of his family; Spencer called his agent and asked about the beneficiary of the policy in 1979 and 1981; the answer both times was Ann Spencer; and John Spencer was insurable until a malignant melanoma was removed from his chest in 1982. The misrepresentation of who was the owner and who was the beneficiary did not constitute an unfair practice under N.C.G.S. § 58-63-15(1) because that section is directed at false statements connected with the sale of insurance policies. An insurance company gains no advantage if it incorrectly advises a person as to who is the owner or beneficiary of a policy. *Barber v. Woodmen of the World Life Ins. Society*, 95 N.C. App. 340, is overruled insofar as it is inconsistent with this case.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 714, 735.

Coverage of insurance transactions under state consumer protection statutes. 77 ALR4th 991.

2. **Insurance § 945 (NCI4th)— life insurance—erroneous statement as to identity of beneficiary—negligent misrepresentation**

A claim for negligent misrepresentation was improperly dismissed where the insured purchased life insurance and named his wife as beneficiary, subsequently changed the beneficiary, called his agent on two occasions some years later to inquire as to who was the beneficiary, and was given erroneous infor-

mation. It does not unreasonably extend the liability of an insurance company to make it liable to the widow of an insured if the insurer negligently supplies information to the insured which causes the insured not to provide insurance for his wife.

Am Jur 2d, Insurance §§ 2009 et seq.

3. Limitations, Repose, and Laches § 37 (NCI4th)— life insurance—beneficiary—erroneous information—statute of limitations

A counterclaim against an insurance company for negligent misrepresentation of the beneficiary of an insurance policy was not barred by the statute of limitations of N.C.G.S. § 1-52(5) where John Spencer made inquiries of plaintiff concerning his insurance policies in September 1979 and January 1981; he was erroneously informed on both occasions that his wife, Ann Spencer, was the beneficiary; John Spencer died on 10 July 1988; there is no indication of any other communication between plaintiff and defendant which would have alerted John Spencer to the error; John and Ann Spencer did not know of the misrepresentation prior to John's death; plaintiff filed a complaint for interpleader relating to the proceeds on 16 November 1990; and Ann Spencer counterclaimed on 20 February 1990. The claim does not accrue until the claimant suffers harm because of the misrepresentation and the claimant discovers the misrepresentation. The action here did not accrue before John Spencer's death on 10 July 1988 and the counterclaim filed on 20 February 1990 was therefore brought within three years of the accrual of the cause of action. N.C.G.S. § 1-52(9).

Am Jur 2d, Limitation of Actions §§ 98, 126; Monopolies, Restraints of Trade, and Unfair Trade Practices § 713.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts. 18 ALR4th 1340.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 110 N.C. App. 194, 429 S.E.2d 583 (1993), reversing in part and affirming in part the granting of summary judgment for the plaintiff by Hairston, J., at the 8 October 1991 Civil Session of Superior Court, Forsyth County. Both

parties petitioned for discretionary review. Heard in the Supreme Court 7 December 1993.

This action was commenced by the plaintiff pursuant to N.C.G.S. § 1A-1, Rule 22, to determine the right to the proceeds of a life insurance policy. The plaintiff interpleaded Winston Steam Laundry, Incorporated and Ann L. Spencer, alleging that each one claimed the proceeds of the policy, and praying that it be allowed to pay the proceeds of the policy to the clerk of superior court and be discharged of any further liability to either of the defendants.

Winston Steam Laundry and Ann Spencer filed answers. Mrs. Spencer pled an estoppel of the plaintiff to deny that she is entitled to the proceeds because she and John Spencer, her husband, had relied to her detriment on representations by agents of the plaintiff during the lifetime of John Spencer that she was the beneficiary of the policy. Mrs. Spencer also counterclaimed, claiming an unfair practice, fraud, negligence, and breach of contract. Mrs. Spencer made one of the plaintiff's agents a third party defendant and alleged several claims against him. She has dismissed all claims against the agent.

The plaintiff made a motion for summary judgment. The papers filed in support of and in opposition to the motion showed that on 18 April 1974, Pilot Life Insurance Company, a predecessor in interest of the plaintiff, issued a life insurance policy to John K. Spencer, Jr. The defendant Ann L. Spencer, who was the wife of John Spencer, was the beneficiary on the policy. On 21 June 1974, John Spencer changed the beneficiary to Winston Steam Laundry, Incorporated and shortly thereafter transferred ownership of the policy to the corporation. There were 2,502 shares of stock outstanding in the corporation, of which John Spencer owned 570 shares. The rest of the stock was owned by members of John Spencer's family, including his mother.

In September 1979, John Spencer called his servicing agent with plaintiff and asked him who was the beneficiary of the policy. The servicing agent told Mr. Spencer that Ann Spencer was the beneficiary. John Spencer made a similar inquiry with the same result in January 1981.

The premiums on the policy were waived on 18 April 1979 based on John Spencer's condition which was diagnosed as diabetes, with peripheral neuropathy. In April 1982, a malignant melanoma

was removed from his left chest area. In December 1983, he had a stroke which resulted in some paralysis and he was diagnosed as having renal cell carcinoma. He died in 1988. There was evidence that John Spencer was insurable until he was diagnosed with malignant melanoma in April 1982.

The superior court allowed the plaintiff's motion for summary judgment. The court ordered the proceeds from the policy paid to Winston Steam Laundry and dismissed Mrs. Spencer's defense and counterclaims. Mrs. Spencer appealed the dismissal of her counterclaims to the Court of Appeals. The Court of Appeals reversed the granting of summary judgment for the plaintiff on Mrs. Spencer's claim for an unfair and deceptive trade practice. It affirmed the summary judgment against her on all her other counterclaims. We allowed petitions for discretionary review by both parties. The plaintiff has appealed the Court of Appeals' holding that it was error for the superior court to dismiss Mrs. Spencer's claim for an unfair and deceptive practice. The defendant Ann L. Spencer appeals from the ruling by the Court of Appeals that her claim for negligent representation was properly dismissed.

Bell, Davis & Pitt, P.A., by William Kearns Davis, Stephen M. Russell and D. Anderson Carmen, for plaintiff-appellant and appellee.

Bowden & Rabil, P.A., by S. Mark Rabil, for defendant Ann L. Spencer, appellant and appellee.

WEBB, Justice.

[1] We deal first with the defendant's claim for unfair and deceptive acts or practices in the business of insurance. N.C.G.S. § 58-63-15 provides in part:

> The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (1) Misrepresentations and False Advertising of Policy Contracts.—Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any

> false or misleading statement as to the dividends or share or surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.

N.C.G.S. § 58-63-15(1) (1991). We have held that a violation of N.C.G.S. § 58-63-15(1) is an unfair and deceptive practice under N.C.G.S. § 75-1.1 establishing a claim under N.C.G.S. § 75-16. *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 343 S.E.2d 174 (1986).

The first question posed by this appeal is whether the misrepresentation to John Spencer by the plaintiff as to who was the owner and who was the beneficiary of the policy constituted an unfair practice under N.C.G.S. § 58-63-15(1). We hold that it did not.

This subsection is entitled "Misrepresentations and False Advertising of Policy Contracts." In keeping with this subtitle and reading the subsection as a whole, we believe it is directed at false statements connected with sale of insurance policies. An insurance company gains no advantage if it incorrectly advises a person as to who is the owner or beneficiary of a policy. It could gain an unfair advantage if it misrepresented to a potential customer the terms, benefits or advantages of a policy as well as dividends paid on the policy. We believe this is the evil at which this subsection is aimed. The "terms" of a policy, as used in this subsection, deal with the conditions and limits of policies. They do not refer to who is the owner or beneficiary of the policy. The "benefits" of the policy refer to advantages to policy holders. They do not refer to who is to receive the benefits.

This case is distinguishable from *Pearce*, which dealt with a misrepresentation as to what coverage the beneficiary would receive in the event the insured was killed while operating a military aircraft. The insurer in that case misrepresented the terms and benefits of the policy. We hold that the action of the plaintiff

in this case was not an unfair or deceptive practice within the meaning of N.C.G.S. § 58-63-15. Insofar as *Barber v. Woodmen of the World Life Ins. Society*, 95 N.C. App. 340, 382 S.E.2d 830 (1989), is inconsistent with this case, it is overruled.

[2] We consider next the defendant Ann L. Spencer's claim that there was a negligent misrepresentation by plaintiff to John Spencer which was the proximate cause of damage to her. We have recognized claims for negligent misrepresentation. *Raritan River Steel Co. v. Cherry, Beckaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988); *Freight Lines v. Pope, Flynn and Co.*, 42 N.C. App. 285, 256 S.E.2d 522, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 299 (1979). In *Raritan*, we held that an accountant could be held liable for negligent misrepresentation to those who he knows and intends will rely on his opinion or who he knows his client intends will so rely.

> The Court of Appeals, relying on *Raritan*, said,
>
> Although defendant presented evidence that Jefferson-Pilot in the course of its business failed to exercise care in communicating information to John, who was justified in expecting accurate information, there is no evidence that Jefferson-Pilot knew the information would be relied upon by defendant or that defendant did in fact rely upon the information to her harm.

Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 205, 429 S.E.2d 583, 589. The Court of Appeals affirmed the summary judgment entered against defendant based on this statement.

Raritan dealt with the liability of an accounting firm for supplying inaccurate information. In order to protect accountants from liability that unreasonably exceeds the bounds of their real undertaking, we restricted those who may sue them to those persons who accountants know will rely on their opinions or who they know their clients intend will rely on their opinions. *Raritan River Steel Co. v. Cherry, Beckaert & Holland*, 322 N.C. 200, 214, 367 S.E.2d 609, 617. The Court of Appeals relied on this holding in deciding this issue. We do not believe such a restriction is necessary in this case. It does not unreasonably extend the liability of an insurance company to make it liable to the widow of an insured if the insurer negligently supplies information to the insured which causes the insured not to provide insurance for his wife. The insurer is under a duty to the wife not to provide false information to the insured.

Although we determine there was evidence of negligence, we must determine whether there was sufficient evidence that this negligence was the proximate cause of damage to the defendant Ann Spencer to survive the motion for summary judgment. When a party charged with negligence moves for summary judgment and makes a forecast of evidence which would entitle him to a directed verdict if it were introduced at trial, the nonmovant must offer a forecast of evidence which if offered at trial would defeat a motion for a directed verdict. If the nonmovant does not do so, summary judgment against him should be allowed. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979).

If there is not sufficient evidence for a jury to determine that the plaintiff's negligence prevented John Spencer from either changing the beneficiary on the life insurance policy or procuring other life insurance to replace it, the negligence of the plaintiff did not damage Ann Spencer.

The plaintiff filed affidavits from all stockholders of the Laundry other than John Spencer in which each affiant said he or she would not have agreed to change the beneficiary on the policy or transfer ownership of the policy. There was no evidence to the contrary. This forecast of evidence would require a directed verdict for the plaintiff on the question of John Spencer's ability to change the beneficiary of the policy if he had been given the proper information as to the identity of the beneficiary. The plaintiff's negligence did not damage Ann Spencer in this respect.

As to John Spencer's ability to procure other life insurance, the evidence showed that he was insurable, although possibly at a higher rate, from the time he received the misinformation in September 1979 until he had a malignant melanoma removed from his chest in April 1982. In 1979, the laundry ceased operations due to "economic difficulties." Ann Spencer testified by deposition that she knew very little about her husband's financial affairs, that "John Kerr [Spencer] had had some stock . . . that he did get the dividends from . . . . It wasn't a lot . . . . [H]e had some [R.J. Reynolds stock]." John and Ann Spencer had on numerous occasions borrowed money from Ann Spencer's mother. They "didn't have a lot of expenses [from about 1979 forward] . . . because the children were all through school, and they were all self-supporting[.]"

On this forecast of evidence, indulgently regarding, as we must, Ann Spencer's forecast, *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 350, 363 S.E.2d 215, 217, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988), we cannot hold that it is not a jury question as to whether John Spencer could have purchased other insurance.

[3] Plaintiff has pled a statute of limitations defense to the negligent misrepresentation claim. Since this claim is one for negligent misrepresentation of an insurance contract, it is governed by the statute of limitations set out in N.C.G.S. § 1-52(5), which states that an action must be brought "[w]ithin three years . . . [f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." *Pierson v. Buyher*, 330 N.C. 182, 409 S.E.2d 903 (1991).

N.C.G.S. § 1-52(9) further provides: "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." This applies to a claim for negligent misrepresentation against an insurance company since that claim is essentially one for mistake. *Cf. Swartzberg v. Insurance Co.*, 252 N.C. 150, 156-57, 113 S.E.2d 270, 276-77 (1960) (action by insurance company to rescind contract on ground of material misrepresentation by insured in insurance application governed by N.C.G.S. § 1-52(9), thus using discovery rule and following "almost unanimous consensus of judicial opinion"). This result is further compelled since we do not think our legislature intended the negligence of an insurer in providing false information to enable it to benefit from the passage of time caused by the negligent act itself. In the situation where an insured makes reasonable efforts to identify the beneficiary under an insurance policy, this reasoning is especially applicable.

While an action for negligent misrepresentation of an insurance contract does not accrue before the misrepresentation is discovered, neither does it accrue until the misrepresentation has caused claimant harm. *Pierson v. Buyher*, 330 N.C. 182, 409 S.E.2d 903. Ordinarily, when the plaintiff is the beneficiary of the policy, such harm does not occur until the death of the insured when the insured has the power while living to change the beneficiary. *Id.* In some cases, however, the harm may occur sooner than this. For example

in the instant case, the harm to the beneficiary, Ann Spencer, might have occurred when the insured, John Spencer, became uninsurable.

In any event, for the purpose of applying the statute of limitations in these kinds of circumstances, the claim does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation and second, the claimant discovers the misrepresentation.

In September 1979 and January 1981 John Spencer made inquiries of plaintiff concerning his insurance policies. On both occasions he was informed that his wife, Ann Spencer, was the beneficiary of the policy at issue in this case. The parties agree that this was error. On 10 July 1988 John Spencer died. There is no indication of any other communication between plaintiff and defendants during this time period that would have alerted John Spencer to plaintiff's error. On 16 November 1990 plaintiff insurance company filed a complaint for interpleader relating to the insurance proceeds. Ann Spencer counterclaimed on 20 February 1991.

This forecast of evidence indicates that John and Ann Spencer did not know of the misrepresentation prior to John Spencer's death. Thus, the action did not accrue before John's death on 10 July 1988. The counterclaim filed on 20 February 1991 was therefore brought within three years of the accrual of the cause of action. Thus, Ann Spencer's claim is not barred by the statute of limitations.

For the reasons stated in this opinion, we reverse the holding by the Court of Appeals that the claim for an unfair and deceptive practice should not have been dismissed. We also reverse the holding of the Court of Appeals that the claim for negligent misrepresentation was properly dismissed.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. CHRISTOPHER BAKER

No. 171PA93

(Filed 8 April 1994)

1. **Rape and Allied Offenses § 15 (NCI4th)— first-degree rape— infliction of serious personal injury—mental or emotional harm**

In order to prove a serious personal injury in a rape case based upon mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the *res gestae* results present in every forcible rape.

Am Jur 2d, Rape §§ 4-6.

2. **Rape and Allied Offenses § 15 (NCI4th)— first-degree rape— infliction of serious personal injury—mental or emotional harm**

In order to find a defendant guilty of first-degree rape based upon the infliction of serious personal mental injury, there is no requirement that the mental injury arise from an act of the defendant not ordinarily present in a forcible rape. What is required is that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape.

Am Jur 2d, Rape §§ 4-6.

3. **Rape and Allied Offenses § 96 (NCI4th)— first-degree rape— infliction of serious personal injury—sufficient evidence of serious mental harm**

There was sufficient evidence of serious mental or emotional harm to the victim to support defendant's conviction of first-degree rape based upon the infliction of serious personal injury on the victim where the evidence tended to show that in the months after the rape, the victim suffered from depression and loss of appetite, quit her job because she could not handle dealing with the public, moved from her home, contacted a rape crisis center for counseling, had nightmares, and could not sleep; the victim experienced weight loss for ten months after the rape; before the rape the victim was a loving, caring and capable mother, but after the rape she

was unable to carry out her role as a mother and gave up the care of her child to the child's grandmother for nine months; and at the time of the trial, twelve months after the rape, the victim was still experiencing depression, was unable to sleep, and did not feel comfortable interacting with the public. A reasonable juror could conclude from this evidence that the victim's injuries extended for some appreciable time beyond the incidents surrounding the crime itself and that the injuries suffered are not the *res gestae* results present in every forcible rape.

Am Jur 2d, Rape §§ 88 et seq.

On discretionary review upon the State's petition pursuant to N.C.G.S. § 7A-31 of a unanimous decision by the Court of Appeals, 109 N.C. App. 557, 428 S.E.2d 216 (1993), vacating a judgment upon defendant's conviction of first-degree rape entered by Owens, J., at the 5 August 1991 Criminal Session of Superior Court, Orange County, and remanding for entry of judgment on the charge of second-degree rape, and finding no error in the judgment of second-degree sexual offense but remanding for new sentencing hearing. Heard in the Supreme Court 3 February 1994.

Michael F. Easley, Attorney General, by Philip A. Telfer, Special Deputy Attorney General, for the State-appellant.

Glover and Petersen, P.A., by James R. Glover, for defendant-appellee.

MEYER, Justice.

Defendant was convicted of first-degree rape and second-degree sexual offense and was given the mandatory life sentence for the first-degree rape and a concurrent twenty-year sentence for the second-degree sexual offense. The Court of Appeals held that the evidence was insufficient to support a jury finding that the victim suffered the serious personal injury necessary for a first-degree rape conviction. The court vacated the judgment of first-degree rape and remanded the case for entry of a judgment of second-degree rape. The Court of Appeals found no error in defendant's conviction for second-degree sexual offense but remanded that case for resentencing. The parties did not contest this decision, we do not discuss it herein, and the Court of Appeals' disposition of that charge remains undisturbed. However, as to the rape convic-

tion, we reverse the decision of the Court of Appeals and remand the case for reinstatement of the judgment entered on the first-degree rape.

The State offered evidence tending to show that on 21 August 1990, Tammy Jo Medlin was asleep in her mobile home. Also in the mobile home were her infant child; her roommate, Penny Brown; and Brown's two children. At about 12:30 a.m., defendant, a boyfriend of Ms. Brown's who was acquainted with the victim, came to the door and began knocking loudly. Ms. Medlin went to the door to see who was there. As Ms. Medlin was opening the door, defendant barged into the home, forced her arms behind her, and pushed her against the wall. Defendant then began kissing and fondling Ms. Medlin and stuck his finger into her vagina. Next, defendant forced the victim to her bedroom, threw her face down on the bed, and raped her.

Defendant was interrupted when one of his friends, Page Kimery, who had been waiting outside in defendant's car, knocked on the door of the mobile home. Defendant left Ms. Medlin, walked to the door, and let Mr. Kimery into the mobile home. Ms. Medlin got dressed and went out to the living room. She asked Mr. Kimery to make defendant leave and told him that defendant had just raped her. Defendant meanwhile was engaged in an argument with Ms. Brown in Ms. Brown's bedroom. Ms. Brown accused defendant of having sex with someone else. Defendant denied this at first but then admitted having sex with Ms. Medlin. Ms. Brown became very angry and began yelling at defendant; defendant began hitting Ms. Brown and chasing her around the mobile home. At this point, Ms. Medlin took the children and left the mobile home to call the police. She called the police from a convenience store. When the police arrived, she told them that defendant had raped her and that he was beating Ms. Brown.

The police followed Ms. Medlin back to the mobile home. When they arrived at the home, Ms. Brown, defendant, and Kimery were all standing outside. The police questioned Ms. Brown and then arrested defendant for assaulting a female.

The State also offered testimony tending to show that in the months after the rape, the victim suffered from depression and loss of appetite, quit her job because she could not handle dealing with the public, moved out of the mobile home, contacted a rape crisis center for counseling, had nightmares, could not sleep, and

was not able to care for her baby for nine months. The child's grandmother, Barbara Crutchfield, cared for the child during those nine months. At the time of the trial, almost a year after the rape, there was testimony that the victim's nerves were still bad, she was depressed, and she still had trouble sleeping.

Additional facts will be addressed as necessary for an understanding of the particular issue hereinafter presented.

The sole question presented for review by the State is whether the Court of Appeals erred in vacating defendant's conviction of first-degree rape. Defendant argues that, as the Court of Appeals concluded, there was insufficient evidence of serious personal injury, which was a necessary element of this particular charge of first-degree rape. We conclude, based on our decision in *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), that the Court of Appeals erred and that the State presented sufficient evidence to permit a reasonable juror to find that the victim suffered serious personal injury.

A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.2(a)(2) (1993).

In this case, it was not alleged that defendant displayed a deadly weapon or committed the offense aided and abetted by another. The State sought to prove defendant's guilt of first-degree rape by showing that defendant inflicted serious personal injury upon the victim.

In determining if there was sufficient evidence of serious personal injury to survive defendant's motion to dismiss the charge of first-degree rape, we view the evidence in the light most favorable

to the State. *State v. Jordan*, 333 N.C. 431, 438, 426 S.E.2d 692, 697 (1993). In reviewing a denial of a motion to dismiss based on insufficiency of the evidence,

> [a]ll 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).

In *State v. Boone*, we first noted that "serious personal injury" could be established based solely upon the existence of mental and emotional injury:

> We therefore believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case.

307 N.C. at 205, 297 S.E.2d at 590.

[1] Defendant argues that to establish the essential elements of first-degree rape based upon serious personal injury, when the injury is a mental injury, the State must prove that the defendant committed acts not present in every forcible rape which caused the requisite mental suffering. A close reading of *Boone* illustrates that this is not the test established to show serious personal injury based on mental or emotional injury. *Boone* holds that in order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm,

that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "*res gestae*" results present in every forcible rape. *Res gestae* results are those "so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening." *Black's Law Dictionary* 1305 (6th ed. 1990).

[2] Defendant argues that the legislature intended that in order to find one guilty of first-degree rape based upon infliction of serious personal mental injury, the mental injury must have been caused by an act of the defendant not present in every forcible rape. There is nothing in the statute or our case law to support such an argument. The statute clearly states that a defendant is guilty of first-degree rape if he "[i]nflicts serious personal injury upon the victim." Under defendant's theory, a defendant would not be guilty of inflicting serious personal injury even if the victim of a forcible rape suffers from a serious diagnosable mental trauma that all experts agree is greater than that normally suffered by a rape victim, unless the mental injury stemmed from an act not present in every forcible rape. Such a requirement is not supported by the plain wording of the statute. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Defendant's misunderstanding seems to stem from his reliance on *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989). In *Cofield*, this Court held that evidence that defendant had strangled the victim until she lost consciousness immediately after her rape and that she was suffering from nightmares almost four years after her rape supported a finding of the aggravating factor that there was physical or emotional injury in excess of that normally present in the offense, there second-degree rape. In reaching our decision that nightmares which persisted for almost four years were sufficient evidence of excess harm, we noted that the nightmares stemmed from defendant attempting to strangle the victim, an action that is not inherent in every second-degree rape. However, in *Cofield*, we did not consider whether the nightmares and the strangling constituted "serious personal injury," and, because the jury found defendant guilty of second-degree rape, there was no discussion of whether the injury at issue satisfied the requirement of serious personal injury so as to raise the crime to first-degree rape.

There is no requirement in *Boone* that the mental injury arise from an action not ordinarily present in a forcible rape, as defendant would suggest. What is required is that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape.

In *Boone*, the evidence failed to support a finding of serious personal injury, as it indicated only that the victim was hysterical and crying immediately after the attempted rape. However, in *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585, *disc. rev. denied*, 326 N.C. 803, 393 S.E.2d 903 (1990), and in *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), *appeal dismissed & disc. rev. denied*, 328 N.C. 574, 403 S.E.2d 516 (1991), the Court of Appeals found sufficient evidence of serious personal injury based in part or in whole upon evidence of mental and emotional injury. In *Mayse*, the victim's mental and emotional injuries continued for at least seven months after the rape; the victim quit work, quit school, moved from her home, and sought professional help.

We recognize that the Court of Appeals attempted to distinguish *Mayse* in its opinion below. However, we conclude that the language in *Mayse* does not support the distinction made by the Court of Appeals. *Baker*, 109 N.C. App. at 562, 428 S.E.2d at 218. The Court of Appeals stated that *Mayse* is distinguishable because in *Mayse*, the victim sought counseling and was still suffering injuries at the time of the trial, seven months after the rape. *Id.* (citing *Mayse*, 97 N.C. App. at 563, 389 S.E.2d at 587). In this case, the victim also sought counseling, quit work, moved from her home, and was suffering from injuries at the time of the trial, twelve months after the rape. We thus are unpersuaded by the Court of Appeals' attempt to distinguish *Mayse* on these grounds.

The Court of Appeals distinguished *Mayse* by noting that in *Mayse*, the defendant displayed a knife; thus, he could be guilty of first-degree rape under the theory that he displayed a dangerous weapon. However, the Court of Appeals in *Mayse* specifically chose to address the issue of whether defendant could be guilty of first-degree rape based upon the theory of serious personal injury. The court held that, based upon the evidence noted above, the State had offered

> "proof that such [mental and emotional] injury was not only caused by the defendant but that the injury extended for some

> appreciable time beyond the incidents surrounding the crime itself" as required by *State v. Boone*[, 307 N.C. at 205, 297 S.E.2d at 590]. Therefore, we hold that the victim suffered serious mental injury and that defendant's motion to dismiss was properly denied.

Mayse, 97 N.C. App. at 564, 389 S.E.2d at 587-88. The Court of Appeals specifically stated that defendant could be guilty of first-degree rape based upon the theory of serious personal injury. *Id.* at 563-64, 389 S.E.2d at 587-88. We conclude that the finding of serious personal injury in the *Mayse* case is supportive of our conclusion that there was sufficient evidence of "serious personal injury" in this case.

In *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645, the Court of Appeals also held that the evidence was sufficient to support a finding of serious personal injury. In *Davis*, the victim suffered from physical pain, appetite loss, severe headaches, nightmares, and difficulty in sleeping lasting for at least eight months.

[3] In this case, the mental injuries at issue "extended for some appreciable time beyond the incidents surrounding the crime itself." *Boone*, 307 N.C. at 205, 297 S.E.2d at 590. The victim experienced weight loss for ten months after the rape; at the time of trial, twelve months after the rape, she was still experiencing depression, was unable to sleep, and did not feel comfortable interacting with the public. Like the victim in *Mayse*, the victim here had quit work, moved from her home, and sought counseling. There was evidence presented in this case that before the rape, the victim was a loving, caring, and capable mother. However, after the rape, the victim was unable to carry out her role as a mother and had to give up her child to the child's grandmother, Barbara Crutchfield, for care for nine months.

From this evidence, a reasonable juror could conclude that the victim's injuries extended for some appreciable time beyond the incidents surrounding the crime itself and that the injuries suffered are not *res gestae* results present in every forcible rape.

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior

Court, Orange County, for reinstatement of the judgment entered upon defendant's conviction of first-degree rape.

REVERSED AND REMANDED.

NAEGELE OUTDOOR ADVERTISING, INC. v. THOMAS J. HARRELSON, AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 455A93

(Filed 8 April 1994)

Appeal of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 112 N.C. App. 98, 434 S.E.2d 244 (1993), which affirmed a judgment entered by Stephens (Donald W.), J., on 30 June 1992 in Superior Court, Wake County, allowing petitioner's motion for summary judgment and denying respondent's motion for summary judgment. Heard in the Supreme Court 18 March 1994.

Michael F. Easley, Attorney General, by Elizabeth N. Strickland, Assistant Attorney General, for respondent-appellant.

Wilson & Waller, P.A., by Betty S. Waller, for petitioner-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion for the Court of Appeals by Greene, J., the decision of the Court of Appeals, which affirmed the summary judgment for the petitioner entered by the Superior Court, Wake County, is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for the entry of summary judgment for the respondent.

REVERSED AND REMANDED.

IN THE MATTER OF: DISMISSAL PROCEEDINGS AGAINST DR. BARNEY K. HUANG, PROFESSOR, NORTH CAROLINA STATE UNIVERSITY

No. 326A93

(Filed 8 April 1994)

On appeal pursuant to N.C.G.S. § 7A-30(2) and on discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 110 N.C. App. 683, 431 S.E.2d 541 (1993), affirming a judgment entered 4 June 1991 by Greene, J., in Superior Court, Wake County, ordering the respondents to restore the petitioner to his position on the faculty of North Carolina State University. Heard in the Supreme Court 16 March 1994.

Berman & Shangler, by Dean A. Shangler, for petitioner-appellee.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for respondents-appellants.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion in the Court of Appeals. The case is remanded to the Court of Appeals for further remand to Superior Court, Wake County, for entry of an order upholding the University's action.

REVERSED AND REMANDED.

IN THE MATTER OF: ROCK-OLA CAFE T. K. TRIPPS, INC. 41-48752; ROCK-OLA CAFE, T. K. TRIPPS, INC. 92-41165; T. K. TRIPPS OF ASHEVILLE, INC. 11-26547; T. K. TRIPPS OF CHARLOTTE, INC. 60-55718; T. K. TRIPPS OF DURHAM, INC. 32-22431; T. K. TRIPPS OF GREENSBORO, INC. 41-42543; T. K. TRIPPS OF RALEIGH, INC. 92-33500; T. K. TRIPPS OF RIDGEWOOD, INC. 92-34759

No. 383PA93

(Filed 8 April 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an opinion of the Court of Appeals, 111 N.C. App. 683, 433 S.E.2d 236 (1993), affirming the judgment entered on 30 October 1991 by McHugh, J., in Superior Court, Guilford County. Heard in the Supreme Court on 15 March 1994.

Michael F. Easley, Attorney General, by George W. Boylan, Special Deputy Attorney General, for the petitioner-appellant N.C. Secretary of Revenue.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by William G. McNairy, for respondents-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN THE MATTER OF THE APPEAL OF THE ATLANTIC COAST CONFERENCE

No. 464A93

(Filed 8 April 1994)

Appeal by Guilford County (Taxing Authority) pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 112 N.C. App. 1, 434 S.E.2d 865 (1993), remanding for further hearings before the Property Tax Commission. Heard in the Supreme Court 15 March 1994.

Guilford County Attorney's Office, by Jonathan V. Maxwell, County Attorney, and Joyce L. Terres, Assistant County Attorney, for Taxing Authority-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Bynum M. Hunter, for Atlantic Coast Conference-appellee.

PER CURIAM.

AFFIRMED.

HEART OF THE VALLEY MOTEL, INC. v. KYLE EDWARDS AND WIFE, MARY SUE EDWARDS

No. 393A93

(Filed 8 April 1994)

Appeal 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. 896, 433 S.E.2d 466 (1993), reversing the judgment of Allen (C. Walter), J., at the 9 March 1992 Mixed Session of Superior Court, Haywood County. Heard in the Supreme Court 18 March 1994.

Roberts Stevens & Cogburn, P.A., by Max O. Cogburn and Vernon S. Pulliam, for plaintiff-appellee.

Russell L. McLean, III, for defendant-appellants.

PER CURIAM.

The decision of the Court of Appeals is affirmed; and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Haywood County, for new trial only on Issue Two submitted to the jury at the first trial.

AFFIRMED.

AYERS v. BD. OF ADJUST. FOR TOWN OF ROBERSONVILLE

No. 76P94

Case below: 113 N.C.App. 528

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

BRONDYKE v. JONAS

No. 57P94

Case below: 113 N.C.App. 201

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

BRYANT v. THALHIMER BROTHERS, INC.

No. 55P94

Case below: 113 N.C.App. 1

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1994. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

CAMALIER v. JEFFRIES

No. 93PA94

Case below: 113 N.C.App. 303

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994. Petition by defendant (Charles J. Jeffries) for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994.

CARTER v. FLOWERS BAKING CO.

No. 89P94

Case below: 113 N.C.App. 422

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

CATAWBA MEMORIAL HOSPITAL v.
N.C. DEPT. OF HUMAN RESOURCES

No. 569P93

Case below: 112 N.C.App. 557

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

DUNCAN v. PIEDMONT AVIATION, INC.

No. 19P94

Case below: 112 N.C.App. 852

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

FLORENCE CONCRETE v. N.C.
LICENSING BD. FOR GEN. CONTRACTORS

No. 70PA94

Case below: 113 N.C.App. 270

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994.

FULKS v. STRATEGIC ORGANIZATIONAL SYSTEMS

No. 81P94

Case below: 113 N.C.App. 424

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

HAAS v. WARREN

No. 571PA93

Case below: 112 N.C.App. 574

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994.

IN RE OGLE

No. 38P94

Case below: 113 N.C.App. 202

Petition by Steve Pendley for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

ISENHOUR v. UNIVERSAL UNDERWRITERS INS. CO.

No. 47PA94

Case below: 113 N.C.App. 152

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994.

MOORE v. PATE

No. 17P94

Case below: 112 N.C.App. 833

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

ONE NORTH McDOWELL ASSN. v. McDOWELL DEV. CO.

No. 82P94

Case below: 113 N.C.App. 425

Petition by defendant Godfrey for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

ROBINSON v. ROBINSON

No. 35P94

Case below: 113 N.C.App. 422

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

SMITH v. JACK ECKERD CORP.

No. 73P94

Case below: 113 N.C.App. 422

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

SMITH v. N.C. DEPT. OF NAT. RESOURCES

No. 31P94

Case below: 112 N.C.App. 739

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

SMITH v. SMITH

No. 90P94

Case below: 113 N.C.App. 410

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

SOUTH RIVER ELECTRIC MEMBERSHIP CORP.
v. CITY OF FAYETTEVILLE

No. 88P94

Case below: 113 N.C.App. 401

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. BISHOP

No. 72P94

Case below: 113 N.C.App. 425

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. BOWEN

No. 39A94

Case below: 113 N.C.App. 422

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1994.

STATE v. CUMMINGS

No. 79P94

Case below: 113 N.C.App. 368

Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. CUNNINGHAM

No. 232A91-2

Case below: Superior Court

Petition by defendant for writ of supersedeas and motion for temporary stay denied 5 April 1994. Petition by defendant for writ of certiorari to review the order of the Mecklenburg County Superior Court denied 5 April 1994. Petition by defendant for writ of mandamus or prohibition denied 5 April 1994.

STATE v. DAVIS

No. 13P94

Case below: 113 N.C.App. 203

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. EDWARDS

No. 16P94

Case below: 112 N.C.App. 853

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. ERWIN

No. 575P93

Case below: 112 N.C.App. 545

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 April 1994.

STATE v. JONES

No. 46P94

Case below: 113 N.C.App. 423

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 7 April 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STATE v. OAKES

No. 91P94

Case below: 113 N.C.App. 332

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1994.

STEWARD v. HENRY

No. 59PA94

Case below: 113 N.C.App. 204

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1994.

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

TAYLOR v. ASHBURN

No. 109P94

Case below: 112 N.C.App. 604

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 7 April 1994.

STATE OF NORTH CAROLINA v. DWIGHT LAMONT ROBINSON

No. 273A92

(Filed 6 May 1994)

1. **Jury § 260 (NCI4th)— peremptory challenges of black jurors—reasons offered by State**

Although the reasons offered by the State in support of its decision to exercise a peremptory challenge need not rise to the level of justifying the exercise of a challenge for cause, they must demonstrate that the prosecutor was not excluding jurors on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

2. **Jury § 256 (NCI4th)— peremptory challenges—racial discrimination—factors considered**

Factors to which the Supreme Court has looked to help determine the existence or absence of purposeful discrimination in the prosecution's use of peremptory challenges include (1) the susceptibility of the particular case to racial discrimination; (2) whether similarly situated whites were accepted as jurors; (3) whether the State used all of its peremptory challenges; (4) the race of the witnesses in the case; (5) whether the early pattern of strikes indicated a discriminatory intent; and (6) the ultimate makeup of the jury. In addition, an examination of the actual explanations given by the district attorney for challenging black veniremen is a crucial part of testing defendant's claim of racial discrimination, and it is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

3. Jury § 256 (NCI4th)— peremptory challenges—racial discrimination—appellate review

When evaluating the prosecutor's stated reasons for the use of peremptory challenges, the ultimate question to be decided by the trial court is whether the prosecutor was exercising his peremptory challenges with a discriminatory intent. Evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within the trial judge's province, and the findings of the trial judge are not to be overturned unless the appellate court is convinced that the judge's determination was clearly erroneous.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

4. Jury § 260 (NCI4th)— peremptory challenge—showing of race-neutral reasons

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding in a discriminatory manner where the prosecutor stated that he challenged this juror because she was a liberal arts teacher, had a master's degree in education, and her husband had been a teacher for twenty years; she had a male child sixteen years old and would have sympathy for the defendant; she answered some questions with her arms folded and did not answer in a very direct manner; and he did not feel that she would be fair and impartial toward the State.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

5. Jury § 260 (NCI4th)— peremptory challenge—showing of race-neutral reasons

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding in a discriminatory manner where the prosecutor stated that he challenged the juror because she had stated that she was eager to attend her granddaughter's college graduation on

Thursday; she had back problems that she mentioned in response to the prosecutor's question whether anyone on the jury had any problems that would interfere with his or her service as a juror; she had a male child twenty-eight years of age and another forty-one years of age; when asked if she had ever been a witness in a civil case, she confused being a witness with being a juror; she listed her age as fifty-nine but appeared to the prosecutor to be much older than that; and the prosecutor thought that, given her age, her family obligations, the male children in her family, and her somewhat confused state in answering questions, she would not be a completely fair and impartial juror in the case.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

6. Jury § 260 (NCI4th) — peremptory challenge — showing of race-neutral reasons

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding in a discriminatory manner where the prosecutor stated that he challenged the juror because she had lived at the same address for three months but had trouble remembering her other address; she could not remember the name of the trucking company for which her husband had worked for three years; she had a male child seventeen years old, and the prosecutor believed that members of her family had been in trouble in the City of High Point; her lack of attention to detail would make her unable to retain the evidence that was to come forward; and her family relations and the age of her son would cause her to sympathize with the defendant.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

7. Jury § 260 (NCI4th) — peremptory challenge — showing of race-neutral reasons

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding

in a discriminatory manner where the prosecutor stated that he challenged the juror because she had a pending court appearance for DWI which would be prosecuted by the district attorney's office; the juror had stated that she would hold the State to a higher burden of proof in a death penalty case; and when asked if she had any strong leanings, she stated that she leaned toward life and that she did not think she could impose the death penalty.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

8. **Jury § 260 (NCI4th) — peremptory challenge — showing of race-neutral reasons**

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding in a discriminatory manner where the prosecutor stated that he challenged the juror because the juror equivocated on her position on capital punishment and her leanings were toward life imprisonment; the juror was separated from her husband and had a male child near the age of defendant; and the prosecutor felt that defendant would probably present evidence of a broken home full of abuse and that "based on [the prosecutor's] eleven years of picking juries, in [his] opinion this woman would have never voted for capital punishment in this particular case or in any particular case."

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

9. **Jury § 260 (NCI4th) — peremptory challenge — showing of race-neutral reasons**

The prosecutor did not use his peremptory challenge of a black prospective juror in a capital resentencing proceeding in a discriminatory manner where the prosecutor stated that he challenged the juror because the juror answered "yes" in response to a jury questionnaire inquiry as to whether he was presently "employed, unemployed, or retired"; this response

indicated a lack of ability to comprehend or a lack of attention to detail that would not make him a good juror; the juror had a pending DWI charge with a court date within two weeks; the juror had been convicted for nonsupport of illegitimate children and had been back to court three times since that conviction for failure to comply with court orders; the prosecutor's office had been presenting evidence against this juror for the past five years; and the juror was almost the same age as the defendant.

Am Jur 2d, Jury § 235.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR3d 15.

10. Jury § 148 (NCI4th)— capital sentencing—jury voir dire—questions about consideration of life sentence—objections sustained as to form—exclusion harmless

The trial court properly sustained as to form defense counsel's questions to prospective jurors in a capital resentencing proceeding as to (1) whether, under the factual situation he had explained to them, they would have any trouble giving, if the evidence and mitigating circumstances so warranted, defendant life imprisonment, or whether they would be prone to give the defendant the death penalty, and (2) whether, under the facts that he had stated in an uninterrupted, rambling recitation of hypothetical facts, the jurors could vote for life imprisonment if they found the mitigating circumstances were sufficient to outweigh the aggravating circumstances. The first question was not properly phrased, was too broad and could properly be viewed as an attempt to indoctrinate prospective jurors, the hypothetical nature and phrasing of both questions improperly tended to cause jurors to pledge themselves to a decision in advance of the evidence, and the questions were objectionable as ambiguous compound questions that created a likelihood of confusing the jury. Assuming, *arguendo*, that the trial court was required by *Morgan v. Illinois*, --- U.S ---, 119 L. Ed. 2d 492 (1992) to allow these particular questions, any error in excluding them was rendered harmless by the fact that defendant was allowed to satisfy his inquiry through further use of *voir dire* by himself and by the trial court.

Am Jur 2d, Jury §§ 197, 201-203.

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

11. Jury § 222 (NCI4th)— capital sentencing—death penalty views—excusal of prospective juror for cause

The trial court properly excused a prospective juror for cause in a capital sentencing proceeding where her responses to questions by the prosecutor and the court indicated that her feelings about the death penalty would prevent her from following the law and from being a fair and impartial juror. The trial court was not required to permit counsel for defendant to attempt to rehabilitate this juror, and there was no requirement that the trial court offer any further explanation of the law of capital sentencing before excusing her for cause.

Am Jur 2d, Jury § 290.

12. Criminal Law § 1363 (NCI4th)— capital sentencing—sentences for other related crimes—not mitigating circumstance

The trial court properly refused to allow the jury in a capital sentencing proceeding to consider as mitigation three consecutive sentences totaling 80 years imposed on defendant for crimes arising from the same transaction as the capital crime since (1) those sentences are not circumstances tending to justify a sentence less than death for the capital crime, and (2) a reference to additional sentences improperly injects the issue of parole into the capital sentencing proceeding because, in order for information of separate sentences to have any bearing on a jury's choice between life imprisonment and death, the jury must presuppose the possibility of defendant's parole for his potential life sentence. Furthermore, defendant was not entitled to introduce evidence of these sentences as rebuttal to the State's use of the attendant crimes as evidence of aggravating circumstances.

Am Jur 2d, Criminal Law §§ 598 et seq.

13. Criminal Law § 1309 (NCI4th)— capital sentencing—testimony about "gay" person and club—admissibility for corroboration—not plain error

The trial court did not err by failing to exclude in a capital sentencing hearing testimony that a certain bar was a "gay club" and that a man in a group of persons with defend-

ant was a "gay person" since this testimony effectively corroborated a witness's testimony concerning defendant's activities and location on the night prior to the crime, and the testimony does not appear unduly inflammatory or designed to exploit any prejudice against homosexuals. Assuming, *arguendo*, that it was error to admit this testimony, defendant failed to object to this testimony and its admission was not plain error.

Am Jur 2d, Criminal Law §§ 598 et seq.

14. Evidence and Witnesses § 2917 (NCI4th)— capital sentencing—cross-examination to show bias—exclusion of testimony not prejudicial

Assuming that cross-examination of a witness in a capital sentencing proceeding about whether, when he negotiated a plea, he was told the sentence he could have received in this case and whether he was advised that any breach of the law would be a violation of his parole should have been permitted to show bias of the witness, defendant was not prejudiced by the exclusion of this testimony where it was made clear that the State had no leverage over the witness to cause him to testify against defendant in this sentencing hearing, and the witness's answers to these questions could not have shown any bias that was not clearly revealed through other examination of the witness. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Witnesses § 520.

15. Criminal Law § 1363 (NCI4th)— capital sentencing—ability to adjust to prison—mitigating circumstance—refusal to submit—harmless error

Although it was error for the trial court to refuse to submit in a capital sentencing proceeding the mitigating circumstance that "in a structured prison environment, [defendant] is able to conform his behavior to the rules and regulations and performs tasks he is required to perform," this error was harmless beyond a reasonable doubt where defendant was allowed to introduce evidence concerning his conduct in prison and his ability to adjust to prison life; the court's submission of two other mitigating circumstances dealing with defendant's conduct in prison, as well as the catchall mitigating circumstance, allowed the jury to fully consider this evidence; and the jury answered "no" to each of these circumstances, indicating that

no juror found any of these circumstances to exist and have mitigating value. The holding in *State v. Pinch*, 306 N.C. 1, that the ability to adjust to prison is irrelevant to sentencing is overruled to the extent that it conflicts with the decision of *Skipper v. South Carolina*, 476 U.S. 1.

Am Jur 2d, Criminal Law §§ 598 et seq.

16. Criminal Law § 1310 (NCI4th)— capital sentencing—mitigating evidence—questions disallowed—relevancy of answers not apparent—answer shown by other evidence

Defendant is precluded from predicating error upon the trial court's sustaining of the State's objection in a capital sentencing proceeding to a question to defendant's sister about their father's treatment of defendant's sisters and a question to defendant's wife about her comprehension of the nature of a capital sentencing proceeding where defendant made no offer of proof at trial to preserve the answers of the witnesses, and the context within which the questions were asked gives no indication of any relevance the responses of the witnesses may have had to the mitigation of defendant's crime. Furthermore, the trial court did not err by sustaining the State's objection to a question to defendant's wife about her attitude toward defendant where her feelings about defendant were made clear by her later testimony.

Am Jur 2d, Criminal Law §§ 598 et seq.

17. Criminal Law § 1323 (NCI4th)— capital sentencing—mitigating circumstances—instructions—finding of mitigating value

The trial court did not err by instructing the jury in a capital sentencing proceeding that it should find whether each nonstatutory mitigating circumstance existed and then whether that circumstance had mitigating value.

Am Jur 2d, Criminal Law §§ 598 et seq.

18. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—submission not required

The trial court in a capital sentencing proceeding did not err by refusing to submit the statutory mitigating circumstance that "defendant had no significant history of prior criminal activity" where there was evidence of defendant's continuous,

extensive, and recent involvement in criminal activity, including his use and sale of drugs and his conviction of the violent crime of robbery of a U-Haul Center and two of its employees. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598 et seq.

19. Criminal Law § 1325 (NCI4th)— capital sentencing—mitigating circumstances considered—instructions comporting with McKoy decision

The trial court did not err by instructing the jury in Issue Four of a capital sentencing proceeding that, in determining whether the aggravating circumstances, when considered with the mitigating circumstances, were sufficiently substantial to call for the imposition of the death penalty, "each juror may consider any mitigating circumstance that juror determined to exist by a preponderance of the evidence." Each juror was not required by *McKoy v. North Carolina*, 494 U.S. 433, to consider any mitigating circumstance found by *any* of the jurors when weighing the aggravating and mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598 et seq.

20. Criminal Law § 1325 (NCI4th)— capital sentencing—consideration of mitigating circumstances—instructions comporting with McKoy decision

The trial court's capital sentencing instructions which informed the jury at Issue Three and Issue Four 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 juror 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.

Am Jur 2d, Criminal Law §§ 598 et seq.

21. Criminal Law § 1348 (NCI4th)— capital sentencing—definition of mitigating circumstance

The trial court's instructions defining mitigating circumstance in a capital sentencing proceeding, which were virtually identical with the Pattern Jury Instructions, were a

correct statement of the law of mitigation and did not preclude the jury from considering any aspect of defendant's character which he may have presented as a basis for a sentence less than death.

Am Jur 2d, Criminal Law §§ 598 et seq.

22. Criminal Law § 1325 (NCI4th)— capital sentencing—consideration of mitigating circumstances—erroneous instruction—harmless error

Any error in the trial court's instruction in Issue Three of a capital sentencing proceeding that each juror may consider any mitigating circumstance that the "jury," rather than "juror," determined to exist by a preponderance of the evidence in Issue Two did not preclude an individual juror from considering mitigating evidence that such juror alone found in Issue Two and was harmless where the jury was clearly instructed for each of the mitigating circumstances submitted in Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it was deemed mitigating, and it was thus clear that, in order for the "jury" to find the existence of a mitigating circumstance, only one juror was required to find that circumstance.

Am Jur 2d, Criminal Law §§ 598 et seq.

23. Criminal Law § 860 (NCI4th)— capital sentencing—refusal to instruct on meaning of life imprisonment

The trial court did not err by refusing to give defendant's requested instruction in a capital sentencing proceeding that "the term 'life imprisonment' means life imprisonment" since such an instruction would unnecessarily present the issue of parole without any indication that the jury was considering that possibility, and the requested instruction was an inaccurate statement of the law. Absent jury inquiry as to the meaning of a life sentence or an inquiry as to the eligibility of defendant for parole, the trial court should not instruct the jury as to how it is to consider the meaning of the term "life imprisonment."

Am Jur 2d, Trial § 890.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

24. Criminal Law § 931 (NCI4th)— capital case—impeachment of verdict—juror beliefs about parole—internal influences—affidavits inadmissible

The trial court properly denied defendant's motion for appropriate relief in a capital case based on juror affidavits that the jury's recommendation of the death penalty was the result of erroneous beliefs about defendant's eligibility for parole in the event a life sentence was imposed since jurors' beliefs concerning parole eligibility relate to "internal" influences on a jury, N.C.G.S. § 8C-1, Rule 606(b) prohibits juror testimony that impeaches a jury verdict on the basis of internal influences, and the jurors' affidavits thus could not be considered by the trial court.

Am Jur 2d, Trial §§ 1219 et seq.

25. Criminal Law § 951 (NCI4th)— denial of motion for appropriate relief—evidentiary hearing unnecessary

The trial court did not err by denying defendant's motion for appropriate relief without an evidentiary hearing where the court correctly determined that juror affidavits supporting the motion were inadmissible and that defendant was not entitled to relief as a matter of law. N.C.G.S. § 15A-1420(c)(2).

Am Jur 2d, Coram Nobis and Allied Statutory Remedies § 59.

26. Criminal Law § 455 (NCI4th)— jury argument—deterrent effect of death penalty—no gross impropriety

Even if the prosecutor's argument to the jury in a capital sentencing proceeding could be construed as an argument about the general deterrent effect of the death penalty, it was not so grossly improper as to warrant *ex mero motu* intervention by the trial court.

Am Jur 2d, Trial §§ 229, 497 et seq.

27. Criminal Law § 442 (NCI4th)— capital sentencing—jury argument—jury as voice of community

The prosecutor did not tell the jurors in a capital sentencing proceeding to decide defendant's punishment based on community sentiment when he explained to the jurors that they were the voice and conscience of the community and reminded

the jurors that it was their responsibility to make a decision by stating: "It's your verdict. It's how you look at it."

Am Jur 2d, Trial §§ 225 et seq.

28. Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—comments about mitigating circumstances

The prosecutor's closing argument in a capital sentencing proceeding that defendant's mitigating circumstances can be pretty much grouped into categories like "Society made me do it" or "My family made me do it" was not a misstatement of the law of mitigation or a statement of facts not in evidence but was a rebuttal of circumstances supported by defendant's evidence that he was abused by his father, that his parents were alcoholics, and that defendant was a member of an inner-city culture where illegal activities are the accepted standard. Furthermore, the prosecutor's characterization of defendant's evidence in mitigation as an "evasion of responsibility" was not an improper depreciation of mitigating evidence but was a proper comment directed toward the weight that the jury should give to defendant's evidence.

Am Jur 2d, Trial §§ 497 et seq.

29. Criminal Law § 449 (NCI4th)— capital sentencing—jury argument—race not cause or excuse

The prosecutor's closing argument in a capital sentencing proceeding to the effect that defendant's race was not the cause of his criminal behavior and should not serve as an excuse was not an improper racial comment but was only a response to testimony by defendant's expert that defendant's inner-city upbringing was, in part, a cause of his criminal behavior and did not require intervention on the part of the trial court.

Am Jur 2d, Trial §§ 283 et seq.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases. 70 ALR4th 664.

30. Criminal Law § 436 (NCI4th)— capital sentencing—jury argument—drug use after murder—comment on lack of remorse

The prosecutor's closing argument in a capital sentencing proceeding that scarcely two hours after the murder, defend-

ant was "coming out of a room with a needle in his arm, dancing to the music" was a proper comment on defendant's lack of remorse, not an improper offer of defendant's drug use as an aggravating circumstance.

Am Jur 2d, Trial §§ 497 et seq.

31. Jury § 261 (NCI4th)— peremptory challenges—reservations about death penalty

The trial court did not err in allowing the prosecutor in a capital sentencing proceeding to exercise peremptory challenges against those jurors who expressed reservations about imposing the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

32. Criminal Law § 1327 (NCI4th)— capital sentencing—duty to recommend death—pattern instruction constitutional

The pattern jury instruction that imposes a duty upon the jury to return a recommendation of death if it finds that the mitigating circumstances are insufficient to outweigh the aggravating circumstances is not unconstitutional.

Am Jur 2d, Trial §§ 888 et seq.

33. Jury § 103 (NCI4th)— capital sentencing—denial of individual voir dire and sequestration of jurors

The trial court did not err when it denied defendant's motion for individual *voir dire* and sequestration of jurors in a capital sentencing proceeding.

Am Jur 2d, Jury § 197.

34. Criminal Law § 1373 (NCI4th)— death penalty not disproportionate

A sentence of death imposed upon defendant for first-degree murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate to the penalty imposed in similar cases considering the crime and the defendant where (1) the jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the use of violence to the person, that the murder was committed while defendant was engaged in the commission of robbery, and that the murder was part of a course of conduct in which defendant engaged

and which included the use of violence against other persons; (2) the evidence tended to show that defendant came to this state to sell drugs and to commit some crime; he purposefully abstained from the use of drugs in preparation for his crime; he roamed about the High Point area looking for a suitable target and decided to rob a Western Steer restaurant; defendant forced the manager and two employees at gunpoint to go from the parking lot back into the restaurant; when the manager was unable to open the safe, defendant shot him in the leg; after the safe was finally opened, defendant threw the manager out of the way and took out two money bags; he then forced all three victims to the back of the restaurant, personally dragging the manager down the hall; defendant forced the victims to lie on the floor; and defendant rejected his companion's suggestion that they lock the victims up in the meat cooler and personally shot each of the victims in the head, killing the manager and seriously wounding the two employees; (3) defendant showed no remorse for his actions, never sought medical attention for his victims, and a short time after the murder gleefully danced to music while injecting cocaine purchased with the stolen money; (4) defendant never acknowledged his part in the murder or cooperated with the police in the investigation and had to be forced out of his Maryland home by the use of a S.W.A.T. team and a trained dog; (5) there was no evidence of any provocation or threat to defendant on the part of the victims; and (6) it is manifestly clear that defendant intended the death of all three victims and not just that of the manager.

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 Ross, J., at the 18 May 1992 Special Criminal Session of Superior Court, Guilford County. Heard in the Supreme Court 8 December 1993.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, and Gretchen Engel, North Carolina Resource Center, for defendant-appellant.

MEYER, Justice.

On 17 March 1986, defendant, Dwight Lamont Robinson, was indicted by a Guilford County grand jury for the first-degree murder of Robert Page and for robbery with a dangerous weapon. On 6 April 1987, defendant was also indicted for two counts of assault with a deadly weapon with intent to kill inflicting serious injury upon Gene Hill and Tammy Cotner. The offenses were joined for trial. On 17 September 1987, the jury returned verdicts of guilty of first-degree murder on the basis of malice, premeditation, and deliberation and under the felony murder rule. The jury also found defendant guilty of robbery with a dangerous weapon, and guilty on both counts of assault with a deadly weapon with intent to kill inflicting serious injury. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court, on 22 September 1987, imposed the sentence of death in the first-degree murder case. Defendant was also sentenced to forty years for the robbery with a dangerous weapon conviction and twenty years each for the two convictions of assault with a deadly weapon with intent to kill inflicting serious injury.

On defendant's direct appeal, this Court affirmed the convictions for first-degree murder, robbery with a dangerous weapon, and two counts of assault with a deadly weapon with intent to kill inflicting serious injury, but vacated the death sentence because of *McKoy* error, and the case was remanded for a new capital sentencing proceeding. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991). At the new sentencing proceeding, conducted at the 18 May 1992 Special Criminal Session of Superior Court, Guilford County, the jurors returned a recommendation of death. Judge Thomas W. Ross, in accordance with the jury's recommendation, imposed a sentence of death.

Defendant has brought forth fifty-four assignments of error. After a careful and thorough review of the transcript, the record, the briefs, and oral arguments of counsel, we conclude that defendant received a fair resentencing hearing, free of prejudicial error.

Except where necessary to develop and determine the issues presented to this Court arising from defendant's resentencing hearing, we will not repeat the evidence supporting defendant's convictions, as that evidence is summarized in our prior opinion on defendant's direct appeal.

JURY SELECTION ISSUES

Defendant contends that his constitutional right to a jury selected without regard to race was violated by the prosecutor's discriminatory use of peremptory strikes against potential jurors of African-American descent. In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the Supreme Court of the United States set forth a three-step process to determine if a prosecutor has impermissibly excluded jurors because of their race. First, a criminal defendant must make out a *prima facie* case of racial discrimination by the prosecutor in the exercise of peremptory challenges. *Robinson*, 330 N.C. at 15, 409 S.E.2d at 296.

In this case, the prosecutor voluntarily gave reasons for the dismissal of each of the jurors in question. Accordingly, we need not address the question of whether defendant has made a *prima facie* showing of discrimination and may proceed as if defendant has met this burden. *See id.* at 17, 409 S.E.2d at 296.

The second step in a determination of whether the State has used its peremptory challenges in a discriminatory manner requires the State to "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). It is then the trial court's responsibility to "determine whether the defendant has carried his burden of proving purposeful discrimination." *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991).

[1] Although the reasons offered by the State in support of its decision to exercise a peremptory challenge "need not rise to the level justifying exercise of a challenge for cause," *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88, they must demonstrate that the prosecutor was not excluding jurors "on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant," *id.* at 89, 90 L. Ed. 2d at 83.

[2] Factors to which this Court has looked in the past to help determine the existence or absence of purposeful discrimination include (1) " 'the susceptibility of the particular case to racial discrimination,' " *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d

144, 150 (1990) (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987), *cert. denied*, 486 U.S. 1017, 100 L. Ed. 2d 217 (1988)); (2) whether similarly situated whites were accepted as jurors, *Robinson*, 330 N.C. at 19, 409 S.E.2d at 298; (3) whether the State used all of its peremptory challenges, *Jackson*, 322 N.C. at 255, 368 S.E.2d at 840; (4) the race of the witnesses in the case, *id.*; (5) whether the early pattern of strikes indicated a discriminatory intent, *State v. Smith*, 328 N.C. 99, 124, 400 S.E.2d 712, 724 (1991); *see also State v. Jackson*, 322 N.C. at 255, 368 S.E.2d at 840; and (6) the ultimate racial makeup of the jury, *Smith*, 328 N.C. at 124, 400 S.E.2d at 712. In addition, "[a]n examination of the actual explanations given by the district attorney for challenging black veniremen is a crucial part of testing defendant's *Batson* claim." *Id.* at 125, 400 S.E.2d at 726. It is satisfactory if these explanations have as their basis a "legitimate hunch" or "past experience" in the selection of juries. *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991); *see also Porter*, 326 N.C. 489, 391 S.E.2d 14.

[3] When evaluating the prosecutor's stated reasons for dismissal, the ultimate question to be decided by the trial court is whether the prosecutor was exercising his peremptory challenges with a discriminatory intent. The United States Supreme Court has acknowledged that, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' " *Hernandez*, 500 U.S. at 365, 114 L. Ed. 2d at 409 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 83 L. Ed. 2d 841, 854 (1985)). The findings of a trial court are not to be overturned unless the appellate court is "convinced that its determination was clearly erroneous." *Id.* at 368, 114 L. Ed. 2d at 412. " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Thomas*, 329 N.C. at 433, 407 S.E.2d at 148 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985)).

In this sentencing hearing, defendant was black and his three victims were white. One of the key witnesses, Thomas Wood, was black. At the time of the sentencing hearing, defendant was thirty-one years old.

[4] Defendant raised his first *Batson* challenge when the prosecutor struck jurors Lolita Page and Evelyn Lee. At this point, the State had examined twelve jurors, eight of whom were white and four

black. The prosecutor accepted two of the black jurors and challenged two. As the basis for his exercise of the peremptory challenge, the prosecutor stated (1) that Ms. Page was a liberal arts teacher, she had a master's degree in education, and her husband was also a teacher and had been for twenty years; (2) that she had a male child sixteen years old and that she would have sympathy for defendant and not for the State; and (3) that she answered some of the questions with her arms folded and did not answer in a very direct manner. The prosecutor stated that he did not feel that she would be a juror who would be fair and impartial toward the State.

[5] With regard to Evelyn Lee, the prosecutor noted that she had stated that she was eager to attend her granddaughter's graduation from Towson State University on Thursday, that she had a doctor's appointment the following Monday, and that she had back problems that she mentioned in response to the prosecutor's question whether anyone on the jury had any problems that would interfere with his or her service as a juror. She had a male child twenty-eight years of age and another forty-one years of age. When asked if she had ever been a witness in a civil case, she confused being a witness with being a juror. In addition, she listed her age as fifty-nine but appeared to the prosecutor to be much older than that. The prosecutor concluded by stating that, given her age, her family obligations, the male children in her family, and her somewhat confused state in answering the questions, she would not be a completely fair and impartial juror in the case.

Before overruling defendant's *Batson* objection, the trial court noted that there was no *prima facie* showing of discrimination, that two of the ten jurors passed to the defendant were black, and that four of the ten passed to the State were black. Defendant made no further showing at trial regarding jurors Page and Lee. We hold that the trial court did not err in overruling defendant's objection to the State's use of its peremptory challenges for jurors Page and Lee.

[6] In his second *Batson* objection, defendant questioned the State's dismissal of juror Lyles. Prior to defendant's objection to the excusal of juror Lyles, the State had also exercised a peremptory challenge, without objection, to excuse juror Arrington. In overruling defendant's objection to the State's excusal of juror Lyles, the trial court stated:

That the Court has observed the questioning by counsel for the State of all the jurors. That the Court can distinguish no significant variance between the method of inquiry followed by the State for any juror. That there is no evidence that the jurors were asked different questions, depending on whether they were black or white.

That there are now three blacks seated on the jury. That even though the passing and seating of a black on a jury does not, in and of itself, obviate a claim for discrimination, that it is evidence of a lack of purposeful discrimination by the State.

That no questions have been asked by the District Attorney that are racial in nature, or oriented only to persons of one race.

And further, the Court would find that eleven black jurors in total have been called to the jury box. Four, including Ms. Lyles, if the Court allows, would be excused by peremptoral [sic] challenges exercised by the State, to which three have been objected by the defendant.

That three are seated on the jury, and that the remainder have been excused, without objection, by the Court for cause.

Based on these findings, the Court would conclude that the State has not engaged in any purposeful discrimination in the selection of jurors or the exercise of peremptoral [sic] challenges.

After the State was allowed to exercise its peremptory challenge of Ms. Lyles, the State volunteered the following reasons for its challenge: that Ms. Lyles had only lived at the same address for three months, that she had trouble remembering her other address, and that she was hesitant to do so. She also could not remember the name of the trucking company for which her husband had worked for three years. She had a male child seventeen years old, and the prosecutor believed that members of her family had been in trouble in the City of High Point. The State contended that her lack of attention to detail would make her unable to retain the evidence that was to come forward and that her family relations and the age of her son would cause her to sympathize with the defendant. We hold that the trial court properly denied defendant's objection to the State's use of this peremptory challenge.

[7] Defendant's third *Batson* challenge came at the State's excusal of juror McCrimmon. As reasons for Ms. McCrimmon's dismissal, the State contended that she had a pending court appearance for driving while impaired (DWI) and that it would be the district attorney's office that would prosecute her. The State further argued that she had stated that she would hold the State to a higher burden of proof in a death penalty case. When asked if she had any strong leanings one way or the other, she stated that she leaned toward life and that she did not think that she could impose the death penalty.

Counsel for defendant argued that another white juror had reported that he had been charged with DWI but had been passed by the State. The prosecutor informed the judge that it was his information that the white juror's DWI case was closed and no longer pending. The trial court noted for the record that Ms. McCrimmon indicated that her case was pending and that a court appearance had been scheduled during the time that it was anticipated the sentencing hearing would continue.

The trial court summarized the entire jury selection proceeding as it had thus far taken place and concluded as follows:

> That at this point in the jury selection, based upon the way that the jury selection has proceeded, based upon the State having passed previously black jurors which have been seated on the jury, based upon the lack of any discernible difference in the method of questioning, or any racially motivated questions or questions of a racial nature, that the Court would find and conclude that the defendant has failed to make a prima facie showing of purposeful discrimination in the jury selection process by the State.

The trial court further found that the reasons stated for Ms. McCrimmon's removal were "clear and reasonable for the exercise of a peremptoral [sic] challenge, and are related to this case." We hold that the trial court properly overruled defendant's objection to the State's excusal of juror McCrimmon.

[8] Defendant's next *Batson* challenge occurred when the State excused juror Bivens. The State's excusal of Ms. Bivens came shortly after this exchange during *voir dire*:

MR. KIMEL: Would you lean more toward life imprisonment in this particular case, just from the nature of the punishment?

MS. BIVENS: Yes.

MR. KIMEL: Do you think that your feelings or leanings in this case would substantially impair your ability to sit as a juror? In other words, make it difficult for you to sit as a juror?

MS. BIVENS: Somewhat.

After defendant objected to the State's peremptory challenge, the State offered its reasons for excusing juror Bivens, saying that Ms. Bivens equivocated on her position on capital punishment and that her leanings were toward life imprisonment. The prosecutor further noted that Ms. Bivens was separated from her husband and had a male child near the age of defendant. The prosecutor felt that defendant would probably present evidence of a broken home full of abuse and that "based on [the prosecutor's] eleven years of picking juries, in [the prosecutor's] opinion this woman would have never voted for capital punishment in this particular case or in any particular case."

The trial court adopted the findings of fact made in its ruling on the excusal of juror McCrimmon and held that defendant had failed to make a *prima facie* case of purposeful discrimination with regard to the State's excusal of juror Bivens. The trial court further ruled "that the State has indicated clear and reasonable reasons for the exercise of its peremptoral [sic] challenge relating to this case, and also has established racially neutral reasons for the challenge to the juror." We hold that the trial court did not err in overruling defendant's objection to the State's excusal of juror Bivens.

[9] Defendant's next *Batson* challenge came when the State excused juror Brooks. As reasons for Mr. Brooks' dismissal, the State first noted that in response to the jury questionnaire inquiry, "Are you presently employed, unemployed, or retired," Mr. Brooks answered "yes." The prosecutor contended that this response indicated a lack of ability to comprehend or a lack of attention to detail that would not make him a good juror.

In addition, the State pointed out that Mr. Brooks had a pending DWI charge with a court date within two weeks. Mr. Brooks

had also been convicted for nonsupport of illegitimate children and had been back to court three times since that conviction for failure to comply with court orders. The prosecutor pointed out that it was his office that had been presenting evidence against Mr. Brooks for the past five years. Finally, the prosecutor noted that Mr. Brooks was thirty-one years old, almost the same age as the defendant.

The trial court adopted the findings made in its holding regarding the excusal of juror McCrimmon and made further findings detailing the jury selection proceedings since McCrimmon's excusal. The trial court then found that defendant had not made a *prima facie* case of purposeful discrimination and held that Mr. Brooks' pending DWI charge was race-neutral, reasonable, and clearly related to the trial. The trial court also held that this reason alone would have been enough to justify the State's use of its peremptory challenge, but took further notice of the other reasons offered by the State.

We hold that the trial court properly overruled defendant's objection to the State's use of its peremptory challenges to excuse each of these jurors. Taken singly or in combination, the State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during *voir dire*. The trial court correctly ruled that the State did not exclude any jurors based solely upon their race in violation of *Batson v. Kentucky*. Defendant's assignments of error on these grounds are overruled.

[10] In defendant's next assignment of error, he contends that the trial court erred when it precluded him from inquiring if prospective jurors could consider a life sentence if, in the event he was found guilty of premeditated murder, they found that mitigating circumstances outweighed aggravating circumstances.

As support for this proposition, defendant relies upon *Morgan v. Illinois*, --- U.S. ---, 119 L. Ed. 2d 492 (1992), in which it was held that a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at ---, 119 L. Ed. 2d at 507. In the present case, defendant contends that because the trial judge sustained objections to certain of his questions to jurors,

he was denied his right to engage in the line of inquiry permitted by *Morgan*.

The first instance of which defendant complains occurred on the first day of jury selection when his counsel attempted to ask the following question:

> MR. ALEXANDER: And I ask this to the other jurors I've already talked to. Under the factual situation that I have explained to you, would you have any trouble giving—if the evidence and mitigating circumstances so warranted, and other evidence—the defendant life imprisonment. Or, under those facts or situations, would you be prone to give the defendant the death penalty?
>
> MR. KIMEL: We object to that question as it's phrased.
>
> THE COURT: Sustained.

Counsel for defendant made no attempt at that time to rephrase the question.

In his other assignment of error on these grounds, the State's objection was sustained *as to form* regarding a question that was asked at the end of three transcript pages of uninterrupted dialogue by defendant's counsel:

> Under the facts that I have stated, if you found that the mitigating circumstances were sufficient to outweigh the aggravating circumstances, could you vote for life imprisonment?
>
> MR. KIMEL: Objection to the form of the question.
>
> THE COURT: Well, sustained to the form.

Again, counsel for defendant made no attempt at this time to rephrase the question.

In *Morgan v. Illinois*, the United States Supreme Court held that a defendant must be allowed, through the use of jury *voir dire*, an opportunity "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would *always* impose death following conviction." *Morgan*, --- U.S. at ---, 119 L. Ed. 2d at 506. In *Morgan*, the defendant's question was whether the juror would "automatically vote to impose the death penalty no matter what the facts are." *Id.* at ---, 119 L. Ed. 2d at 499. The questions in this case bear little resemblance to that specifical-

ly authorized in *Morgan*. Furthermore, the State's objection was sustained only as to the form of the question, leaving defense counsel free to ask the question again in proper form.

The trial court properly sustained *as to form* the objections to these questions. The first question was simply not properly phrased; it was too broad and could properly have been viewed by the trial court as impermissible attempts to indoctrinate the prospective juror. *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) ("Counsel should not engage in efforts to indoctrinate"). The second question was predicated upon a three-page, uninterrupted, rambling recitation of hypothetical facts. The hypothetical nature and phrasing of the questions tend to cause jurors to pledge themselves to a decision in advance of the evidence to be presented and are therefore improper. *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981); *State v. Vinson*, 287 N.C. 326, 215 S.E.2d 60 (1975), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). In addition, the questions were properly objectionable as ambiguous compound questions that created a likelihood of confusing the jury.

Assuming, *arguendo*, that the trial court was required, under *Morgan*, to allow these particular questions, any error in excluding them was rendered harmless by the fact that defendant was allowed to satisfy his inquiry through further use of *voir dire* by himself and by the trial court.

Each time a group of new jurors was impaneled, the trial court gave the entire group certain instructions and asked certain preliminary questions. One example of the trial court's *voir dire* is the following exchange:

> Do any of you all have personal feelings about capital punishment, that is, about the death penalty, either for or against it, which you feel would prevent you from, or substantially impair your ability to perform the duty of a juror to fairly consider both possible punishments, life imprisonment and death? Anybody have any such personal feelings, that you think would interfere with your ability or impair your ability to fairly consider both possible punishments?
>
> (All twelve prospective jurors gave a negative response.)
>
> THE COURT: I take it, then, by your silence or the nodding of your heads—well, let me ask you, do all of you feel

> that you can fairly consider both possible punishments, life imprisonment and death, and make a recommendation of one or the other of those, based on the evidence and the law?
>
> (All twelve prospective jurors gave an affirmative response.)

Nearly identical instructions were given each time additional jurors were impaneled. After concluding its instructions and *voir dire*, the trial court passed the jury to the State and ultimately defendant for further *voir dire*.

After the trial court properly sustained the State's objection to defendant's first question at issue, defendant continued, eventually asking the same group of jurors the following question:

> I direct these questions to all members of the jury. Under the facts I have stated, if you found that the mitigating circumstances were sufficient to outweigh the aggravating circumstances, could you render a verdict of life imprisonment in this trial?
>
> (All twelve jurors gave an affirmative response.)

We thus hold that any error arising from the State's objection to the question previously put to this group of jurors was harmless beyond a reasonable doubt because defendant was allowed to satisfy his right to inquiry through further use of *voir dire*. The State's objection to the second question at issue came on the fourth day of jury selection. The record indicates that during the interim, the trial court consistently allowed counsel for defendant great latitude to inquire about jurors' feelings toward the death penalty, both as a group and individually. With regard to the group to which counsel for defendant directed the second question at issue, it had been questioned by the trial court as before, specifically, whether the jurors could consider both possible punishments. Accordingly, any error arising from the State's objection to the second question is likewise harmless beyond a reasonable doubt.

Morgan stands for the principle that a defendant in a capital trial must be allowed to make inquiry as to whether a particular juror would automatically vote for the death penalty. "Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion." *State v. Yelverton*, 334 N.C. 532, 541, 434

S.E.2d 183, 188 (1993). We hold that defendant was afforded a fair opportunity to make the inquiries specifically authorized in *Morgan*, and his assignment of error on these grounds is overruled.

[11] In his next assignment of error, defendant contends that the trial court erred when it excused juror Stacy Martin for cause. After doing so, and after excusing the remainder of the jury from the courtroom, the trial court noted the following for the record:

> The prospective juror Ms. Martin was excused by the Court for cause, having indicated, the Court would find unequivocally, opposition to capital punishment which would interfere with her ability to follow the law, and would substantially impair her in her ability to fairly consider both possible punishments.

The law with regard to whether a trial court may excuse a juror for cause based on his feelings concerning the death penalty is clear. The test is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)).

After indicating that her religious beliefs would cause her to have a "hard time deciding for capital punishment," Ms. Martin responded to the following questions:

> MR. KIMEL: Do you think that those strong moral or religious feelings or objections you have to capital punishment, do you feel like those would substantially impair your ability to sit as a juror in this case, and fairly consider both capital punishment and life imprisonment?
>
> MS. MARTIN: I think, when it came down to the end, it would.
>
> MR. KIMEL: So you are saying that you think your feelings, those moral feelings that you have, they would substantially impair your ability as a juror to follow the law that the Judge gives you?[ ]
>
> MS. MARTIN: Yes.
>
> . . . .

MR. KIMEL: All right. So what you're saying is, you feel like those religious beliefs would substantially impair your ability to be a fair and impartial juror in this case?

MS. MARTIN: Yes, sir.

After counsel for defendant objected to the State's challenge for cause, the trial court determined that Ms. Martin understood various aspects of the capital sentencing scheme and asked the following questions:

THE COURT: Do you feel that your personal feelings about capital punishment would substantially impair your ability to fairly consider both possible punishments, life imprisonment and death?

MS. MARTIN: I think so, your Honor.

THE COURT: Okay. Do you feel that you would be unable to put those personal feelings out of your mind, and make a determination on the law and the evidence?

MS. MARTIN: (Pause) I don't believe so.

THE COURT: You don't believe that you would?

MS. MARTIN: No.

Juror Martin's responses unequivocally indicate that her feelings about the death penalty would prevent her from following the law and from being a fair and impartial juror. The trial court properly excused Ms. Martin.

Defendant contends that the trial court should have explained the law to Ms. Martin or that counsel for defendant should have been allowed to rehabilitate juror Martin with further questioning about her feelings on the death penalty. However, "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. Gibbs*, 335 N.C. 1, 35, 436 S.E.2d 321, 340 (1993). Nor is there any requirement that the trial court offer any further explanation of the law of capital sentencing. Defendant's assignment of error on these grounds is overruled.

SENTENCING PROCEEDING ISSUES

[12] In his next assignment of error, defendant contends that the trial court erred when it refused to allow the jury to consider as mitigation consecutive forty-, twenty-, and twenty-year sentences imposed on defendant for crimes arising from the same transaction as the murder.

At trial, defendant requested that the following instruction be given to the jury:

> [T]he defendant has already received an 80-year sentence in this case for the following convictions: (1) robbery with a dangerous weapon whereby he received a 40-year sentence and (2) two counts of assault with a deadly weapon with intent to kill resulting in serious bodily injury in which the defendant received 20 years on each count.

As support for the submission of this instruction, defendant relies on the rule established in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978). In that case, it was held that "the sentencer [must] . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990.

In *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated*, --- U.S. ---, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *petition for cert. filed* (No. 93-7348, 29 December 1993), we held "[t]hat defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced." *Id.* at 634, 418 S.E.2d at 177. We think the same is true in the present case when defendant has been subjected to separate sentences for the offenses committed pursuant to the same crime.

Reference to additional sentences when a jury is considering a life sentence or a sentence of death necessarily injects the issue of parole into the proceedings. For information of separate sentences to have any bearing on a jury's choice between life imprisonment and death, the jury must presuppose the possibility of defendant's parole for his potential life sentence. As this Court held in *State v. Robbins*, "a criminal defendant's status under the parole laws

is irrelevant to a sentencing determination and, as such, cannot be considered by the jury during sentencing, whether in a capital sentencing procedure under N.C.G.S. § 15A-2000 or in an ordinary case." *Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *see also State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955). Nor are we persuaded that defendant should have been allowed to introduce evidence of these sentences as rebuttal to the State's use of the attendant crimes as evidence of aggravating circumstances. Defendant's assignment of error on this issue is without merit.

[13] In his next assignment of error, defendant contends that the trial court erred in failing to exclude testimony that defendant contends was prejudicially tainted by homosexual innuendo.

The prosecutor examined a police officer who gave testimony concerning defendant's whereabouts on the evening of the crimes. After testifying that he had stopped defendant's car in Winston-Salem, the following exchange occurred:

> Q. Are you familiar with the bar there in Winston-Salem, back in 1986, named Pookie's Bar?
>
> A. Yes, sir.
>
> Q. What kind of a bar was that back then, sir?
>
> A. It was a bar where a lot of homosexuals went to.
>
> Q. How far from Pookie's Bar was the defendant's car when you stopped it?
>
> A. Approximately 11 blocks.

Later, the prosecutor asked this witness about the other passengers in the car:

> Q. Were there any other people in that motor vehicle besides Mr. Robinson?
>
> A. Yes, sir, there was.
>
> Q. Would you describe the passenger in that motor vehicle to the members of the jury, please.
>
> A. Yes, sir. He was a tall, slim, black male with feminine attributes.
>
> Q. With what?

A. Feminine attributes.

Q. With feminine attributes?

A. Yes.

Later, during the presentation of the State's evidence, another witness testified that a man who was with defendant in an automobile was "a gay person."

Defendant contends that this testimony had no probative value and that the admission of the testimony was unfairly prejudicial. We disagree.

The State's principal witness, Thomas Wood, testified that the day prior to the crime, he, defendant, and a group of persons had gone from Wood's cousin's house to a "gay club" called Pookie's Lounge. During this testimony, Wood identified one of the members of the group as Frank Boozer, a gay man. Defendant did not object to the description of Frank Boozer as a gay man or to the characterization of Pookie's Lounge as a "gay club." Wood further testified that during the evening, defendant and Boozer disappeared for a period of two to three hours.

The testimony complained of by defendant on appeal effectively corroborates Wood's testimony concerning defendant's activities and location on the night prior to the crime. In addition, the testimony does not appear to be unduly inflammatory or designed to exploit any prejudice against homosexuals. We do not find it necessary, however, to engage in a detailed analysis of whether it was error to admit this testimony. Assuming *arguendo*, however, that it was error to admit this testimony, we note that defendant did not object to this testimony at trial. Accordingly, our review on appeal is limited to the question of whether the admission of the testimony constituted plain error. N.C. R. App. P. 10(c)(4). 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). Defendant has made no showing that these relatively innocuous remarks about other persons or places resulted in anything approaching this sort of injustice. Accordingly, defendant's assignment of error on these grounds is overruled.

[14] In his next assignment of error, defendant contends that the trial court erred when it sustained the State's objections to

certain questions asked by counsel for defendant during the cross-examination of Thomas Wood.

Defendant specifically assigns error to the following exchanges:

Q. Your attorney negotiated a plea, did he not?

A. Yes, he did.

Q. You weren't tried for this case, were you?

A. No, I wasn't.

Q. Sir?

A. No, I wasn't.

Q. Were you told the sentence that you could get in this case?

MR. COLE: Objection. He has to be told, Judge. By law, he has to be told.

THE COURT: Well, sustained.

Counsel for defendant attempted to ask this question twice more, but each time the State's objection, on the same grounds, was sustained. Later during Mr. Wood's testimony, the following occurred:

Q. Did you not know, when you got out of prison after the two years you were in prison for these crimes you are testifying here to today, didn't you realize that if you broke the law again, it would be a violation of your probation?

MR. KIMEL: Object to that, your Honor.

THE COURT: Sustained.

Q. Had you been advised that if you broke the law again, it could be a violation of your probation, by your probation officer?

MR. KIMEL: Objection.

THE COURT: Sustained.

Defendant contends that the testimony he sought was admissible for impeachment purposes under North Carolina Rule of Evidence 611(b). In addition, defendant contends that the trial court's failure to allow the testimony violated defendant's constitutional right to confront the witnesses against him.

Rule 611(b) states that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992). Defendant contends that the answers to the questions he was prohibited from asking would have showed that Wood was biased or unreliable.

Assuming it was error for the trial judge to exclude these particular bits of testimony, we cannot see how defendant has been prejudiced. The transcript reveals that defendant was given the opportunity to fully explore the nature and extent of any bias on the part of Thomas Wood. It was made clear on both direct and cross-examination that Thomas Wood had testified for the State at defendant's original trial as well as the present sentencing hearing. After Wood testified at defendant's original trial, he pled guilty to various charges arising from the crime at issue and was sent to prison. He was released from prison on parole but violated the conditions of his parole and was sent back to complete his original sentence as well as a sentence for unrelated convictions of forgery. Wood was in prison at the time of the second sentencing hearing but had volunteered to testify without being promised any sort of "deal" by the State. All of this was made clear through Wood's testimony.

Simply put, it was made clear that the State had no leverage over Wood to cause him to testify against defendant in this sentencing hearing. We fail to see how his answer to either of these questions could have showed any bias on Wood's part that was not clearly revealed through other examination of this witness. In addition, defendant did not attempt to preserve Wood's answers to these questions after objection by the State. Defendant is not entitled to a new sentencing hearing on these grounds.

[15] In his next assignment of error, defendant contends that the trial court erred when it refused to submit the mitigating circumstance that "[i]n a structured prison environment, Dwight Lamont Robinson is able to conform his behavior to the rules and regulations and performs tasks he is required to perform." The trial court, relying on *State v. Pinch*, 306 N.C. 1, 36, 292 S.E.2d 203, 229, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1056, 74 L. Ed. 2d 1031 (1983), *overruled in part on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), denied defendant's request.

In *State v. Pinch*, this Court held that "an opinion from a psychiatrist about whether defendant 'would be able to adjust to life in prison' . . . would have concerned a matter totally irrelevant to sentencing." *Pinch*, 306 N.C. at 21, 292 S.E.2d at 220. Subsequent to our decision in *Pinch*, however, the United States Supreme Court has held that "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2, 90 L. Ed. 2d 1, 8 n.2 (1986). Accordingly, to the extent that our holding in *State v. Pinch* conflicts with *Skipper v. South Carolina*, that case is overruled. We now hold that it was error for the trial court not to submit the mitigating circumstance requested by defendant at trial.

The failure of the trial court to submit a mitigating circumstance that is supported by the evidence does not automatically necessitate a new sentencing hearing. *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684, *reh'g denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993). In order to determine whether defendant is entitled to a new sentencing hearing, we find it helpful to engage in a brief examination of the context in which mitigating circumstances have presented themselves in the past.

In *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, the United States Supreme Court struck down an Ohio death penalty statute, stating:

> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

Id. at 608, 57 L. Ed. 2d at 992. The Court in that case reasoned that the sentencer in a capital case must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604, 57 L. Ed. 2d at 990.

This Court has had several occasions to apply the rules established in *Lockett* and its progeny. One such occasion was *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 329 N.C. 233, 404

S.E.2d 842 (1991). In that case, the defendant contended that the trial court erred when it refused to submit the mitigating circumstance that "the relationship between [the defendant] and the victim was extenuating." *Id.* at 391-92, 373 S.E.2d at 530. The trial court denied defendant's request to submit this particular mitigating circumstance but peremptorily instructed the jury that it was to find that defendant was under the influence of a mental or emotional disturbance and that

> all of the evidence tends to show that at the time of the killing the defendant was under the influence of a mental or emotional disturbance *arising out of the state of his relationship with the victim.*

Id. at 393, 373 S.E.2d at 531 (alteration in original). In finding that the trial court in *Fullwood* met the requirements of *Lockett*, we held that "the court's instructions thus clearly allowed—indeed, required—the jury to consider defendant's relationship with the victim in determining defendant's sentence." *Id.*

In *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988), *sentence vacated*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991), the defendant contended that the trial court erred when it refused to submit two nonstatutory mitigating circumstances concerning his criminal record and, instead, over defendant's objection, submitted the statutory mitigating circumstance that defendant had "no significant history of prior criminal activity." *Id.* at 310, 364 S.E.2d at 324. We held that

> [t]he submission of the mitigating circumstance "no significant history of prior criminal activity" coupled with the submission of the mitigating circumstance "any other circumstances arising from the evidence which the jury deems to have mitigating value" afforded the jury the flexibility necessary to give the defendant the benefit of any parts of his record it deemed of mitigating value. In light of the authority given to the jury to consider any and all facts of mitigating value, we conclude that the trial court properly instructed the jury regarding mitigating circumstances . . . .

Id. at 314, 364 S.E.2d at 325.

In *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765, we held that the trial court erred when it refused to submit the nonstatutory mitigating circumstance that "defendant was a positive influence

on a behaviorally-emotionally handicapped child," but concluded that this error was harmless beyond a reasonable doubt under N.C.G.S. § 15A-1443(b). *Id.* at 416-17, 417 S.E.2d at 779-80. In reaching this conclusion, we reasoned that "[t]he jury was allowed to consider and must have given full consideration to all evidence of the defendant's positive influence on the child in question when the jury considered the good character and catch-all mitigating circumstances." *Id.* at 417, 417 S.E.2d at 780. In addition, "the particular mitigating evidence supporting this particular nonstatutory mitigating circumstance was of little import, given the overwhelming evidence supporting the defendant's conviction and the aggravating circumstances found by the jury." *Id.*

In *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991), the defendant contended that the trial court erred when it refused to submit three proposed circumstances as separate mitigating circumstances and, instead, incorporated his requested instructions into the instructions for the statutory mitigating circumstances of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988), and impaired capacity to conform one's conduct to the requirements of the law, N.C.G.S. § 15A-2000(f)(6) (1988). In addition, the court in *Greene* submitted the catchall mitigating circumstance of "any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value." *Greene*, 324 N.C. at 21, 376 S.E.2d at 442. We noted that the jury was allowed to consider the evidence that had been presented with regard to his proposed mitigating circumstances and held that "the refusal to submit the proposed circumstances separately and independently was within the dictates of constitutional precedent and was not error." *Id.* at 21, 376 S.E.2d at 443.

In *Skipper v. South Carolina*, where it was held that a defendant's ability to adjust to prison life is a relevant mitigating circumstance, the defendant and his former wife were allowed to testify briefly "that [he] had conducted himself well during the 7½ months he spent in jail between his arrest and trial." *Skipper*, 476 U.S. at 3, 90 L. Ed. 2d at 5. The defendant in that case was precluded, however, from introducing the testimony of two jailers and a regular visitor "that [he] had 'made a good adjustment' during his time spent in jail." *Id.* at 3-4, 90 L. Ed. 2d at 5-6. The trial court's ruling excluding this evidence was upheld by the Supreme Court of South Carolina. *State v. Skipper*, 285

S.C. 42, 48, 328 S.E.2d 58, 61-62 (1985), *judgment reversed*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986). In reviewing the case, the Supreme Court of the United States stated that

> the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment.

Skipper, 476 U.S. at 4, 90 L. Ed. 2d at 6. It is thus apparent that the fact that the jury in *Skipper* was not allowed to hear the evidence at all was of concern to the Supreme Court. In the present case, however, the record reveals that defendant was not precluded from introducing any evidence concerning his conduct in prison or his ability to adjust to prison life.

Defendant's expert testified that she had reviewed defendant's Department of Correction custodial records and gave her opinion that

> Mr. Robinson functions quite well in the prison environment. That he is able to follow the rules on the vast majority of occasions. That he is able to get along with other inmates, sufficient to have had only one physical altercation with an inmate in four or five years in the Department of Corrections. And that he is able to live in that environment without disturbing or offending other people by his behavior.

In addition, the following mitigating circumstances, among others, were submitted to the jury:

> (4) That the defendant has a good prison record while incarcerated at Central Prison.
>
> . . . .
>
> (5) That the defendant has exhibited good behavior while a prisoner incarcerated at the Guilford County Jail in High Point, and has volunteered to serve meals to his fellow inmates and to perform other custodial duties such as mop the floor.

The trial court also submitted the catchall mitigating circumstance:

> (20) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury responded "no" to each of these, indicating that no juror found any of these circumstances to exist and have mitigating value.

Although we acknowledge that it was error for the trial court to refuse to submit the mitigating circumstance that "[i]n a structured prison environment, Dwight Lamont Robinson is able to conform his behavior to the rules and regulations and performs tasks he is required to perform," any error was harmless beyond a reasonable doubt. A thorough examination of the record demonstrates that the failure to submit the specific mitigating circumstance requested by defendant does not raise a reasonable probability that a different result would have been reached at this sentencing hearing. The jury answered "no" to the mitigating circumstances that most directly reflected the evidence presented at trial, even after defendant's expert was allowed to give her testimony in its entirety. In addition, the submission of the two mitigating circumstances dealing with defendant's conduct in prison, as well as the catchall mitigator, allowed the jury to fully consider the evidence as presented by defendant. *See State v. Hill*, 331 N.C. 387, 417 S.E.2d 765.

The jury was not precluded from considering evidence of this mitigating circumstance. The evidence that supported this factor was presented to the jury, and it was allowed to consider the evidence in the context of the mitigating circumstances submitted by the trial court. Defendant's assignment of error on these grounds is overruled.

[16] In his next assignment of error, defendant contends that it was error for the trial court to exclude the testimony of certain witnesses who would have testified to defendant's background and character. The first of the State's objections to be sustained occurred during the following testimony given by defendant's sister, Felicia Hawkins:

> Q. Ms. Hawkins, if you remember, if you recall, do you recall how your father treated you and your brothers and sisters, and Dwight specifically?
>
> A. (No response.)
>
> Q. Take your time.
>
> A. Well, my father was an alcoholic.
>
> Q. And as a result of being an alcoholic, how did he treat you?

A. If we would do anything, he would make me and my sister take our blouse off and beat us.

Q. And what did he beat you with?

MR. KIMEL: We object to what he might have done to her, your Honor, as far as that goes to mitigating factors.

THE COURT: Sustained.

Later, defendant sought to elicit testimony from his former wife:

Q. Do you know what this hearing is all about?

A. Yes, sir.

Q. What is it about?

MR. KIMEL: Object, your Honor.

THE COURT: Sustained.

Q. What is your attitude toward your husband at this time?

MR. KIMEL: Object to what her attitude is, your Honor.

Q. What is your feeling toward your husband at this time?

MR. KIMEL: Really object to that. It amounts to the same thing.

THE COURT: Sustained.

Defendant made no offer of proof at trial in order to preserve the witnesses' answers to the questions.

We note at the outset of this discussion that it is difficult to see what relevant information defendant was attempting to present through these lines of questioning, and the "context within which questions were asked" gives no indication of the particular relevance the responses may have had in preserving the rulings for review. N.C.G.S. § 8C-1, Rule 103(a)(2) (1992).

In the first instance, where defendant examined his sister, this Court cannot ascertain what relevance the father's treatment of defendant's sisters would have with regard to mitigation of defendant's crime. Although it is true that "[e]videntiary rules which would normally apply at the guilt phase of a trial do not necessarily apply with equal force at a sentencing hearing," *State v. Barts*,

321 N.C. 170, 180, 362 S.E.2d 235, 240 (1987), we have not yet abandoned all requirements for relevancy.

Even if it were possible for this Court to imagine a response to this question that would have relevance, such a response is certainly not apparent from the context of the examination. *See State v. Hester*, 330 N.C. 547, 411 S.E.2d 610 (1992). Accordingly, defendant is precluded from predicating error upon the trial court's ruling on the State's objection to the question. *See* N.C.G.S. § 8C-1, Rule 103(a)(2) (1992); N.C.G.S. § 15A-1446(a) (1988).

The same can be said in the second instance, where counsel inquired about defendant's wife's comprehension of the nature of a capital sentencing proceeding.

In the case of her attitude toward defendant, assuming *arguendo* that her attitude was relevant and would have had mitigating value, her feelings were made clear by her later testimony:

> Q. Do you ever discuss their father [defendant] with the children?
>
> A. Yes, sir.
>
> Q. In what relationship?
>
> A. I tell them that I miss their father, and that we need him. And, you know, we pray to God that he will come home, you know. It's—it's—we miss him very much, and we love him, and I know—I know a lot of people has been hurt behind this. I still don't know what it's all about.
>
> But, like, the Page family, I know they're hurting, but so is my family. Me and my kids, my kids need their father. I need my husband.
>
> I can't make up what has happened. All I can say is, I sympathize and I know what they're going through also, you know.
>
> But it's—I know it's hard on everybody that's involved. But I, you know, it's just something very hard for us to deal with.

Defendant has shown no abuse of discretion in the trial court's sustaining of the State's objections to these questions; accordingly, defendant's assignment of error on these grounds is overruled.

JURY INSTRUCTIONS

[17] Defendant lists several assignments of error with regard to the jury instructions given at the close of the evidence. In the first of these, defendant contends that it was error for the trial court to instruct the jury that it could refuse to consider mitigating evidence if the jury deemed that the evidence had no mitigating value. Specifically, defendant complains about the instructions given to the jurors with regard to their consideration of nonstatutory mitigating circumstances. The trial court instructed the jury as follows:

> Third, consider whether the defendant dropped out of school while he was in the seventh or eighth grade, and whether you deem this to have mitigating value.
>
> You would find this mitigating circumstance if you find that the defendant dropped out of school while he was in the seventh or eighth grade, and that this circumstance has mitigating value.
>
> If one or more of you finds by a preponderance of the evidence that this circumstance exists, and also is deemed mitigating, you would so indicate by having your foreperson write "Yes" in the space provided after this mitigating circumstance on the Issues and Recommendation form.
>
> If none of you find the circumstance to exist, or if none of you deem it to have mitigating value, then you would so indicate by having your foreperson write "No" in that space.

These instructions were given in substantially the same form for all of the nonstatutory mitigating circumstances that were submitted to the jury. Defendant contends that these instructions unconstitutionally permitted the jury, as sentencer, to refuse to consider relevant mitigating evidence. We disagree.

The language of the instructions clearly permits and instructs the jury to consider any evidence of the nonstatutory mitigating circumstances, as required by *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, and *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982). As this Court noted in *State v. Fullwood*, however, "neither *Lockett* nor *Eddings* requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value." *Fullwood*, 323 N.C. at 396, 373 S.E.2d at 533.

Accordingly, we rejected defendant's argument in *State v. Hill*, 331 N.C. at 418, 417 S.E.2d at 780 (no error for trial court to instruct jury that it must find whether each nonstatutory mitigating circumstance existed and then whether that circumstance had mitigating value). Defendant's assignment of error on these grounds is without merit.

[18] In his next assignment of error, defendant contends that the trial court erred when it refused to submit the statutory mitigating circumstance that "defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988).

In making the determination of whether the submission of this mitigating circumstance is warranted, the trial court must "determine *whether a rational jury could conclude* that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988) (first emphasis added). If the trial court determines that a rational jury *could* so find, it is then up to the jury to decide whether this is the case. *Id.*

We found this factor *not* to have been properly submitted *ex mero motu* in *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), and *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991).

In *State v. Stokes*, there was evidence that over a period of eight years, the defendant had engaged in five incidents of theft, three of which involved a break-in; an assault on a female; and one break-in apparently not involving theft. The defendant in *Stokes* also admitted that he had possessed, used, and sold marijuana on many occasions. *Stokes*, 308 N.C. at 653-54, 304 S.E.2d at 196.

In *State v. Artis*, there was evidence of a number of convictions, including

> assault on a female with intent to commit rape in 1957, assault on a female in 1967, assault on a female in 1974, escape and larceny of an automobile in 1961, misdemeanor larceny in 1974, driving while license revoked in 1974, 1975, and 1979, driving while under the influence in 1974 and 1979, driving with no operator's license in 1981, and assault with a deadly weapon in 1975.

Artis, 325 N.C. at 315, 384 S.E.2d at 491.

In the present case, the evidence showed that defendant had been involved in criminal activity since his adolescence. There was testimony from his wife that he had been a drug user since the age of thirteen and that he would sometimes make as much as $4,000 to $5,000 a week selling drugs. There was testimony indicating that defendant made his living selling drugs; he had been seen selling illegal drugs, including cocaine, marijuana, and PCP in the State of Maryland and in Thomasville and Winston-Salem, North Carolina.

In addition, three years prior to the murder in this case, defendant pled guilty to the robbery of a U-Haul center and two of its employees.

Finally, the jury heard the testimony of Thomas Wood, who detailed the circumstances of defendant's visit to North Carolina, how he had come down from Washington, D.C., armed with a pistol and supplied with a drug called "love-boat," marijuana laced with PCP and formaldehyde. Wood's testimony was that defendant had come to North Carolina to sell his "love-boat" for higher prices than were available in D.C. and that, while the men were on their journey to North Carolina, defendant revealed the other purpose for the venture: that he was intent on "making a lick." Defendant wandered about Winston-Salem to various liquor houses, selling drugs and using another man's driver's license as identification until it was time to rob the Western Steer.

We do not find it necessary to engage in any further comparison between this case and those cases in which we have determined the propriety of the submission or refusal to submit the circumstance at issue. We simply hold that based on the evidence of defendant's continuous, extensive, and recent involvement in criminal activity, including his use and sale of drugs and his conviction of a violent crime, no rational jury could have found that he had "no significant history of prior criminal activity." The jury, in fact, specifically found, as an aggravating circumstance, that defendant had been previously convicted of a felony involving the use or threat of violence to the person. The trial court did not err by not submitting this circumstance for the jury's consideration.

[19] In his next assignment of error, defendant contends that the jury instructions concerning the manner in which the jury was to weigh aggravating and mitigating circumstances prohibited individual jurors from considering mitigating circumstances found

by other jurors to exist. Defendant contends that the instructions are therefore unconstitutional according to *Lockett v. Ohio*, which held that a capital jury may not be precluded from considering, as a mitigating circumstance, any aspect of a defendant's character or record that he proffers as a basis for a sentence less than death. *Lockett*, 438 U.S. at 604, 57 L. Ed. 2d at 990.

The instructions at issue here are those that concerned Issue Four of the Issues and Recommendation as to Punishment form that was completed by the jury in this case. Issue Four of this form requires the jury to consider whether the aggravating circumstances, when considered with the mitigating circumstances, are sufficiently substantial to call for the imposition of the death penalty.

The instructions given to the jury with regard to how to determine this issue were as follows:

> In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstance 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.

Defendant contends that each juror should consider any mitigating circumstance found by *any* of the jurors when weighing the aggravating and mitigating circumstances and that these instructions violate the rule in *McKoy v. North Carolina* that a sentencing jury may not be precluded from giving full and free consideration to evidence of mitigation. *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We decided this issue otherwise in *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994). In that case, we stated that

> 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.

Id. at 287, 439 S.E.2d at 570. We continue to adhere to our decision in *Lee*, and for the foregoing reasoning, defendant's assignment of error on this issue is overruled.

[20] In a related assignment of error, defendant contends that this instruction, which is given to the jury in similar form for Issue Three, is flawed because it instructs the jury that it "*may* consider any mitigating circumstance or circumstances that juror determined to exist." (Emphasis added.) Defendant contends that this instruction violates the rule that a juror may not be precluded from considering mitigating evidence. However, in both Issues Three and Four, prior to those portions of the instructions about which defendant complains, the jury is first instructed that it "*must*" consider the aggravating and mitigating circumstances.

Again, this issue was decided adversely to defendant in *State v. Lee*, where we stated that

> 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.

335 N.C. at 287, 439 S.E.2d at 569-70. Accordingly, defendant's assignment of error on this issue is overruled.

[21] In his next assignment of error, defendant contends that the trial court erroneously instructed the jury with regard to the concept of mitigation. The trial court instructed the jury as follows:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but 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.

Defendant argues that by focusing the jury's attention on the killing itself, this instruction limited the jury's ability to consider defendant's character and background as a basis for a sentence less than death. We disagree. After the instruction above was given, the jury was instructed:

> Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your *duty to consider as a mitigating circumstance any aspect of the defendant's character or record*, and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstance arising from the evidence which you deem to have mitigating value.

(Emphasis added.) In addition, the jury was instructed that it should consider the catchall mitigating circumstance, "[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value."

We hold that the instructions as given, which are virtually identical to the North Carolina Pattern Jury Instructions, are a correct statement of the law of mitigation. The instructions here are identical to those instructions that we held in *State v. Artis* to be "a correct statement of the law." 325 N.C. at 326, 384 S.E.2d at 497. They did not preclude the jury from considering any aspect of defendant's character which he may have presented as a basis for a sentence less than death. Defendant has shown no basis for relief on this assignment of error.

[22] In defendant's fourth challenge to the pattern jury instructions for the weighing of mitigating and aggravating circumstances, defendant contends that the instructions given for Issue Three unconstitutionally prohibited an individual juror from considering mitigating circumstances found in Issue Two. The transcript reveals that the following instruction was given to the jury:

> Issue Three, which appears there at the bottom of Page Five, reads as follows: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is or are insufficient to outweigh the aggravating circumstance or circumstances found?"
>
> 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 the *jury* determined to exist by a preponderance of the evidence in Issue Two.

(Emphasis added.) The pattern jury instruction, which has been approved by this Court, reads: "each juror may consider any

mitigating circumstance or circumstances that the *juror* determined to exist." N.C.P.I.—Crim. 150.10, at 42 (1993) (emphasis added).

It is difficult to determine whether the use of the word "jury" as opposed to the word "juror" is a case of *lapsus linguae* on the part of the trial court or a mistake in the transcription of the trial court's instruction. In either event, any error was harmless beyond a reasonable doubt.

The jury was clearly and unambiguously instructed for each of the twenty mitigating circumstances submitted in Issue Two that only one or more of the jurors was required to find that the mitigating circumstance existed and that it was deemed mitigating. Thus, in order for the "jury" to find the existence of a mitigating circumstance, it was expressly clear that only one juror was required to find that circumstance. The jurors were then instructed in Issue Three that "[i]f you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances." No individual juror was therefore precluded in Issue Three from considering mitigating evidence that that juror alone found in Issue Two. Defendant is not entitled to a new sentencing hearing on the basis of this assignment of error.

[23] In his next assignment of error, defendant contends that the trial court erred when it failed to instruct the jury on the meaning of life imprisonment.

During the charge conference, counsel for defendant made the following request for instruction: "The defendant hereby moves the Court to instruct the jury that the term 'life imprisonment' means life imprisonment and give no other definition and explanation." The trial court denied the request but stated that "if the jury asks the question, the Court would intend to instruct them in accordance with the case law." Defendant made no further request for this instruction, nor did the jury inquire about the meaning of a life sentence.

This Court has held that if the question of eligibility for parole arises during jury deliberations, the jury is to be instructed

> that the question of eligibility for parole is not a proper matter for the jury to consider and . . . that in considering whether they should recommend life imprisonment, it is their duty to determine the question as though life imprisonment means

> exactly what the statute says: "imprisonment for life in the State's prison" . . . .

State v. Conner, 241 N.C. at 471-72, 85 S.E.2d at 587. We have not held that the jury is to be so instructed in the absence of such inquiry. To do so would unnecessarily present the issue of parole to the jury, absent any indication that the jury was considering that possibility. In addition, the instruction requested by defendant is an inaccurate statement of the law. It is not the same as the *Conner* instruction, which directs that the jury should consider the term life imprisonment "*as though* life imprisonment means exactly what the statute says." *Id.* (emphasis added). In addition, the purpose of the *Conner* instruction is to instruct the jury that it is to eliminate the possibility of parole from consideration. *Id.* To give the instruction requested by defendant and nothing more would not be in keeping with this principle.

Absent jury inquiry as to the meaning of a life sentence or an inquiry as to the eligibility of defendant for parole, the trial court should not instruct the jury as to how it is to consider the meaning of the term "life imprisonment." Defendant's assignment of error on this issue is overruled.

[24] In his next assignment of error, defendant contends that the trial court erred in denying his motion for appropriate relief filed pursuant to N.C.G.S. § 15A-1414. In his motion for appropriate relief, defendant alleged that the jury's recommendation of the death penalty was the result of juror misinformation about his parole eligibility in the event a life sentence was imposed. With his motion, defendant included affidavits from jurors, at least one of whom indicated that she believed "that Mr. Robinson would be released on parole within five or ten years" and that had she "been informed that on a first degree life sentence the defendant would not have been eligible for parole until after he had served a minimum of twenty-five years, [she] would have voted that he receive a life sentence." The trial court ruled that the affidavits were inadmissible under N.C.G.S. § 8C-1, Rule 606(b), which reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to extraneous influences that may have affected the jury's decision. *See* N.C.G.S. § 8C-1, Rule 606(b), official commentary (1986). The trial court then denied defendant's motion and ruled that "discussions about the parole eligibility of the defendant are 'internal

influences' on a jury coming from the jury themselves [sic] and cannot be considered as a basis of relief." We hold that the trial court correctly denied defendant's motion for relief.

We addressed this same question in *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681, *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). In *Quesinberry*, this Court distinguished between "external" and "internal" influences on jury deliberations. Internal influences were defined as "information coming from the jurors themselves—'the effect of anything upon [a] juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.' " *Id.* at 134, 381 S.E.2d at 687 (quoting Fed. R. Evid. 606(b)). External influences were defined as " 'information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried.' " *Id.* at 135, 381 S.E.2d at 688 (quoting *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988)). We specifically held that "allegations that jurors considered defendant's possibility of parole during their deliberations are allegations of 'internal' influences on the jury." *Id.* Again, Rule 606(b) prohibits juror testimony that impeaches a jury verdict on the basis of internal influences. As in *Quesinberry*, there are no allegations of improper external influences as being the cause of the jury's decision in this case. The trial court correctly refused to consider the affidavits of the jurors, and properly denied defendant's motion for relief on these grounds.

[25] In the alternative, defendant contends that he was entitled to at least an evidentiary hearing on his motion. We disagree. When a motion for appropriate relief is filed pursuant to N.C.G.S. § 15A-1414, an evidentiary hearing is not required, "but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." N.C.G.S. § 15A-1420(c)(2) (1988). In addition, "[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law." N.C.G.S. § 15A-1420(c)(3) (1988). In this case, the trial court correctly determined that the juror affidavits supporting the motion were inadmissible. This Court has unequivocally held that "[a]llowing jurors to impeach their verdict by revealing their 'ideas' and 'beliefs' influencing their verdict is not supported

by case law, nor is it sound public policy." *Quesinberry*, 325 N.C. at 136, 381 S.E.2d at 688. The trial court properly determined that, as a matter of law, defendant was not entitled to relief. No evidentiary hearing was required. Accordingly, defendant's assignments of error on these grounds are overruled.

In his next assignment of error, defendant contends that the trial court erred in failing to correct the prosecutor's improper closing statement, where he argued: (1) a need for the jury to kill defendant to deter crime, (2) an appeal to community sentiment, and (3) facts not supported by the evidence. Defendant also contends that the prosecutor argued a nonstatutory aggravating circumstance based on allegations of drug use and improper racial comments.

Defendant did not object to these portions of the prosecutor's argument at trial. Accordingly, our review of the arguments is limited to a determination of whether the arguments amounted to gross impropriety requiring the trial court to intervene *ex mero motu*. "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

[26] With respect to defendant's contention that the prosecutor improperly argued the need for the jury to sentence defendant to death in order to deter crime, the prosecutor argued the following:

> The Supreme Court has said that there is a rising tide of criminality. "Whether the imposition of the death penalty of any case or such a case would be futile is necessarily a matter of opinion about which reasonable and responsible minds do differ. The steadily rising tide of crimes of the most serious nature throughout the nation has occurred in an era of unprecedented permissiveness in our society, and an emphasis on sympathy for the accused rather than for the victim and those endangered by him."
>
> This is the Supreme Court talking. "This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes other than imprisonment coupled with carefully organized programs of rehabilitation designed to in-

> sure the prisoner that he has the sympathy of society is necessary to bring about the turning of the tide, the turning of the tide of cruel and vicious crimes."[1]

Defendant argues that this argument was an improper request for the jury to sentence defendant to die in order to deter the crimes of others. We have held that arguing the general deterrent effect of the death penalty to the jury is improper. *State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); *see also State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994). In so holding, however, we specifically noted that to do so was not so grossly improper that it warranted *ex mero motu* intervention by the trial court. *Kirkley*, 308 N.C. at 215, 302 S.E.2d at 155. Accordingly, even if the prosecutor's argument could be construed as argument about the general deterrent effect of the death penalty, no intervention on the part of the trial court was required. Defendant's assignment of error on these grounds is overruled.

[27] With regard to defendant's contention that the prosecutor made an improper argument appealing to community sentiment, the prosecutor argued the following:

> Now, this is your choice, this is your opportunity as jurors. You are the voice and the conscience of your community here in Guilford County.
>
> Are the illegal activities of Mr. Robinson, are they your accepted standards, or do you have different standards? If not this case for capital punishment, what case? If not this set of circumstances, what set of circumstances?
>
> Are we going to have Stratford Woods apartments, Stratford Woods law across the country and across Guilford County?
>
> . . . .
>
> Do you accept murder and robbery in your county? You speak for the community. Your verdict should reflect the com-

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1. The prosecutor's statements came from *State v. Jarrette*, 284 N.C. 625, 665, 202 S.E.2d 721, 747 (1974), *vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1206 (1976).

> munity. It shouldn't reflect what Dr. Royal thinks or anyone else thinks. It's your verdict. It's how you look at it.

Defendant contends that this argument improperly asked the jury to decide defendant's punishment based on community sentiment. *See State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985).

In *Scott*, this Court held that arguments designed to convince the jury to convict a defendant due to public sentiment against crime were improper. *Id.* at 312, 333 S.E.2d at 298. We have, however, held that a reminder to the jury that for purposes of the present trial, it acts as the voice and conscience of the community is not improper. *State v. Harvell*, 334 N.C. 356, 362, 432 S.E.2d 125, 128 (1993). In the case at hand, the prosecutor explained to the jurors that they were the voice and conscience of the community. In addition, the prosecutor told the jurors that it was their responsibility to make a decision by reminding the jurors: "It's your verdict. It's how you look at it." Thus, the State did not tell the jurors to decide defendant's punishment based on community sentiment, but rather told the jurors that they were to act as the voice of the community. Accordingly, defendant's assignment of error on these grounds is overruled.

[28] With respect to defendant's contention that the prosecutor's closing argument was not supported by the evidence, the prosecutor argued the following:

> The defendant is entitled to put on evidence of mitigating factors, factors which don't lessen the degree of the crime but, as the Judge will charge you, they will contend in some way mitigates the crime, or reduces the defendant's moral culpability for this crime, and you must consider these if any one of you finds that it [sic] does exist.
>
> And I contend to you that defendant's mitigating factors can be pretty much grouped into categories like "Society made me do it," or "My family made me do it." Nothing but a complete evasion of responsibility by this man.

Defendant contends that the prosecutor misstated the law regarding mitigation in order to frustrate and impair the jury's consideration of the evidence, specifically, defendant's deprived background, childhood, and familial relationships.

A jury has a duty to examine the character of the defendant and the circumstances of the crime in making its sentencing decision. *Zant v. Stephens*, 462 U.S. 862, 77 L. Ed. 2d 235 (1983). A jury argument is proper as long as it is consistent with the record and not based on conjecture or personal opinion. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

In the case *sub judice*, defendant's witnesses testified that defendant was abused by his father. Furthermore, Dr. Royal, defendant's expert witness, testified that defendant's parents were alcoholics and that defendant had sustained physical abuse at the hands of his father. Also, this expert witness testified that defendant was a member of an inner-city culture where illegal activities are the accepted standard.

The prosecutor attempted to rebut these factors by arguing that defendant would use them in an attempt to evade responsibility for his acts by blaming society and his family situation as a child. In so doing, the prosecutor did not misstate the law of mitigation, nor did he rely on facts not in evidence.

We are not persuaded by defendant's argument that the prosecutor's characterization of defendant's evidence in mitigation as an "evasion of responsibility" was a depreciation of mitigating evidence so improper that it required *ex mero motu* intervention by the trial court. This remark was directed toward the weight that the jury should give to defendant's evidence, and as such, the comment was not improper. *See State v. Kirkley*, 308 N.C. at 214, 302 S.E.2d at 154. Defendant's assignment of error on these grounds is without merit.

[29] Defendant's final contention concerning the prosecutor's argument is that the prosecutor's references to drugs and race were improper. With respect to what defendant contends were improper racial comments, the prosecutor argued the following:

> Well, that's fine, but he didn't have to put his culture down here with us. What this means is that anyone who is poor and black and lives in an inner city has a license to commit murder, because it's not their fault. That none of these folks can ever rise above where they start out. Because they are poor, they are black, and they come from an inner city, they have no right, they have no way, that's it.

> And they have a license to commit crime, because that's just what happens there, and there's nothing you can do about it. That's what their doctor says.

The prosecutor was responding to the testimony of defendant's expert, who gave testimony indicating that defendant's inner-city upbringing was, in part, a cause of his criminal behavior. In so doing, the prosecutor argued that defendant's race was not the cause of his criminal behavior and should not serve as an excuse. We do not find this portion of the prosecutor's closing argument to be improper, and it certainly did not require intervention on the part of the trial court.

[30] Defendant further contends that the prosecutor's assertion that defendant's use of drugs later in the evening of the murder was a factor that "calls out . . . for the imposition of the death penalty" should have been prevented by the trial court. The portion of the prosecutor's argument about which defendant complains was as follows:

> Do you recall Gary Chaney's testimony about these folks as they did the dope in the room? If I'm not mistaken, Mr. Robinson, Mr. Gantt and Mr. Wood all did their drugs intravenously by arm—you know, with a needle and works in their arm. And do you recall how he described Mr. Robinson coming out of the other room?
>
> He said, "Well, you know, he came out of the other room with a needle in his arm, dancing to the music." Now, this is a man who has just murdered a citizen, who has just shot two other people in the head. And scarcely two hours later, he's coming out of a room with a needle in his arm, dancing to the music.

The General Assembly has codified permissible circumstances in aggravation upon which a jury can recommend a sentence of death. N.C.G.S. § 15A-2000(e) (1988). Drug use is not one of these factors; thus, defendant argues that the prosecutor's argument was improper.

While lack of remorse is not a statutory aggravating circumstance, a prosecutor's comment on a defendant's lack of remorse is proper. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *sentence vacated*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand & sentence reinstated*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated*, --- U.S. ---, 122 L. Ed. 2d 113, *on remand & sentence reinstated*,

334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated*, --- U.S. ---, --- L. Ed. 2d ---, 1994 WL 287581 (30 June 1994). Reviewing this portion of the State's closing argument in context, we see that the statement, "scarcely two hours later, he's coming out of a room with a needle in his arm, dancing to the music," was offered to show defendant's lack of remorse, not to offer drug use as an aggravating circumstance. Defendant is not entitled to relief on this assignment of error.

PRESERVATION ISSUES

[31] Defendant raises three issues that he admits have been previously decided against him by this Court. In the first of these, defendant contends that the trial court erred in allowing the prosecutor to exercise peremptory challenges against those jurors who expressed reservations about imposing the death penalty. Defendant acknowledges that this issue was decided against him in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand & sentence reinstated*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 775, *reh'g denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993).

[32] In the next of these assignments of error, defendant contends that the pattern jury instruction that imposes a duty upon the jury to return a recommendation of death if it finds that the mitigating circumstances are insufficient to outweigh the aggravating circumstances is unconstitutional. Defendant acknowledges that this Court has held to the contrary in *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 308; *see also State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983).

[33] In the last of these assignments of error, defendant contends that the trial court erred when it denied defendant's motion for individual *voir dire* and sequestration of individual jurors. Defendant acknowledges that this Court has consistently denied relief on this basis. *See, e.g., State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752.

After careful consideration of each of these issues, we continue to adhere to our previous decisions and overrule each of these assignments of error.

PROPORTIONALITY REVIEW

[34] In the guilt-innocence phase of defendant's first trial, we found no error. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288. In our review of defendant's second capital sentencing proceeding, we have found no error. It is now the duty of this Court to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988).

The following aggravating circumstances were submitted to the jury:

(1) Has the defendant been previously convicted of a felony involving the use or threat of violence to the person?

. . . .

(2) Was this murder committed while the defendant was engaged in the commission of robbery?

. . . .

(3) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons?

The jury responded "yes" to each of these inquiries, thus finding these aggravating circumstances.

We have conducted a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, and we conclude that the jury's finding of each of these aggravating circumstances was supported by the evidence.

We further conclude that nothing in the record suggests that the jury sentenced defendant to death while under the influence of passion, prejudice, or any other arbitrary factor.

Our final duty is to determine whether the punishment of death in this case is proportionate to other cases in which we

have affirmed the death penalty. *State v. Jennings*, 333 N.C. 579, 629, 430 S.E.2d 188, 214-15, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 602 (1993); *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

As this Court has frequently noted, the purpose of proportionality review is to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In so doing, proportionality review serves as "a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (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).

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. McHone*, 334 N.C. 627, 646, 435 S.E.2d 296, 307 (1993) (quoting *State v. Brown*, 315 N.C. at 70, 337 S.E.2d at 829), *cert. denied*, --- U.S. ---, 128 L. Ed. 2d 220 (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)).

The pool of cases that this Court uses for comparative purposes consists of

> "*all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the

jury's failure to agree upon a sentencing recommendation within a reasonable period of time."

State v. Syriani, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983)).

We first compare the instant case to those cases in which this Court has determined the sentence of death to be disproportionate.

This Court has thus far held the sentence of death to be disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds 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).

In *State v. Benson*, the conviction was based solely on the felony murder theory; the victim died of cardiac arrest after being robbed and shot in the legs by the defendant. Only one aggravating circumstance was found: that the crime was committed for pecuniary gain. In holding that the sentence of death was disproportionate, we noted that "[f]rom the evidence it appears that [the defendant] intended only to rob; he fired at [the victim's] legs rather than a more vital part of his body." *Benson*, 323 N.C. at 329, 372 S.E.2d at 523. The defendant in *Benson* "also pleaded guilty during the trial and acknowledged his wrongdoing before the jury." *Id.* at 328, 372 S.E.2d at 523.

In *State v. Stokes*, the Court took notice of the fact that Stokes' accomplice in the crime was not sentenced to death, although they "committed the same crime in the same manner." *Stokes*, 319 N.C. at 21, 352 S.E.2d at 664. Only one aggravating circumstance was found in that case, that the murder was especially heinous, atrocious, or cruel.

In *State v. Rogers*, the only aggravating circumstance found was that the killing was part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against other persons. *Rogers*, 316 N.C. at 236,

341 S.E.2d at 732. This Court emphasized the fact that those cases in which the sentence of death was predicated on this aggravating circumstance alone involved facts considerably more egregious than those in *Rogers*. *Id.* at 236, 341 S.E.2d at 733.

In *State v. Young*, a robbery-murder case, this Court took notice that the facts of the case "more closely resemble[d] those cases in which the jury recommended life imprisonment than those in which the defendant was sentenced to death." *Young*, 312 N.C. at 688, 325 S.E.2d at 193. We specifically stated that we had reviewed the armed robbery cases in which this Court had affirmed the death penalty, but concluded that we were "convinced that defendant Young did not commit a crime as egregious as those." *Id.* at 691, 325 S.E.2d at 194.

In *State v. Hill*, the defendant shot a police officer while engaged in a struggle near defendant's automobile. We specifically found that the crime was not especially heinous, atrocious, or cruel; was not of a torturous, sadistic, or bloodthirsty nature; was not part of a violent course of conduct; was not committed in the perpetration of another felony; and that there was no evidence that the defendant calculated or planned the commission of the crime. *Hill*, 311 N.C. at 478, 319 S.E.2d at 171. In addition, we noted that some of the eyewitness testimony was "less than crystal clear," *id.*, and concluded:

> Given the somewhat speculative nature of the evidence surrounding the murder here, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being gainfully employed, and the unqualified cooperation of defendant during the investigation, we are constrained to hold as a matter of law that the death sentence imposed here is disproportionate within the meaning of G.S. 15A-2000(d)(2).

Id. at 479, 319 S.E.2d at 172.

In *State v. Bondurant*, the defendant inexplicably shot his friend in the head with a pistol after taunting the victim, saying, " 'You don't believe I'll shoot you, do you?' " *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. Immediately after shooting the victim, however, defendant directed that the victim be taken to the hospital

and accompanied him there. While at the hospital, defendant spoke with police officers about the incident. In *Bondurant*, we held that the sentence of death did " 'not rise to the level of those murders in which we have approved the death sentence upon proportionality review.' " *Id.* at 693, 309 S.E.2d at 182 (quoting *State v. Jackson*, 309 S.E.2d at 46, 305 S.E.2d at 717). We noted that defendant did not kill the victim in the perpetration of another felony, that he did not coldly calculate the commission of the crime for a long period of time, and that it was not a torturous murder. *Id.* In addition, we found it important that "immediately after he shot the victim, [defendant] 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.

In *State v. Jackson*, the defendant flagged down the victim's car and rode off with him after telling his companions that he intended to rob the man. The defendant met up with his companions later and told them that he had robbed and killed the man. The victim was later found dead in the automobile. In finding that the sentence of death was disproportionate, we emphasized the fact that there was "no evidence of what occurred after defendant left with [the victim]" in his automobile. *Jackson*, 309 N.C. at 46, 305 S.E.2d at 717.

We find no significant similarity between the instant case and those in which we have found the death penalty to be disproportionate as a matter of law.

In this case, defendant deliberately set out to rob the Western Steer Steakhouse and would not be dissuaded by his companions. There was evidence that defendant had come down from Washington, D.C., for the specific purpose of committing some crime as well as to sell drugs. His scheme was not the result of drug or alcohol intoxication; the evidence showed that he purposefully abstained from the use of drugs and alcohol on the day of the killing in order, presumably, to increase his chances for success in whatever criminal endeavor he eventually decided upon.

He roamed about the High Point area looking for a suitable target. Once he decided upon the Western Steer, he executed his deliberated plan to rob the restaurant. He surprised his victims outside the restaurant; ordered them back inside at gunpoint; and made the two teenagers, Gene Hill and Tammy Cotner, lie on the floor. He ordered the manager, Robert Page, to open the safe.

When Mr. Page was unable to open the safe, defendant shot him in the leg and forced him to continue, in tears, with his struggle to recall and correctly enter the combination. Mr. Page was finally successful in his attempts to open the safe. Defendant threw Mr. Page out of the way and took out two money bags. He then forced all three victims to the back of the restaurant, personally dragging Mr. Page, who was unable to walk due to the wound in his leg, fifty feet down the hall. Defendant forced the victims to lie on the floor. His accomplice suggested that they lock them up in the meat cooler, which was just across the room. Defendant reflected on this idea for a "minute or two" and then decided that he did not have time for that. Defendant did, however, have time to stalk about the room and, one by one, personally shoot each of the victims in the head, killing Mr. Page and seriously wounding Gene Hill and Tammy Cotner.

There is no evidence whatsoever that defendant showed any remorse for his actions or ever sought medical attention for his victims. To the contrary, the evidence shows that within hours of the murder, defendant celebrated by purchasing cocaine with the proceeds of the robbery. He disappeared into a motel bathroom to inject the drugs and emerged with the needle dangling from his arm, dancing to some music.

There is no evidence whatsoever that defendant cooperated with the police in the investigation. In fact, when it came time for his arrest, he barricaded himself in his Maryland home and had to be forced out by the use of a S.W.A.T. team and a trained dog.

The details of the event in question are not in dispute. Accounts of the crime were given by defendant's own accomplice and by the surviving witnesses to the ordeal.

Simply put, the evidence shows a senseless, brutal, and willful murder committed for the purpose of concealing defendant's own pre-planned and deliberated robbery. In addition, it is manifestly clear that defendant intended the death of all three victims, not just Mr. Page.

In this case, the jury found each of the three submitted aggravating circumstances: that defendant had been previously convicted of a felony involving the use of violence to the person, that the murder was committed while defendant was engaged in the commission of robbery, and that the murder was part of a

course of conduct in which defendant engaged and which included the use of violence against other persons.

Of the twenty mitigating circumstances submitted, the jury found nine, only one of which was a statutory mitigating circumstance.[2] The jury refused to find that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6) (1988).

As support for the proposition that his sentence of death is disproportionate, defendant argues that the majority of robbery-

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2. The jury found that the murder was committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2).

The jury found the following nonstatutory mitigating circumstances:

(7) That the defendant functions at an intellectual age of eight to ten years old, has an IQ of 70, and is borderline mentally retarded.

. . . .

(8) That the defendant has been an abuser of drugs since the age of twelve or thirteen.

. . . .

(11) That the defendant suffered during his early childhood and adolescent years as a result of a lack of love and nurturing from his parents.

. . . .

(13) That during his formative and later years as a child, the defendant suffered emotionally and mentally as a result of his parents' alcohol abuse and other behavioral problems.

. . . .

(15) That the defendant, in his early teens, was abandoned by his parents on more than one occasion, and during those occasions he assisted in the care of his siblings.

. . . .

(16) That the defendant's early developmental years were in the inner city culture, with a dysfunctional family.

. . . .

(18) That the defendant has an adjustment disorder with mixed emotions.

. . . .

(19) That the defendant has a personality disorder not otherwise specified.

murder cases have resulted in sentences of life imprisonment. We are not persuaded by this argument. It is true that our task on proportionality review is to compare the case "with other cases in the pool which are roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. However, in our assessment of whether a case is proportionate to other death-affirmed cases, this Court's attention is focused upon an "independent consideration of the individual defendant and the nature of the crime or crimes which he has committed." *State v. Pinch*, 306 N.C. at 36, 292 S.E.2d at 229. In addition, we have often stated that we reject any mechanical or empirical approach to the comparison of cases that appear superficially similar.

We have said many times that this Court does not "necessarily feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison. . . . The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977." *State v. Williams*, 308 N.C. at 81, 82, 301 S.E.2d at 356. Nevertheless, it is helpful to identify cases that bear resemblance to the instant case in certain pertinent respects.

One such case is *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). In *Oliver*, the defendant and his accomplice robbed a convenience store. The accomplice shot the shopkeeper, and as the men ran through the parking lot, the defendant shot and killed a man who was putting gas in his truck. In affirming the death penalty, this Court noted that

> [t]he motive of witness elimination lacks even the excuse of emotion. We are persuaded by the fact, as we were in *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, that the [victim's] murder was the result of a deliberate plan to seek out a business establishment to rob and, without the slightest provocation or excuse, to callously and in cold blood shoot at close range anyone unfortunate enough to be present at the time.

Id. at 375, 307 S.E.2d at 335.

The murder at issue here is even more brutal and callous than that in *Oliver*. In *Oliver*, the victim was shot as the defendants fled the scene of the crime. In the present case, the victims endured the horrendous experience of being held at gunpoint as defendant went about the task of looting the restaurant safe. In doing so,

he cold-bloodedly shot Mr. Page in the leg while the two teenagers lay on the floor, presumably wondering if defendant intended to kill them all. These fears eventually materialized when defendant moved from witness to witness, systematically shooting each in the head.

In *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493, the victims encountered the defendant as he was in the process of burglarizing the home of one of the victims. Defendant shot the first victim in the head when the victim ran over to the patio of the house. Defendant forced the second victim out of his truck and shot him in the head as well, although this victim survived. In affirming the sentence of death, we noted that "[b]oth the murder and the attempted murder were accomplished as a result of defendant's careful, cold and calculated determination that he would prefer murdering these persons to risking their being able to testify against him and possibly send him back to prison." *Id.* at 648, 314 S.E.2d at 503.

In the instant case, the facts show that defendant's determination to murder the witnesses was made after as much or more consideration than in *Lawson*. Defendant's own accomplice even suggested an alternative to their deaths, that they be put in the restaurant's meat cooler. Instead, defendant deliberately made the decision that they should all be killed.

Finally, this case appears strikingly similar to *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), in which the defendant committed an after-hours robbery and murder at a Steak and Ale restaurant in Winston-Salem. Gardner gained entry by ringing the doorbell after the restaurant had closed and forced his way in when a bartender answered the door. Once inside, he fatally shot a management trainee and the bartender, then escaped with the day's receipts.

The jury found the aggravating circumstances that the capital felony was committed for pecuniary gain and that the murder was part of a course of conduct involving the use of violence against another person. The jury also found the mitigating circumstances that defendant's prior family history would reasonably be expected to contribute to the crime and that his drug and alcohol addiction or abuse would reasonably be expected to contribute to the defendant's criminal conduct. In affirming the sentence of death, this

Court characterized the murders as "part of a violent course of conduct, and were coldblooded, calculated, and senseless." *Id.* at 514, 319 S.E.2d at 607.

Noteworthy dissimilarities between *Gardner* and the present case only serve to reinforce our determination that the sentence of death in this case is not disproportionate. Unlike defendant here, Gardner confessed to the killings and said that he had shot the first victim because he thought he may have had a weapon in his hand. He also stated "that he and his companion had been injecting 'crystal meth' into their arms earlier that evening." *Id.* at 495, 319 S.E.2d at 596.

In contrast, defendant in the present case never acknowledged his part in the murders. There was no evidence whatsoever of any provocation or threat to defendant on the part of the victims. The most pertinent references to drug use on the day of the murders concerned defendant's purposeful abstention in preparation for his crime and his later gleeful injection of cocaine purchased with the stolen money.

We hold that the sentence of death in this case is not disproportionate and decline to set aside the death penalty imposed.

In summary, we have carefully reviewed the transcript of this sentencing proceeding as well as the record, briefs, and oral arguments of counsel. We have addressed all of defendant's assignments of error and conclude that defendant received a fair sentencing proceeding free from prejudicial error before an impartial judge and jury. The convictions and the aggravating circumstances are fully supported by the evidence. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. HARVEY LEE GREEN, JR.

No. 385A84-3

(Filed 6 May 1994)

1. **Jury § 141 (NCI4th)— murder—sentencing—jury selection—questions concerning parole eligibility**

The trial court did not err during jury selection for a first-degree murder sentencing hearing by denying defendant's motion to permit questioning of prospective jurors about their beliefs concerning parole eligibility and by denying defendant's request for an instruction on parole eligibility. Defendant failed to assert a convincing basis for the Supreme Court to abandon its prior authority on the issue of questioning or informing jurors with regard to potential parole eligibility; N.C.G.S. § 15A-2002, upon which defendant relies, applies prospectively only; and parole eligibility is not mitigating since it does not reflect on 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.

Am Jur 2d, Jury §§ 197, 201, 202.

2. **Jury § 153 (NCI4th)— murder—sentencing—jury selection—death qualification**

The trial court did not err during jury selection for a first-degree sentencing hearing by permitting the prosecutor to ask prospective jurors certain questions for the purpose of death qualifying the jury. The questions employed by the prosecutor were appropriately tailored to apply the standard of *Wainwright v. Witt*, 469 U.S. 424, with regard to each juror and the court did not err in allowing the State's questions to form the basis for excusal for cause.

Am Jur 2d, Jury §§ 197, 201-203, 290.

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

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

3. Jury § 150 (NCI4th)— first-degree murder—sentencing—jury selection—rehabilitation of jurors

The trial court did not err during jury selection in a first-degree murder sentencing hearing by refusing to allow defendant to attempt to rehabilitate prospective jurors who were excused for cause on the basis of their opposition to the death penalty. All of the jurors excused for cause after answering the prosecutor's questions had stated unequivocally that they would be unable to follow the law and recommend a sentence of death even if that was what the facts and circumstances required.

Am Jur 2d, Jury §§ 197, 201-203, 290.

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

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

4. Jury § 150 (NCI4th)— first-degree murder—sentencing—jury selection—rehabilitation of particular juror

The trial court did not abuse his discretion during jury selection for a first-degree murder sentencing hearing by not allowing defendant to rehabilitate a particular prospective juror whom the State sought to excuse due to her views on the death penalty. Although it is error for a trial court to enter a general ruling that, as a matter of law, a defendant will never be allowed to attempt to rehabilitate a juror, and although a blanket forecast of intent to deny any motion to rehabilitate is not the wisest course, there was nothing in the trial judge's statements concerning defendant's motions or his rulings which indicates that he was not ruling in the exercise of his discretion.

Am Jur 2d, Jury §§ 197, 201-203, 290.

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

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

5. Jury § 64 (NCI4th)— first-degree murder—jury selection—motion to excuse prospective jurors for misconduct—made in presence of other prospective jurors

There was no error during jury selection for a first-degree murder sentencing hearing where defendant moved that the entire panel be excused for misconduct after two prospective jurors were excused for reading a newspaper in the waiting area. Although defendant contended that there was error in that he was required to make the motion in the presence of the prospective jurors, the motion was heard only by the two prospective jurors who had been excused for cause but told to stay in the courtroom. No juror who heard the case could have heard the motion.

Am Jur 2d, Jury § 227.

6. Jury § 145 (NCI4th)— first-degree murder—sentencing hearing—jury selection—knowledge of previous death sentence

The trial court did not abuse its discretion during jury selection for a first-degree murder resentencing by denying defendant the opportunity to ask a potential juror whether he knew that the defendant had previously been sentenced to death when the juror revealed that he had been exposed to pretrial publicity about the case. The record in the present case shows that counsel had sufficient information upon which to base a peremptory challenge in that the juror identified the sources of his information, including an article of a few days past, and counsel for the defendant had shown familiarity with all of the publicity about the case when making earlier motions. Additionally, the trial court subsequently allowed counsel for the defendant to ask other prospective jurors whether they knew the outcome of the defendant's prior trial and counsel for the defendant could have returned to the prospective juror in question and attempted to raise this issue with that juror again. Furthermore, the juror stated unequivocally that he could base a sentencing recommendation entirely and completely upon the evidence which was presented at the capital sentencing proceeding without regard to what he had read in the newspaper or seen on television.

Am Jur 2d, Jury §§ 197, 201-203, 290.

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

7. Jury § 194 (NCI4th)— first-degree murder—sentencing—jury selection—knowledge of previous sentence—no excusal for cause

The trial court did not err during jury selection for a first-degree murder resentencing by denying defendant's motion to excuse for cause a juror who revealed that he was aware that the defendant had previously been sentenced to death for the same crimes. Knowledge of a prior sentence is not *per se* a reason for excusal and the juror stated that he could decide the case on the evidence.

Am Jur 2d, Jury §§ 265 et seq.

8. Criminal Law §§ 1312, 1337 (NCI4th)— first-degree murder—sentencing—evidence of prior attempted rape—General Court Martial

The trial court did not err in a sentencing hearing for first-degree murder by submitting evidence of a prior attempted rape conviction, submitting the aggravating circumstance of a prior felony involving violence, or in its instructions where the State submitted evidence that defendant had been convicted by General Court Martial of attempted rape. Attempted rape is a felony under North Carolina law, as well as under military law, and, since the military courts have held all rapes to be crimes of violence under military law, and all attempts to commit rape therefore by definition involve the use or threat of force, there was no need to consider whether there is a non-violent crime of attempted rape under North Carolina law. The evidence presented concerning the prior felony was proper and sufficient to establish that the defendant had been convicted of a prior felony involving the use or threat of violence to the person and the court's instruction did not constitute an impermissible conclusive presumption as it permitted the jury to make the determination as to whether defendant had been convicted. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598 et seq.; Evidence § 328.

9. Criminal Law § 1314 (NCI4th)— first-degree murder—sentencing hearing—plea bargain

The trial court did not err in a first-degree murder resentencing by failing to strike plea agreements in which the State accepted guilty pleas to felony murder only. The plea bargain served only to limit the maximum time the defendant would serve in prison *if the jury failed to recommend a sentence of death* and did not "suppress" an aggravating circumstance supported by evidence or otherwise limit the sentence the jury could recommend for first-degree murder.

Am Jur 2d, Criminal Law §§ 598 et seq.; Evidence § 328.

10. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing hearing—mitigating circumstance—guilty plea

The trial court did not err in a sentencing hearing for first-degree murder by failing to give peremptory instructions on the nonstatutory mitigating circumstance that the defendant had pled guilty to both murder charges where the instruction specifically requested North Carolina Pattern Jury Instruction 150.11, which relates to peremptory instructions with regard to statutory mitigating circumstances. The law which should be imparted to a jury when giving peremptory instructions on *nonstatutory* mitigating circumstances is that before a juror "finds" a *nonstatutory* mitigating circumstance, he or she must make two preliminary determinations: (1) that the evidence supports the factual existence of the circumstance, *and* (2) that the juror deems the particular circumstance to have mitigating value in the case in question.

Am Jur 2d, Criminal Law §§ 598 et seq.

11. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—mitigating circumstances—"may" rather than "must"

The trial court did not err in a sentencing hearing for a first-degree murder by instructing the jury that they "may" rather than "must" find mitigating circumstances. The instruction given here is correct and would be interpreted by any reasonable juror as meaning that all "found" mitigating circumstances must be considered.

Am Jur 2d, Criminal Law §§ 598 et seq.

12. Criminal Law § 877 (NCI4th)— first-degree murder—sentencing—jury deliberations—jury note that one juror does not believe in capital punishment—instructions

The trial court did not err when sentencing defendant for first-degree murder where the jury sent a note to the court after deliberations began indicating that one juror had not understood the questions during jury selection and did not believe in capital punishment, the court called the entire jury into the courtroom and told the jury that the matter could not then be addressed and that the jury must continue its deliberations with a view toward reaching a verdict if it could without violence to individual judgment. The trial court insured that no juror would be embarrassed or pressured in open court by not reading the note aloud and emphasized that the deliberations should continue without violence to individual judgment.

Am Jur 2d, Trial §§ 1054 et seq.

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

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)—modern cases. 97 ALR3d 96.

13. Criminal Law § 878 (NCI4th)— first-degree murder—sentencing—deliberations—further instruction on unanimity

The trial court did not err in a sentencing hearing for two first-degree murders where the jury sent the court a note during deliberations asking if the jury decision had to be unanimous on both recommendations and the court instructed the jury that any recommendation they made as to sentencing must be unanimous. The jury did not inquire as to what would result if it failed to reach a sentencing recommendation, but merely inquired as to whether it must be unanimous to make such a recommendation. Furthermore, the jury sent another note to the judge eighteen minutes later indicating that they were unable to reach a unanimous decision in either case. There is no need to speculate as to whether the instructions were misleading or led to a coerced verdict; the jurors clearly

understood that they could report that they were unable to reach a unanimous decision in either case.

Am Jur 2d, Trial §§ 1054 et seq.

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

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)—modern cases. 97 ALR3d 96.

14. Criminal Law § 881 (NCI4th)— first-degree murder—sentencing—deadlocked jury—Allen charge

The trial court did not err during jury deliberations at a first-degree murder sentencing hearing where the jury indicated its inability to reach a unanimous recommendation and the court gave an instruction substantially similar to the *Allen* charge which called the jury's attention to the fact that "[a]ll of us have a considerable amount of time in this case." The sentence complained of, when read in conjunction with the next sentence of the instructions, simply suggested to the jury that they had devoted a substantial amount of time to the defendant's cases, that they were to be commended for their diligence, and that they should continue to deliberate if a recommendation was possible. Further, throughout the charge the trial court continually reminded the jurors to avoid "violence to individual judgment," "decide the case for yourself," and "not to surrender your honest convictions . . . *for the mere purpose of making a recommendation.*" The essence of the instructions was merely to ask the jury to continue to deliberate. N.C.G.S. § 15A-1235.

Am Jur 2d, Trial §§ 1054 et seq.

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

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge)—modern cases. 97 ALR3d 96.

15. Criminal Law § 881 (NCI4th)— first-degree murder—sentencing—supplemental instructions—not coercive

The trial court did not err in a first-degree murder prosecution in supplemental instructions which defendant contended a reasonable juror would likely interpret as meaning that the law requires unanimity and jurors who are in disagreement are not following the law. The complained of remarks merely reminded jurors of their prior instructions and were followed almost immediately by the trial court's specific direction to jurors that they should not surrender their honest convictions or compromise their convictions "for the mere purpose of making a recommendation."

Am Jur 2d, Trial §§ 1054 et seq.

16. Criminal Law § 1363 (NCI4th)— first-degree murder—mitigating circumstances—model prisoner

There was no prejudicial error in a sentencing hearing for first-degree murder where the trial court refused to submit the mitigating circumstance that defendant will continue to adjust well to prison life and be a model prisoner. Although the evidence was sufficient to support submission of this circumstance, which the Supreme Court of the United States has held to be relevant to the sentencing determination, all of the jurors rejected both defendant's present model prisoner status and his prior model prisoner status at Levenworth. All of the evidence tending to support the circumstance not submitted was considered by the jury under those submitted circumstances and under the catch-all circumstance.

Am Jur 2d, Criminal Law §§ 598 et seq.

17. Criminal Law § 1363 (NCI4th)— first-degree murder—mitigating circumstances—good student

The trial court did not err in a first-degree murder sentencing hearing by not submitting the nonstatutory mitigating circumstance that defendant was "a quiet student in school and was not a discipline problem" where two of defendant's teachers testified to that effect but it was uncontroverted that defendant was expelled from high school due to fighting and for that reason joined the army.

Am Jur 2d, Criminal Law §§ 598 et seq.

18. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—killing not premeditated and deliberated

The trial court did not err during a sentencing hearing for first-degree murder by failing to submit the nonstatutory mitigating circumstance that defendant did not kill after premeditation and deliberation. The fact that the defendant pled guilty to the first-degree murders under the felony murder theory and was neither tried nor convicted of those crimes on the theory of premeditation and deliberation is not mitigating; felony murder and premeditation and deliberation reflect notions of equivalent blameworthiness or culpability. Moreover, a mitigating circumstance must be established by evidence and to the satisfaction of the jury. There was no evidence tending to show that the defendant did not act with premeditation and deliberation and evidence was introduced which supported the premeditation and deliberation theory of first-degree murder.

Am Jur 2d, Criminal Law §§ 598 et seq.

19. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—no intent to kill—did not enter building with weapon

There was no prejudicial error in a first-degree murder prosecution where the court refused to submit as possible nonstatutory mitigating circumstances that the defendant did not intend to take the lives of the victims and did not enter the building where they were killed with the weapon which was used to take their lives. There were self-serving portions of a statement defendant made to the police which did tend to support these circumstances; however, the evidence supporting these circumstances was fully argued to and impressed upon the jury by counsel for the defendant during their closing arguments. The jurors must have considered all of this evidence when they considered and in fact found the catch-all mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598 et seq.

20. Criminal Law § 452 (NCI4th)— first-degree murder—sentencing hearing—argument of prosecutor—two murders, one life sentence

A defendant in a first-degree murder prosecution was not denied a fair capital sentencing hearing where the prosecutor argued to the jury that defendant would "get two for the price of one" if he was given life rather than death for two killings. Although defendant contends that this argument was a misstatement of the law because the prosecutor knew that there was the possibility that the defendant would suffer additional punishment for a second life sentence as a result of having his parole eligibility date extended, the argument appears to have been properly directed to the question of the weight the jury should give the course of conduct aggravating circumstance; assuming error, however, there could have been no prejudice because counsel for defendant had made similar statements during their questioning of jurors during jury selection.

Am Jur 2d, Trial §§ 229, 497 et seq.

21. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—jury's responsibility

A first-degree murder defendant was not denied a fair sentencing hearing where the prosecutor argued that the jury was deciding and weighing factors rather than the sentence of life or death, but also spoke of the difficulty of the decision. Taken in context, the closing argument clearly and properly stated to the members of the jury that the ultimate responsibility for a sentencing decision rested with them and with no one else.

Am Jur 2d, Trial §§ 225 et seq.

22. Criminal Law § 438 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—model prisoner and college student

A first-degree murder defendant was not denied a fair sentencing hearing by the prosecutor's disparaging references in closing arguments to defendant's status as a model prisoner and to the fact that he was attending college where the pros-

ecutor's comments were direct responses to specific arguments made by counsel for the defendant.

Am Jur 2d, Trial §§ 497 et seq.

23. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument concerning victims

There was no error requiring the trial court to intervene ex mero motu in a first-degree murder sentencing hearing where the prosecutor argued that the victims, who had been killed at 6:00 p.m. at a dry cleaner's, had been at the same place "you and I might be." Although defendant contended that the prosecutor asked the jurors to put themselves in the victims' place, the prosecutor was arguing that the victims' behavior did not invite attack, they were not at a place where an attack could reasonably be anticipated, were not careless, and were merely engaging in activity common to all humanity.

Am Jur 2d, Trial §§ 497 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

24. Criminal Law § 1056 (NCI4th)— first-degree murder—sentencing—motion for allocution denied—no error

The trial court did not err in a first-degree murder sentencing hearing by denying defendant's motion for allocution. A defendant does not have a right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding; the only remnant of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered. N.C.G.S. § 15A-1334 has no application to capital sentencing proceedings which are conducted pursuant to N.C.G.S. § 15A-2000. There is no constitutional need, much less requirement, for a right of a defendant to make unsworn factual statements to the jury during a capital sentencing proceeding without being subject to cross-examination because the defendant is allowed to take the stand and testify.

Am Jur 2d, Criminal Law § 531.

Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d 1292.

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

A death sentence for two murders during a robbery was not disproportionate where the record supports the aggravating circumstances found by the jury, there is no indication that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary consideration, and the case falls within the class of cases in which the death penalty was previously upheld.

Am Jur 2d, Criminal Law § 628.

Appeal of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from two judgments imposing sentences of death entered by Brown, J., on 3 September 1992 in the Superior Court, Pitt County. Heard in the Supreme Court on 16 November 1993.

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

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

MITCHELL, Justice.

The defendant pled guilty, solely on the basis of the theory of felony murder, to the first-degree murders of Sheila Bland and Michael Edmondson and to two counts of common law robbery. A capital sentencing proceeding was conducted pursuant to N.C.G.S. § 15A-2000, and the jury recommended that he be sentenced to death for each murder. The trial court entered judgments of death in accord with the jury's recommendations and arrested judgment in the robbery cases. The defendant appealed.

This Court remanded the case to the Superior Court, Pitt County, for a hearing as to whether the defendant's rights had been denied by racial discrimination in selecting the jury contrary to the principles set forth in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). *State v. Green*, 324 N.C. 238, 376 S.E.2d 727 (1989). A hearing was held, after which the Superior Court concluded that there had been no racial discrimination in the selection of the defendant's jury. The case was then returned to this Court.

We remanded the case to the Superior Court a second time for a further hearing on the *Batson* issue. It made further and more detailed findings of fact and again found no *Batson* error. The case was again returned to this Court.

The State then filed a motion in which it conceded prejudicial error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), and moved that the defendant receive a new capital sentencing proceeding. This Court ordered the case remanded to the Superior Court, Pitt County, for that purpose. *State v. Green*, 329 N.C. 686, 406 S.E.2d 852 (1991).

A new capital sentencing proceeding was held. As to both murders the jury found the statutory aggravating circumstances that:

(1) The defendant had been previously convicted of a felony involving the use or threat of violence.

(2) The murder was committed for pecuniary gain.

(3) This murder was part of a course of conduct in which the defendant engaged and the course of conduct involved another crime of violence against another person.

The jury also found seven mitigating circumstances. The jury again recommended sentences of death for each of the two first-degree murders, and the trial court entered judgments accordingly. The defendant appeals to this Court as a matter of right from the judgments sentencing him to death for each of the first-degree murders.

On 19 December 1983, Michael Edmondson and Sheila Bland were beaten to death at Young's Cleaners in Bethel, North Carolina during a robbery. On 16 January 1984, the Grand Jury of Pitt County returned true bills of indictment charging the defendant, Harvey Lee Green, Jr., with first-degree murder for each of these killings.

The State's evidence introduced during the capital sentencing proceeding tended to show, *inter alia*, the following. On 19 December 1983, Sheila Bland, a seventeen-year-old high school senior, was working as a cashier at Young's Cleaners. She came to work at approximately 1:00 p.m. At 6:00 p.m. she was to close the cleaners, lock the doors and leave.

John Michael Edmondson, then thirty-three years old, was the organist for Bethel United Methodist Church. On the afternoon of 19 December 1983, choir practice for an upcoming Christmas play at the church ended a little before 6:00 p.m. Michael Edmondson told Holly Teeterson that he had to be somewhere by 6:00 p.m. and left the church. The church is just across the street and around the corner from Young's Cleaners.

Lynn Rogerson had dinner on 19 December 1993 at Da-Nite Cafe and afterwards, at just after 6:00 p.m., she started to go into the cleaners to leave some laundry. She looked through the windows of the cleaners and noticed that the lights were on but that Sheila Bland was not sitting behind the counter where she usually sat. No one appeared to be in the cleaners.

About 6:45 p.m., Mrs. Frances Young, a co-owner of the cleaners, drove by and noticed that the lights were on but that no one was in the front. When Mrs. Young went to the door of the cleaners, it was unlocked and she entered. Nothing appeared out of place or unusual in the front of the building. She called for Ms. Bland and then went to the back of the building. She looked over a partition and saw the bodies of Ms. Bland and Mr. Edmondson lying face down in a pool of blood. Their heads were "right up against the partition." Mrs. Young then called for help. When the rescue squad and police arrived, both victims were dead. The bodies were lying roughly parallel to each other, directly behind the partition. They were lying in pools of blood and had obvious head wounds. The cleaners itself showed no other signs of any disturbance.

Mr. Edmondson had died as a result of a trauma to his head causing skull fractures and bruising of the brain. That injury had been produced by a stiff rod-like instrument. Ms. Bland's death was the result of blows to the head causing fractures and contusions of the brain. Incomplete manual strangulation had contributed to her death.

Sometime between 7:30 and 8:00 p.m. on the evening of 19 December 1983, the defendant went into the Whitehurst grocery near the cleaners. A few minutes later, the people in the grocery learned about the murders at Young's Cleaners and went down the street to see what had happened. A search of the cleaners revealed that the rolled coins kept in a bank bag under the counter had been taken. The electric cash register had not been opened. A length of pipe used by the pressers and ordinarily placed on

one of the machines in back of the cleaners was also missing. The night of the murders, the defendant presented several dollars worth of rolled pennies to Joe Suggs at Whitehurst grocery in exchange for paper money.

On 30 December 1983, the Bethel police recovered a piece of pipe from the yard of a residence located between the cleaners and the defendant's residence. The pipe tested positively for blood. Hair on the pipe was consistent with that of Michael Edmondson.

On 31 December 1983, officers of the SBI and the Bethel Police Department spoke to the defendant about the rolled coins he had exchanged for bills on the night of the murders. The defendant Green admitted to the officers that on one occasion he had used rolled coins, but he denied having gone to the cleaners at any time on 19 December 1983 or committing the two murders. He allowed officers to look at the clothes and shoes he claimed he had worn on that night.

On 1 January 1984, the defendant was again questioned. He again denied involvement in the murders. Special Agent Godly then spoke with the defendant for about an hour. The defendant gave Godly a statement to the effect that he had used a toy gun to rob the cleaners. He said that Ms. Bland had been alone at first. When Mr. Edmondson came in, the defendant turned around to see who had entered. Ms. Bland jumped over the counter onto the defendant's back, and Mr. Edmondson struggled with the defendant. The defendant then flipped Ms. Bland off of his back, subdued Mr. Edmondson, and made the two victims get down by the counter. He took the coins from under the counter and then went back and demanded money from the victims. Mr. Edmondson gave him twenty dollars, but then struggled with him again. In the struggle, the defendant grabbed a pipe and used it to beat Mr. Edmondson. Ms. Bland started screaming, and the defendant told her to stop. When she did not, he hit her with the pipe. The defendant tried to get Mr. Edmondson to open the cash register for him. The defendant then beat the victims with the pipe. Thereafter, he took the rolled coins, left the building, and hid the pipe in some bushes. The defendant told Godly that he never meant to hurt anyone.

Godly called in another agent of the SBI and the Police Chief of Bethel who took a similar but more detailed statement. The defendant explained that he had committed the robbery because

he needed money to pay off checks he had forged. He had thought that he could get at least half of the money he needed from the cleaners. He stated that on the day of the murder he had shared a pint of wine with his brother, his brother's girlfriend, and George Purvis. He clarified that he took the victims to the back behind the partition after having scuffled with them in the front of the cleaners.

After completing his statement, the defendant accompanied officers to his home where he gave them the pants he had worn on the night of the murders. They had minute blood splatters on the front of both legs. The defendant also showed the officers where he had hidden the pipe.

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

[1] In an assignment of error the defendant contends that the trial court erred by denying his motion to permit questioning of prospective jurors about their beliefs concerning parole eligibility and by denying his request for an instruction on parole eligibility. The defendant argues that because the General Assembly has recently amended N.C.G.S. § 15A-2002 to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life (1993 N.C. Session Laws Ch. 538, § 29), he was entitled to such an instruction in this case. We disagree.

First, the defendant has failed to assert a convincing basis for this Court to abandon its prior authority on the issue of questioning or informing jurors with regard to potential parole eligibility of a defendant. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *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 582, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991); *State v. Price*, 326 N.C. 56, 338 S.E.2d 84, *sentence vacated*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *mandate reinstated*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated*, --- U.S. ---, 122 L. Ed. 2d 113 (1993), *mandate reinstated*, 334 N.C. 615, 433 S.E.2d 746 (1993); *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). Second, the legislation the defendant relies upon applies prospectively only. As the legislation was not

made to apply retroactively, it has no effect in this case. Finally, parole eligibility is not mitigating since it does not reflect on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 6 (1986). This assignment of error is therefore overruled.

[2] By another assignment of error, the defendant contends that the trial court erred in permitting the prosecutor to ask prospective jurors inappropriate and misleading questions for purposes of "death qualification" during the jury *voir dire*. The defendant contends that the questions asked did not reveal any jurors who were excusable as a matter of law and the trial court erred in excusing jurors on the basis of their answers to these questions. We disagree.

The prosecutor asked each prospective juror five general questions: (1) if the juror had any personal or moral beliefs against the death penalty; (2) if the juror could conceive of any first-degree murder case where the juror believed the death penalty would be the right and correct punishment; (3) if, after examining the aggravating and mitigating circumstances, the juror was satisfied from the law that the death penalty was called for, would the juror in good conscience to his own beliefs be able or unable to recommend a sentence of death; (4) could the juror vote for the death penalty knowing the juror had to go back into court and be polled; and (5) if the juror could sign the sentence recommendation if selected as foreman. If potential jurors indicated an inability or reluctance to recommend a death sentence, the prosecutor, prior to challenging for cause, would ask if that inability was without regard to the facts and circumstances of the case. The defendant only objected to the third question due to its hypothetical nature.

The test for determining whether a prospective juror may be properly excused for cause for his views on the death penalty is whether those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985); *accord, e.g., State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). The questions employed by the prosecutor were appropriately tailored to apply the *Witt* standard with regard to each juror. The trial court did not err in allowing the

State's questions to form the basis for excusal for cause under *Witt*. *See, e.g., State v. Jennings*, 333 N.C. 579, 595-96, 430 S.E.2d 188, 194-95, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 602 (1993); *State v. Syriani*, 333 N.C. 350, 371, 428 S.E.2d 118, 128 (1993).

We have recognized that a prospective juror's bias may not always be "provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

> [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

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

Both the defendant and the State have the right to question prospective jurors about their views on capital punishment. *E.g., State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985). The extent and manner of such an inquiry, however, lies within the trial court's discretion. *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992). "A challenge for cause . . . may be made by any party on the ground that the juror . . . [a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (1988). The ruling of the trial court will not be disturbed absent abuse of discretion. *Wilson*, 313 N.C. at 526, 330 S.E.2d at 458. Here, the trial court did not abuse its discretion in excusing the prospective jurors for cause.

[3] The defendant also asserts as error under this assignment the trial court's refusal to allow him to further question or attempt to "rehabilitate" the prospective jurors who were excused for cause on the basis of their opposition to the death penalty. "The defendant is not allowed to rehabilitate a juror who has expressed unequivocal

opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. The reasoning behind this rule is clear. It prevents harassment of the prospective jurors based on their personal views toward the death penalty." *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990).

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

State v. Brogden, 334 N.C. 39, 45, 430 S.E.2d 905, 909 (1993) (quoting *State v. Bock*, 288 N.C. 145, 156, 217 S.E.2d 513, 520 (1975), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976)).

Our review of the record indicates that all of the jurors excused for cause after answering the prosecutor's questions had stated unequivocally that they would be unable to follow the law and recommend a sentence of death, even if that was what the facts and circumstances required. Therefore it was not error for the trial court to deny the defendant's request to attempt to rehabilitate those jurors. This assignment of error is overruled.

[4] By another assignment of error, the defendant contends that the trial court committed reversible error by holding as a matter of law that the defendant could not be allowed to attempt to rehabilitate prospective Juror Morris whom the State sought to excuse for cause due to her views concerning the death penalty. The record before us does not demonstrate that Judge Brown, who presided over this sentencing proceeding, was ruling as a matter of law when he refused to allow the defendant to attempt to rehabilitate prospective Juror Morris. It is true that another Superior Court Judge, in a motion hearing prior to this sentencing proceeding, denied a general motion by the defendant that he be allowed to seek to rehabilitate all prospective jurors before they were excused for cause for their views on the death penalty. At the beginning of the defendant's sentencing proceeding, however, the defendant renewed this six-page motion which culminated with his request that "the court enter an order allowing counsel for Defendant to ask further questions (i.e., rehabilitate) any juror challenged by the State for cause." Although the written motion seems to have requested that the trial court rule in the defendant's

favor on this motion as a matter of law, the oral arguments in support of the motion by counsel for the defendant clearly revealed that counsel was addressing the trial court's discretion. Counsel for the defendant expressly stated: "I don't know how Your Honor handles that. Seems like each judge is different on what he allows. But we filed that . . . motion. I don't know whether I could get some guidance from the bench on that." Judge Brown denied the defendant's written motion for a blanket order granting him the right to attempt to rehabilitate each and every juror challenged for cause due to the juror's views on the death penalty. Judge Brown then indicated that counsel for the defendant could make a request to rehabilitate with regard to any individual juror at the appropriate time. However, Judge Brown indicated that he would deny any such motion. Although such a blanket forecast of intent by a trial court is not the wisest course of action available, we find nothing in Judge Brown's statements concerning the defendant's motions or in his rulings which indicates that he was not ruling in the exercise of his discretion. In fact, as we have indicated, the defendant's counsel at trial seems to have characterized his motion as one directed to the trial court's discretion, and Judge Brown ruled on that motion in light of such characterization. Accordingly, we conclude that the trial court exercised its discretion in denying the defendant's written motion and his later motions to be allowed to attempt to rehabilitate jurors challenged for cause due to their views on the death penalty.

It is error for a trial court to enter a general ruling that, as a matter of law, a defendant will never be allowed to attempt to rehabilitate a juror when the juror's answers to questions by the prosecutor or the trial court have indicated that the juror may be unable to follow the law and fairly consider the possibility of recommending a sentence of death. *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). However, the trial court made no such ruling here. We conclude in the present case that both Judge Brown's ruling on the defendant's general motion to be allowed to attempt to rehabilitate in every instance and Judge Brown's ruling on the defendant's specific request to be allowed to attempt to rehabilitate prospective Juror Morris after she had been challenged for cause due to her views on the death penalty were rulings made in his discretion. Further, our review of the record in this case leads us to conclude that the trial court did not abuse its discretion in this regard. This assignment of error is without merit and is overruled.

[5] By another assignment of error, the defendant contends that the trial court erred in requiring counsel for the defendant to make his motion to excuse prospective jurors for misconduct in the presence of other prospective jurors. We disagree.

During jury selection, a number of prospective jurors admitted to having read an article about the defendant's case in a newspaper that had been in the jury room used by the prospective jurors waiting to be questioned. The defendant moved to strike the remaining prospective jurors who might have been exposed to the publicity. The trial court insisted that the defendant's counsel make this motion in the presence of the prospective jurors in the courtroom at that time, and then denied the motion. The defendant contends that the effect of this was to deny him a fair jury selection by putting his counsel in the untenable position of having to criticize the conduct of prospective jurors in their presence.

The record shows that at the beginning of jury selection, twelve prospective jurors were called into the jury box. They were then placed in the jury room. The trial court then stated to the remaining prospective jurors still in the courtroom:

> All right, ladies and gentlemen, we are making arrangements for you to wait in another area during the jury selection process, and you will be taken to that area in just a minute.

Those prospective jurors were then sent to a courtroom on the third floor. The trial court later instructed the original twelve prospective jurors to report back to the jury room the next morning. The court then had the remaining prospective jurors brought back in and told them to return to the third floor courtroom the next morning. Both groups were reminded that they were not to discuss the case nor were they to read or listen to any news about the case.

When the defense counsel finished with the first twelve jurors passed to them by the State, seven jurors had been selected. Those seven were permitted to go home. Thereafter, as jurors were selected, they were permitted to go home. The transcript shows that the trial court continued the process of keeping the prospective jurors who had not been questioned in a room other than the courtroom where the questioning took place.

As of the fourth day of jury selection, the time at which the incident complained of occurred, ten jurors had been selected and

sent home. Two prospective jurors were passed to the defendant. One of those jurors admitted that since the beginning of the jury selection she had been reading the newspaper in the waiting area. She was excused but told to remain in the courtroom. The second juror was seated and then sent home.

Prior to any other prospective juror reaching the courtroom, counsel for the defendant moved to excuse the remainder of the panel of prospective jurors. This motion was denied and the next prospective juror was brought into the courtroom. This juror too admitted to reading an article on the previous day while sitting upstairs waiting to be called. This prospective juror was also excused for cause. The trial court lectured this juror and the one excused earlier, but still in the courtroom, and ordered them to take a seat in the courtroom. At that point, counsel for the defendant renewed the motion to excuse the remainder of the prospective jurors for misconduct, which the trial court ordered him to do in open court "so that these jurors can hear what you are asking me to do." Counsel for the defendant then made the motion which the trial court denied. Thus, this motion was heard only by the two prospective jurors the trial court had already excused for cause but told to stay in the courtroom. Only after the renewal of the motion had been made and denied, did the next prospective juror come into the courtroom. No juror who sat on the defendant's case could have heard the motion. After the motion was denied, the remainder of the prospective jurors were brought back into the courtroom and reminded not to read about the case. This argument is meritless since no jurors who sat on this case could have heard the motion. This assignment of error is overruled.

[6] By another assignment of error, the defendant contends that the trial court erred in denying him the opportunity to ask a potential juror whether he knew that the defendant had previously been sentenced to death. The defendant contends that his right to make an intelligent use of his peremptory challenges was impaired. Because our examination of the transcript of the jury *voir dire* persuades us otherwise, we disagree.

One juror revealed that he had been exposed to pretrial publicity about the case, and counsel for the defendant asked him if he knew "the result of the first trial in this matter then?" The trial court sustained the prosecutor's objection and refused to let the juror answer. The juror ultimately was seated and served on the jury.

The trial court has the duty to supervise the examination of prospective jurors. Regulation of the manner and the extent of inquiries on *voir dire* rests largely in the trial court's discretion. *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *death penalty vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); N.C.G.S. § 9-14 (1986). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Carson*, 320 N.C. 328, 357 S.E.2d 662 (1987).

We have stated that:

> "The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for challenge for cause and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. *State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969). 'Obviously, prospective jurors may be asked questions which will elicit information not, per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges.' [*State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974)]."

State v. Allen, 322 N.C. 176, 190, 367 S.E.2d 626, 633 (1988) (quoting *State v. Young*, 287 N.C. at 387, 214 S.E.2d at 771); *see also* N.C.G.S. § 15A-1214(c) (1986). The record in the present case shows that counsel had sufficient information upon which to base a peremptory challenge. The juror identified the sources of his information, including an article of a few days past. Counsel for the defendant had shown familiarity with all of the publicity about the case, including all recent articles, when making earlier motions concerning them. Counsel knew from the recent articles the extent of the juror's information. In passing the juror the defendant's lawyers seem to have assumed he knew the result of the prior capital sentencing proceeding as they requested a special instruction that he not communicate his knowledge concerning the case to the other jurors, even during deliberation. The trial court gave that instruction. We conclude that the defendant was not denied an adequate opportunity to form a basis upon which to intelligently exercise his peremptory challenges.

Additionally, the record before us reveals that after the juror in question here had been examined, the trial court began to let counsel for the defendant ask other prospective jurors whether

they knew the outcome of the defendant's prior trial. At that point, counsel for the defendant could have returned to the prospective juror in question and attempted to raise this issue with that juror again. The fact that counsel for the defendant did not make any such attempt also indicates that counsel for the defendant believed themselves to possess sufficient information regarding the juror's knowledge to exercise the defendant's peremptory challenge intelligently.

Furthermore, any error that may have occurred was harmless. This Court recently declined to impose a *per se* rule to the effect that any juror with knowledge that a previous jury had returned a recommendation of death in the same case to be heard must be excused for cause. *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992). Here, the juror stated unequivocally that he could base a sentencing recommendation entirely and completely upon the evidence which was presented at the capital sentencing proceeding without regard to what he had read in the newspaper or seen on television.

Because there was no basis for a challenge for cause and the defendant had sufficient information to exercise a peremptory challenge intelligently, the trial court did not abuse its discretion. This assignment of error is therefore overruled.

[7] By another assignment of error, the defendant contends that the trial court erred in denying his motion to excuse for cause a juror who revealed that he was aware that the defendant had previously been sentenced to death for the same crimes. Because knowledge of a prior sentence is not *per se* a reason for excusal and because the juror stated that he could decide the case on the evidence, we disagree.

When the juror was questioned by the District Attorney, the following colloquy occurred:

> MR. HAIGWOOD: Okay. If you were selected as a juror in this case could you and would you set aside from your mind what you heard about this case back in '83 and '84 and possibly what you may have heard from your, niece, ah, people that you know in Bethel, and decide this case, ah, entirely and completely upon the evidence that comes from the witness stand here, ah, in the next—in the coming days and—in accordance with the Judge's instructions as to the law?

JUROR: I will try.

MR. HAIGWOOD: Well, ah, would you do that, sir? To the best of your ability would you do that?

JUROR: To the best of my ability, yes.

Thereafter, the juror was asked several questions by counsel for the defendant. He consistently indicated that he believed he could base his recommendation in this case solely on the evidence presented in the courtroom during the capital sentencing proceeding, but he did concede at one point that he did not "believe there is any way I could be absolutely sure." Counsel for the defendant challenged the juror for cause, and the trial court denied that challenge. Counsel for the defendant then asked a final question and received an answer as follows:

MR. HULBERT: Ah, okay. One more question and then I'll move on. Would that substantially impair your ability to decide the case, that prior knowledge? Would that prior knowledge do you think, substantially impair your ability to decide the case based on the evidence that you hear in the courtroom as it comes?

JUROR: I don't believe it would.

The defendant then peremptorily excused the juror. Later after the defendant had exhausted his peremptory excusals, he attempted to renew his challenge of that juror for cause. The challenge was again denied.

N.C.G.S. § 15A-1212 provides in part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (9) For any other cause is unable to render a fair and impartial verdict.

The granting of a challenge for cause under N.C.G.S. § 15A-1212(9) rests in the sound discretion of the trial court. *See, e.g., State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993); *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*,

409 U.S. 1043, 34 L. Ed. 2d 493 (1972). We will not disturb the trial court's ruling on a challenge for cause absent a showing of an abuse of that discretion. *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993).

Where the trial court can reasonably conclude from the *voir dire* examination that a prospective juror can disregard prior knowledge and impressions, follow the trial court's instructions on the law, and render an impartial, independent decision based on the evidence, excusal is not mandatory. *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992); *see also Mu'Min v. Virginia*, 500 U.S. 415, ---, 114 L. Ed. 2d 493, 509, *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1097 (1991) (relevant question when trial preceded by extensive pretrial publicity is not whether jurors remember the case but whether they have such fixed opinions that they cannot judge the defendant impartially).

Here, the juror reiterated that he believed he could return a sentence recommendation based on evidence presented in the courtroom, that to the best of his ability he would divorce his knowledge of the prior sentence from his mind, and that he did not believe the prior knowledge would substantially impair his ability to decide the case based on the evidence. These answers were sufficient to support the actions of the trial court, which heard the answers and observed the juror's demeanor. Therefore, we conclude that the trial court did not abuse its discretion by denying the challenge for cause. This assignment of error is overruled.

[8] By his next assignment of error, the defendant contends that the trial court erred in submitting evidence of his prior attempted rape conviction and by submitting as an aggravating circumstance that the defendant had "been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1988). The defendant contends that this aggravating circumstance was not supported by the evidence. We disagree.

In order to submit this aggravating circumstance, evidence must be introduced tending to show:

> 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 oc-

> curred 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); N.C.G.S. § 15A-2000(e)(3) (1988). The State need not show that the defendant in fact acted violently in the prior felony; the State need only show a previous felony involving the use or threat of violence. *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981), *rev. denied*, 308 N.C. 193, 302 S.E.2d 246 (1983). Under N.C.G.S. § 15A-2000(e)(3), a prior felony can be either one which has as an element 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 as to which the use or threat of violence to the person was actually involved. *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).

> The statute contains the word "involving," which indicates an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element. . . . [W]e find the legislature intended the prior felony in . . . (e)(3) to include any felony whose commission involved the use or threat of violence to the person.

McDougall, 308 N.C. at 18, 310 S.E.2d at 319.

The State presented evidence that on 26 July 1982, the defendant was convicted by General Court Martial of attempted rape. The trial court allowed the certified record of the defendant's conviction to be read to the jury and admitted into evidence. The certified record stated that:

> Specialist 4 Harvey L. Green . . . [tried] by a general court martial on the 26th day of July of 1982 for a violation of the Uniform Code of Military Justice, Article 80, specifically in that Specialist Green . . . did . . . attempt to rape Specialist 4 Patricia L. Peterson; of charge one and it's [sic] specifications, the judgment of that military court is guilty.

An attempt to commit a crime, under the Uniform Code of Military Justice, Article 80 (10 U.S.C. § 880), occurs when an act is done with specific intent to commit an offense and this overt act amounts to more than mere preparation. While it does not have to be the last act to completion of the crime, it must be a direct movement

toward commission of the offense. *Manual of Court-Martials*, Part IV, ¶ 4(c)(2), pp 4-5 (1984).

The defendant's prior conviction by General Court Martial may act as the prior felony supporting this aggravating circumstance. The N.C.G.S. § 15A-2000(e)(3) aggravating circumstance is not limited to felonies that occur in North Carolina, but includes acts by the defendant that would be considered a felony if they occurred in North Carolina. *See State v. Taylor*, 304 N.C. 249, 279, 283 S.E.2d 761, 780, *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L. Ed. 2d 1456 (1983) (Virginia conviction for rape admissible because defendant was convicted of what would be considered a felony in North Carolina). Rape is a felony under North Carolina law (N.C.G.S. § 14-27.2 and N.C.G.S. § 14-27.3), as is attempted rape (N.C.G.S. § 14-27.6). Therefore, the attempted rape the defendant was convicted of is classified as a felony in North Carolina. Further, the defendant concedes that attempted rape is a felony under military law.

Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts "specifically reject the oxymoronic term of 'non-violent rape.' The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission." *Myers*, 22 M.J. at 650. "Among common misconceptions about rape is that it is a sexual act rather than a crime of violence." *United States v. Hammond*, 17 M.J. 218, 220 N.3 (C.M.A. 1984). This Court likewise has stated that rape is inherently a crime of violence. *State v. Artis*, 325 N.C. 278, 321, 384 S.E.2d 470, 494 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

When, as here, the prior felony conviction supporting this aggravating circumstance is one deemed inherently violent under the law of the jurisdiction in which it was committed, the details of the commission of that felony need not be established. *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981). Attempting to commit a crime which inherently involves violence obviously constitutes, at least, a "threat of violence." *See* N.C.G.S. § 15A-2000(e)(3) (1988). Thus the defendant's conviction under military law of at-

empted rape is a conviction for a prior felony involving at minimum the "threat of violence."

The defendant contends that *dicta* in *McDougall* supports the proposition that non-violent rape and attempted rape—not involving the use or threat of force—may occur under North Carolina law. *But see State v. Artis*, 325 N.C. at 321, 384 S.E.2d at 494 (1989). Since the military courts have held all rapes to be crimes of violence under military law, and all attempts to commit rape therefore by definition involve the use or threat of force, we need not and do not consider whether there is a non-violent crime of attempted rape under North Carolina law.

The evidence presented concerning the prior felony was proper and sufficient to establish that the defendant had been convicted of a prior felony involving the use or threat of violence to the person. Rape is always deemed a crime of violence under military law. The felony of attempt to commit rape is therefore by nature of the crime a felony which threatens violence. *See, e.g., Woodruff v. State*, 846 P.2d 1124 (Okla. Crim. App.), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 313 (1993) (Defendant's stipulation to prior convictions for two counts of solicitation to commit murder was sufficient evidence in itself to support the aggravator that the defendant "had previously been convicted of a felony involving the use or threat of violence to the person"). This assignment of error is therefore overruled.

By another assignment of error the defendant contends that the trial court incorrectly charged the jury that in considering this aggravating circumstance, attempted rape constitutes a crime of violence or threat of violence as a matter of law. The defendant contends that the instruction constituted an impermissible expression of opinion by the trial court and that it also constituted an improper conclusive presumption. Because, as we have demonstrated, attempted rape is a crime of violence under military law, the trial court correctly instructed the jury. This did not constitute an improper expression of opinion. *State v. Torain*, 316 N.C. 111, 340 S.E.2d 465, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Further, the trial court's instruction did not constitute an impermissible conclusive presumption, as the instruction permitted the jury to make the factual determination as to whether the defendant had been convicted. *Artis*, 325 N.C. 320-22, 384 S.E.2d 494. For these reasons, this assignment of error is overruled.

[9] By another assignment of error, the defendant contends that the trial court erred in failing to strike the plea agreements *ex mero motu* in this case in which the State accepted pleas of guilty to felony murder only. The defendant contends that this plea agreement is contrary to principles set forth in *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991). Because the plea agreement was proper and did not have the effect of suppressing an aggravating circumstance supported by the evidence, we disagree.

In this case, the prosecutor permitted the defendant to plead guilty to two counts of first-degree murder "based solely upon the felony murder rule and theory," even though the evidence supported other theories of first-degree murder. The plea bargain specified that the armed robbery charges were to be reduced to common law robbery and that the convictions for these robberies, in turn, would be merged with the first-degree murder convictions. As a result, the defendant would be sentenced only for two counts of first-degree murder.

We conclude that *Case* has no application to the present matter. In *Case*, the prosecutor, in exchange for the plea of guilty to first-degree murder, agreed that the State would present evidence of only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel. However, the evidence would also have supported submission of the aggravating circumstances that the defendant committed the murder while engaged in the commission of a kidnapping and that the defendant committed the murder for pecuniary gain. N.C.G.S. §§ 15A-2000(e)(5) and (6) (1988). The plea bargain in *this* case, by contrast, served only to limit the maximum time the defendant would serve in prison *if the jury failed to recommend a sentence of death.* This plea arrangement did not "suppress" an aggravating circumstance supported by evidence or otherwise limit the sentence the jury could recommend for first-degree murder.

Had the State not entered into the plea agreement, it could have gone to trial on the theories of felony-murder and premeditation and deliberation. Had the defendant been convicted of the first-degree murders pursuant to both theories, the number of available aggravating circumstances would have been no different than under the plea bargain at issue here. Absent the plea bargain, the evidence would have supported *either* N.C.G.S. § 15A-2000(e)(5), that the capital felony was committed in the course of a robbery,

or N.C.G.S. § 15A-2000(e)(6), that the capital felony was committed for pecuniary gain. This Court has held that the State may not rely on both of these aggravating circumstances when, as here, they are premised on one underlying robbery and the theory of first-degree murder relied on is premeditation and deliberation. *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), *judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). The only effect of the plea bargain was to establish prior to the capital sentencing proceeding that pecuniary gain was the aggravating circumstance upon which the State intended to rely, not murder in the course of a robbery. Thus the total number of aggravating circumstances was unaffected by the plea agreement. This case is unlike *Case* in that respect.

Nor did the plea agreement lessen the seriousness of the offense. Premeditation and deliberation is a theory pursuant to which a defendant may be convicted of first-degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes. *Shad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1109 (1991); *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989). First-degree murder under one theory is not a lesser included offense of first-degree murder under the other theory. *State v. Lewis*, 321 N.C. 42, 361 S.E.2d 728 (1987). Rather, as noted in *Shad*, 501 U.S. at ---, 115 L. Ed. 2d at 573, these two theories of first-degree murder "reflect notions of equivalent blameworthiness or culpability." Thus this plea agreement did not violate the principles applied in *Case*, and this assignment of error is overruled.

[10] By another assignment of error the defendant contends that the trial court erred in failing to give peremptory instructions on the nonstatutory mitigating circumstance that the defendant had pled guilty to both murder charges. Because the requested instruction was inappropriate, the trial court properly denied the defendant's request.

The defendant requested that the trial court instruct the jury to consider and give weight to the nonstatutory mitigating circumstance that the defendant had pled guilty to the two murders. The instruction specifically requested was a North Carolina Pattern Jury Instruction which reads as follows:

> The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence, as I have explained to you.
>
> Accordingly, as to this mitigating circumstance, I charge you that if one or more of you finds the facts as all the evidence tends to show, you will answer "yes" as to Mitigating Circumstance (read number) on the "Issues and Recommendation" form.

N.C.P.I. 150.11 (October 1991). It is uncontested that the defendant entered two pleas of guilty to first-degree murder pursuant to the felony-murder theory, as well as two pleas of guilty to common law robbery. However, this is evidence of a nonstatutory mitigating circumstance and therefore the requested instruction would have been wholly inappropriate.

This Court has held that as to a proffered *nonstatutory* mitigating circumstance—unlike statutory ones—the jurors must first find whether the proffered circumstance exists factually. Jurors who find that a nonstatutory mitigating circumstance exists are then to consider whether it should be given any mitigating weight. *State v. Hill*, 331 N.C. 387, 418, 417 S.E.2d 765, 780 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684 (1993); *State v. Huff*, 325 N.C. 1, 58-61, 381 S.E.2d 635, 668-70 (1989), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). Thus, a juror may find that a nonstatutory mitigating circumstance exists, but may give that circumstance no mitigating value.

We recognize that our opinions have not limited the application of peremptory instructions with regard to mitigating circumstances solely to statutory mitigating circumstances. *E.g., State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993). We have stated that: "A rule requiring peremptory instructions (where appropriate) only in regard to statutory mitigating circumstances could compromise the potential mitigating value of nonstatutory mitigating circumstances in contravention of the law of this State." *Id.* at 493, 434 S.E.2d at 855. However, nothing we stated in *Gay* supports the notion that the peremptory instructions to be used with regard to nonstatutory mitigating circumstances should be identical to those used with regard to statutory mitigating circumstances. To the contrary, we reemphasized in *Gay* that even if a jury finds from uncontroverted and manifestly credible evidence that a nonstatutory

mitigating circumstance exists, "jurors may reject the nonstatutory mitigating circumstance if they do not deem it to have mitigating value." *Id.* at 492, 434 S.E.2d at 854. It continues to be the law that before a juror "finds" a *nonstatutory* mitigating circumstance, he or she must make two preliminary determinations: (1) that the evidence supports the factual existence of the circumstance, *and* (2) that the juror deems the particular circumstance to have mitigating value in the case in question. *See Huff* at 59, 381 S.E.2d at 669 (decided prior to *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990) (holding a requirement of jury unanimity unconstitutional). It is this law which should be imparted to a jury when giving peremptory instructions on *nonstatutory* mitigating circumstances, rather than the information contained in North Carolina Pattern Jury Instruction 150.11 which relates to peremptory instructions with regard to *statutory* mitigating circumstances.

Where a defendant requests an instruction which is supported by the evidence and which is a correct statement of law, the trial court must give the instruction in substance. *Hill*, 331 N.C. at 420, 417 S.E.2d at 782. However, it would have been error for the trial court to have charged the jury peremptorily on the nonstatutory circumstance in the manner requested by the defendant. *Huff*, 325 N.C. at 60, 381 S.E.2d at 668. This assignment is without merit and is overruled.

[11] By his next assignment of error, the defendant contends that the trial court erred in instructing the jury that they "may" rather than "must" consider found mitigating circumstances. For example, the trial court instructed the jury with regard to Issue Three on the "ISSUES AND RECOMMENDATION FORM" as follows:

> Issue No. Three is: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?"
>
> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. *In deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue No. 2.* And in so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating

> or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give each circumstance, and then weigh the aggravating circumstances so valued against the mitigating circumstances so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.
>
> If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer Issue Three, "Yes." If you do not so find, or a have a reasonable doubt as to whether they do, you would answer Issue Three, "No." If you answer Issue Three, "No", it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three, "Yes," you must consider Issue Four.

(Emphasis added.) The Defendant complains of and assigns error to the above italicized language.

The defendant contends that this instruction permitted the jurors to ignore the mitigating circumstances they had found. For this reason, the defendant contends that the instruction violated the Eighth Amendment and principles set forth in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We have recently addressed and rejected arguments identical to those made by this defendant in support of this assignment of error. *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994). The defendant has demonstrated no reason why we should reverse or alter our recent precedent in this regard. Because we continue to believe that the instruction given here is correct and would be interpreted by any reasonable juror as meaning that all "found" mitigating circumstances must be considered, we conclude that the instruction given was not error. *Id.* This assignment of error is without merit and is overruled.

[12] By another assignment of error the defendant contends that the trial court's responses to jury messages misled the jury and coerced a recommendation of death. The defendant contends that the trial court, by a series of improperly coercive statements, violated his statutory and due process rights. Because, based upon the "totality of the circumstances" the statements were not coercive nor in violation of N.C.G.S. § 15A-1235, we disagree.

The jury was charged pursuant to the pattern jury instructions and sent to deliberate. After the jury deliberated for approximately three hours and fifteen minutes, the jury foreperson sent a note to the trial court. The note said: "Sir—we have a juror that does not believe in capital punishment—the questions asked in jury selection were not understood. She cannot think of any reason for the death penalty." (Emphasis in original.) In response to the note the trial court called the entire jury into the courtroom, identified the author, and said:

> All I can tell you is that the information reported in this note is a matter that cannot now be addressed, and you must continue your deliberations with a view to reaching an agreement, if you can, without violence to individual judgment. You can retire and continue your deliberations.

The defendant contends that the statement that the "matter . . . cannot now be addressed," implied that it was a matter that could and should be addressed by the trial court at some later time and thereby pressured a holdout juror to agree with the majority. Additionally, the defendant argues that the note accused a female juror of misconduct and that the trial court's subsequent instructions implied a future threat of punishment for this misconduct. We disagree.

Under applicable law, the "totality of the circumstances" test is applied in determining whether the trial court's actions have coerced a verdict thereby impinging on a defendant's right to jury trial. *State v. Bussey*, 321 N.C. 92, 96, 361 S.E.2d 564, 566-67 (1987); *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984). Here, the defendant's argument is not supported by the language of the note or the trial court's instructions. The trial court, by not reading the note aloud, insured that no juror would be embarrassed or pressured in open court. Further, when the jury was sent back to deliberate, the trial court emphasized that the deliberations should continue "without violence to individual judgment." Based upon the "totality of the circumstances" the trial court's comments in regard to the first note were not coercive.

[13] After deliberating further, the jury sent out a second note. This one asked: "Does [the jury] decision have to be unanimous on both recommendations?" In response, the trial court instructed as follows:

Ladies and gentlemen of the jury, the Court instructed you that for you to recommend that the defendant be sentenced to death in either or both of these cases, the State must prove three things beyond a reasonable doubt:

First, that one or more aggravating circumstances existed;

Second, that the mitigating circumstances are insufficient to outweigh any aggravating circumstances you have found; and

Third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances.

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find, or if you have a reasonable doubt as to one or more of these things, in either or both of these cases, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

I hope that answers your question—Does your decision have to be unanimous on both recommendations?

All right. You may retire and continue your deliberations.

After these instructions, the jury was returned to the jury room for further discussion.

The trial judge, on his own motion, then called the jury back to the court room and the following took place:

THE COURT: Miss Ross, just answer this question either yes or no.

MR. HAIGWOOD: Excuse me, Judge.

THE COURT: Excuse me. Again, Miss Ross, if you'll answer this question either yes or no. Has the jury arrived at a recommendation in either of the cases? That requires a yes or no. A unanimous recommendation in either of the cases, yes or no?

JUROR: Unanimous in either, no, sir.

THE COURT: Well, let me address the question that you gave me a few minutes ago a little bit further.

> The Court instructed you yesterday that you are required to consider each case separately in your making separate recommendations in each case. I told you that you could recommend—you could recommend death in both cases, or you could recommend death in one case and life imprisonment in the other, or that you could recommend life imprisonment in both cases, but whatever recommendation you make, must be unanimous.

The defendant's objection to this instruction was overruled. The jury then retired to deliberate.

The defendant contends that this statement by the trial court was error of the magnitude found to be reversible in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987). This case is distinguishable from *Smith* in two distinct and dispositive ways. First, in *Smith*, the jury asked, "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" 320 N.C. at 420, 358 S.E.2d at 338. This Court held that the particular instruction in response to the specific inquiry in *Smith* "*probably conveyed* the erroneous impression that a unanimous decision, either for death or for life imprisonment, was required." *Smith*, 320 N.C. at 422, 358 S.E.2d at 339 (emphasis added). In *Smith*, we held that when a jury specifically *inquires as to the result should it fail to reach a unanimous recommendation as to a sentence*, "the trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *Id.* Here, the jury did not inquire as to what would result if it failed to reach a sentencing recommendation, but merely inquired as to whether it must be unanimous to make such a recommendation. The trial court correctly informed that jury that any recommendation they made as to sentencing must be unanimous. *See* N.C.G.S. § 15A-2000(b) (1988).

Second, unlike the situation we dealt with in *Smith*, we are not required to speculate here as to whether the instructions were misleading or led to a coerced verdict. Eighteen minutes after the trial court gave the complained-of instructions, the jury was brought into the courtroom in response to another note to the court. The following proceedings took place:

> THE COURT: Madam foreman, your bailiff has handed me a note, I take it it's from you, that says 'We're unable to

reach a unanimous decision on either case.' Is that your report to the Court?

JUROR: Yes, sir.

The trial court then gave a supplemental instruction directing the jury to continue its deliberations. From this we are able to say that the jury, unlike the jury in *Smith*, was not misled and that the jurors clearly understood that they could report back to the court that they were unable to reach a unanimous decision in either case. In fact this is exactly what they did at this point.

The context in which the trial court's instructions were given in the case *sub judice* therefore differed radically from that in *Smith*. "The lesson in *Smith* is that, in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached." *State v. Price*, 326 N.C. 56, 92, 388 S.E.2d 84, 105 (1990) (emphasis in original). The instructions given in the present case correctly stated the law as established by N.C.G.S. § 15A-2000(b) and did not mislead the jurors into thinking that they must in all events deliberate until they could return a unanimous recommendation of life imprisonment or death.

[14] Additionally, the defendant assigns error to the instruction given to the jury following its receipt of the note from the foreperson indicating the jury's inability to reach a unanimous recommendation. The trial court gave an instruction substantially similar to the legislatively approved version of the *Allen* charge. *See Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896); N.C.G.S. § 15A-1235 (1983). The trial court instructed as follows:

THE COURT: Ladies and gentlemen of the jury, let me say this to you. All of us have a considerable amount of time in this case. I know that you have been diligent in your deliberations.

As I told you yesterday, it is your duty to decide from the evidence what the facts are, and you must then follow the law which I gave you concerning punishment as to those facts. This is important, because justice requires that everyone who is sentenced for first degree murder has the sentence recommendation determined in the same manner and have the same law applied to him.

> It is your duty to reason the matters over together as reasonable men and woman, to listen to one another's viewpoints and to deliberate with a view to reaching an agreement without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, each of you should not hesitate to reexamine your own views and change your opinion if it is erroneous. I caution each of you not to surrender your honest convictions as to the weight or effect of the evidence, or do violence to your conscience, or compromise to your convictions solely because of the opinions of your fellow jurors, or for the mere purpose of making a recommendation.
>
> I'm going to ask you to continue on with your deliberations and see if you can arrive at a recommendation.

The defendant objected to the court's supplemental instruction. The court overruled the objection. One hour after the last supplemental instruction, the jury returned recommendations that the defendant be sentenced to death for both murders.

The defendant contends that this supplemental instruction to the jury was coercive. Specifically, the defendant complains that the trial court called the jury's attention to the fact that "[a]ll of us have a considerable amount of time in this case." This argument is meritless.

"[I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (citing *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978)). The sentence complained of, when read in conjunction with the next sentence of the instructions—"I know you have been diligent in your deliberations"—simply suggested to the jury that they had devoted a substantial amount of time to the defendant's cases, that they were to be commended for their diligence, and that they should continue to deliberate if a recommendation was possible. Further, throughout the charge the trial court continually reminded the jurors to avoid "violence to individual judgment," "decide the case for yourself," and "not to

surrender your honest convictions . . . *for the mere purpose of making a recommendation.*" (Emphasis added.) Although the supplemental instructions did not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235, the essence of the instructions was merely to ask the jury to continue to deliberate. *Price*, 326 N.C. at 91, 338 S.E.2d at 104; *see also State v. Huff*, 325 N.C. 1, 64-65, 381 S.E.2d 635, 672-73 (1989).

[15] Next, the defendant complains that the trial court erred in including in its supplemental instructions the following:

> As I told you yesterday, it is your duty to decide from the evidence what the facts are, and you must then follow the law which I gave you concerning punishment as to these facts. This is important, because justice requires that everyone who is sentenced for first degree murder has the sentence recommendation determined in the same manner and have the same law applied to him.

The defendant contends that a reasonable juror, in the context of this case and the trial court's other instructions, would likely interpret this part of the charge as meaning that the law requires unanimity and jurors who are in disagreement are not "following the law." These remarks by the trial court which the defendant complains of merely reminded the jurors of their prior instructions. The remarks were followed almost immediately by the trial court's specific direction to jurors that they should not surrender their honest convictions or compromise their convictions "for the mere purpose of making a recommendation." The remarks were correct in every respect and were in no way coercive. The trial court did not err in this regard.

Applying the "totality of the circumstances" test, we conclude that the trial court's instructions did not coerce a jury recommendation. This assignment of error is therefore overruled.

[16] By another assignment of error the defendant contends that the trial court erred in denying his request to submit several nonstatutory mitigating circumstances for the consideration of the jury. We disagree.

Here, the defendant made a timely request that the trial court submit specified nonstatutory mitigating circumstances for the jury's consideration. He now assigns error to the trial court's refusal to do so.

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit nonstatutory mitigating circumstances to the jury for its determination raises federal constitutional issues.

State v. Benson, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988) (footnotes omitted).

The defendant in the present case requested in writing that the trial court submit the following nonstatutory mitigating circumstances for consideration by the jury:

> That Harvey Lee Green, Jr. will continue to adjust well to prison life and be a model prisoner.
>
> That Harvey Lee Green, Jr. was a quiet student in school and was not a discipline problem.
>
> That Harvey Lee Green, Jr. did not commit the murders after premeditation and deliberation.
>
> Harvey Lee Green, Jr. did not intend to take the life of Sheila Bland or John Michael Edmondson when he entered Young's Cleaners.
>
> Harvey Lee Green, Jr. did not enter Young's Cleaners with the weapon which was used to take the lives of Sheila Bland and John Michael Edmondson.

The defendant first argues that the trial court erred in refusing to submit the mitigating circumstance that "Harvey Lee Green, Jr. will continue to adjust well to prison life and be a model prisoner." As the Supreme Court of the United States has explained, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986). The evidence presented by the defendant in this case was sufficient to support submission of this circumstance, and a reasonable juror could have found it to be mitigating. Therefore, we must conclude that the trial court erred by refusing to submit this nonstatutory mitigating circumstance to the jury.

Our conclusion that the trial court erred does not end our consideration of this issue, however, because error in failing to submit a nonstatutory mitigating circumstance is subject to harmless error analysis. *State v. Hill*, 331 N.C. 387, 416, 417 S.E.2d 765, 779 (1992). As we have often pointed out, "[w]hether a violation of a defendant's federal constitutional rights is prejudicial is controlled by N.C.G.S. § 15A-1443(b). Such violation is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1993). The burden is upon the state to so prove." *Benson*, 323 N.C. at 326, 372 S.E.2d at 521. Assuming *arguendo* that this error by the trial court amounted to constitutional error under *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), we nevertheless conclude that the State has carried the burden of showing that it was harmless beyond a reasonable doubt.

The trial court submitted the circumstance that "[t]he defendant was an above average inmate and good worker while incarcerated at Fort Levenworth" and the circumstance that "[t]he defendant has been a model prisoner and adjusted well while incarcerated for these offenses." All of the jurors rejected both the defendant's present "model prisoner" status and his prior "model prisoner" status at Fort Levenworth as circumstances in mitigation of these crimes. All of the evidence tending to support the requested nonstatutory mitigating circumstance which was not submitted—that the defendant "will continue to adjust well to prison life and be a model prisoner"—was considered by the jury under those submitted but rejected mitigating circumstances as well as under the catch-all mitigating circumstance. The trial court's error in failing to submit the defendant's requested nonstatutory mitigating circumstance was harmless here, where it is clear the jury was not prevented from considering any potential mitigating evidence. *Hill*, 331 N.C. at 417, 417 S.E.2d at 780. At least two of the circumstances provided a vehicle for the jury to consider defendant's ability to adjust well to prison life in the future. The proposed nonstatutory mitigating circumstance was subsumed in the circumstances that were presented. *See Benson*, 323 N.C. at 327, 372 S.E.2d at 521-22. Accordingly, we conclude that the State has shown that the trial court's failure to submit this nonstatutory mitigating circumstance was harmless beyond a reasonable doubt.

[17] The defendant next argues in support of this assignment that it was error for the trial court to fail to submit the nonstatutory

mitigating circumstance that the defendant "was a quiet student in school and was not a discipline problem." This circumstance was not supported by the evidence, and the trial court was correct in refusing to submit it to the jury. While it is true that two of the defendant's former teachers testified that the defendant had been "quiet" and "wasn't any problem in class," it was uncontroverted that the defendant was expelled from high school due to fighting and for that reason joined the Army. Given this uncontested fact, we conclude that no reasonable juror could have found that he "was not a discipline problem in school." The trial court correctly refused to submit this circumstance to the jury.

[18] The defendant next argues in support of this assignment that the trial court erred in failing to submit the nonstatutory mitigating circumstance that he did not kill after premeditation and deliberation. We disagree.

This Court has previously defined a mitigating circumstance as follows:

> A definition of mitigating circumstance approved by this Court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irving, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981) (citing *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981)). The fact that the defendant pled guilty to the first-degree murders under the felony murder theory and was neither tried nor convicted of those crimes on the theory of premeditation and deliberation is not mitigating. The felony murder theory of the crime of first-degree murder, pursuant to which the defendant entered two pleas of guilty, is not a different crime than first-degree murder by premeditation and deliberation. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). Rather, these two theories by which one may be found to have committed murder in the first degree "reflect notions of equivalent blameworthiness or culpability." *Shad v. Arizona*, 501 U.S. 624, ---, 115 L. Ed. 2d 555, 573 (1991). The absence of an alternative theory for establishing that a murder was murder in the first degree cannot be considered mitigating in a capital sentencing proceeding.

Moreover, the State does not have the burden of proving that any mitigating circumstance does not exist. *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). Instead, a mitigating circumstance must be established by evidence and to the satisfaction of the jury. *Hutchins*, 303 N.C. at 356, 279 S.E.2d at 809. Our review of the record discloses no evidence tending to show that the defendant did not act with premeditation and deliberation. On the other hand, evidence was introduced which supported the premeditation and deliberation theory of first-degree murder. Given the evidence of attempted strangulation of Sheila Bland and the multiple blows administered in the beating of the two victims to death, we simply find no evidence supporting submission of this nonstatutory mitigating circumstance.

[19] Finally, the defendant contends in support of this assignment that the trial court erred in refusing to submit as possible nonstatutory mitigating circumstances that (1) the defendant did not intend to take the life of Sheila Bland or John Michael Edmondson when he entered Young's Cleaners, and (2) the defendant did not enter Young's Cleaners with the weapon which was used to take the lives of the victims. Self-serving portions of a statement the defendant made to the police—although controverted by most of the substantial evidence in the record—did tend to support these two requested nonstatutory mitigating circumstances. Further, a reasonable juror could find such circumstances to be mitigating. Therefore, the trial court erred in failing to submit them for the jury's consideration. *Benson*, 323 N.C. at 325, 372 S.E.2d at 521. That violation must be deemed prejudicial unless the State bears its burden of showing that the error was harmless beyond a reasonable doubt. *Id.* at 318, 372 S.E.2d at 517.

In the present case, the evidence tending to show these two requested nonstatutory mitigating circumstances was fully argued to and impressed upon the jury by counsel for the defendant during their closing arguments. The jurors must have considered all of this evidence when they considered and in fact found the catch-all mitigating circumstance, properly submitted by the trial court pursuant to N.C.G.S. § 15A-2000(f)(9), and again when they considered and found the mitigating circumstance that "the defendant was under the influence of mental or emotional disturbance" at the time he committed the murders. Accordingly, the error of the trial court here did not preclude any juror from considering and giving

weight to any mitigating evidence. *See Hill*, 331 N.C. at 417, 417 S.E.2d at 780. Therefore, we conclude that the State has carried its burden of proving that the trial court's error was harmless beyond a reasonable doubt.

For the foregoing reasons, we reject the defendant's arguments in support of this assignment of error. The assignment of error is without merit and is overruled.

[20] By another assignment of error, the defendant contends that he was denied a fair capital sentencing proceeding due to the prosecutor's improper comments to the jury. The defendant argues that the prosecutor's closing argument contained statements which tended to inflame the jury and misstate the applicable law and which had no evidentiary basis in the record.

Trial counsel are allowed wide latitude in jury arguments. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). Control of closing arguments is in the discretion of the trial court. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.'" *Soyars*, 332 N.C. at 60, 418 S.E.2d at 487-88 (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157, *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431 (1974)). In the present case, the defendant argues that several portions of the prosecutor's closing argument amounted to such "prejudicial error." We address each of the defendant's contentions individually.

The defendant first contends that the prosecutor misstated the law in making the following argument:

> Now, your deciding, you know, does he get life or does he get death. If he kills one, he gets life. Does he get life on

> the second one, too? Two for the price of one. That's why we say that if you kill one or two people, or hurt one and kill one, that's an aggravating circumstance. Life is life. And to come back and to give this man life imprisonment in either one of these cases or both of these cases, you're giving him two for the price of one.

The defendant contends that this argument was a misstatement of the law because the prosecutor knew that there was the possibility that the defendant would suffer additional punishment for a second life sentence as a result of having his parole eligibility date extended from twenty years to forty years. He further argues that this argument denied him due process and, thus, amounted to prejudicial error. We disagree.

The argument complained of here appears to have been properly directed to the question of the weight the jury should give the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), and the prosecutor's reasons for contending that the jury should deem that aggravating circumstance sufficient to warrant the penalty of death rather than life imprisonment. Assuming *arguendo*, however, that the argument was improper, we conclude that it could not have been prejudicial in the present case. We note that counsel for the defendant had made similar statements during their questioning of jurors during jury selection. On several occasions the defendant's counsel told the prospective jurors that their decision would be between death and the defendant spending the rest of his life in prison. The defendant having so characterized a life sentence to the jury, cannot complain that he has been denied due process by the prosecutor's action in doing precisely the same during his closing argument to the jury.

[21] The defendant next argues that other comments by the prosecutor tended to diminish the jury's responsibility during his capital sentencing proceeding in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), *judgment vacated on other grounds*, 479 U.S. 1075, 94 L. Ed. 2d 130 (1987). The prosecutor argued to the jury that "[t]he form tells you, from your answers, whether he should be sentenced to life or death. You're not deciding on the sentence. You're deciding on the factors and you're weighing the factors." No objection was made to this portion of the prosecutor's argument during the capital sentencing proceeding.

> In capital cases, however, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

State v. Johnson, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). The standard of review, therefore, is one of "gross impropriety." *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983).

In *Caldwell*, the Supreme Court of the United States held that it is unconstitutional to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. 478 U.S. at 328, 86 L. Ed. 2d at 239. However, statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred. Further, it must be remembered that the prosecutor in a capital case has a duty to strenuously pursue the goal of persuading the jury that the facts of the particular case at hand warrant imposition of the death penalty. *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980); N.C.G.S. § 15A-2000(a)(4) (1988).

After the remarks complained of here, the prosecutor went on to say, "It's not easy. No matter how hard it is to you, somebody, sometime, has got to make these decisions, and this time it's you." Additionally, the prosecutor told the jury that "somebody's got to stand up and say, I'm responsible. I will follow the law, no matter how hard it is. And no matter if I don't sleep tonight, I'll follow the law." North Carolina General Statute § 15A-2000(b) provides that in capital cases "[a]fter hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court. . . ." N.C.G.S. § 15A-2000(b) (1988). When taken in context, the closing argument of the prosecutor clearly and properly stated to the members of the jury that the ultimate responsibility for a sentencing decision

rested with them and with no one else. This argument is without merit.

[22] The defendant next complains that the prosecutor made several disparaging references to the defendant's status as a model prisoner and to the fact that the defendant was attending college. The defendant contends that there was no reason for these arguments except to unfairly "smear the defendant."

The prosecutor argued that the victims were "dead and buried." But "the defendant, 3180 days later, still sitting around here in a coat and tie, got the run of the Central Prison. You heard that didn't you? Got the run of Central Prison, and we're sending him to college. Maybe [Sheila Bland] wanted to go to college." Next the prosecutor argued that the jury should not consider the fact that the defendant was a good inmate because, "I mean, should he have the benefit of nine years in prison to clean up his act, come to court and be tried?"

The defendant did not object to these arguments at trial. Nevertheless, the defendant argues that the prosecutor's remarks were so grossly improper that the trial court was required to intervene *ex mero motu*. We do not agree.

The defendant requested and the trial court submitted the nonstatutory mitigating circumstance that the defendant had been a "model prisoner." The prosecutor was merely rebutting this circumstance with the argument that the defendant's "model prisoner" behavior was in anticipation of the sentencing hearing. Further, the defendant's counsel had argued that the jury should consider the worth of the courses the defendant was taking, the defendant's "model prisoner" status and the hardship of imprisonment on the defendant for "the rest of his life." The prosecutor's comments were direct responses to specific arguments made by counsel for the defendant and were in no way improper.

[23] Finally, the defendant argues in support of this assignment that the prosecutor improperly asked the jurors to put themselves in the place of the victims. The prosecutor argued, without objection by the defendant, that:

> Sheila Bland was in there working, minding her own business, not hurting anybody, with no hostility or malice toward Harvey Lee Green, Jr., with no bad thoughts against Harvey Lee Green, Jr. All she wanted was to work and go home at 6:00;

> and Mike Edmondson, not knowing Harvey Lee Green, Jr., all he wanted to do was to get through with church practice and get his clothes, like we all do. It wasn't some juke joint, drunk, raising cain. They weren't downtown trying to buy drugs or in the country or somewhere. They weren't out at 4:00 in the morning. *They were the same place you and I might be at 6:00. How many times do we go to the cleaners in our lifetime*? And that's the bottom line. You think about it.
>
> If any one of those mitigating circumstances in any way offset the fact that those two people, under those circumstances, were brutally, without mercy, murdered—they had no charges filed against them. They had no trial. They had no lawyers defending them. There was no jury there to decide their fate. *Harvey Lee Green, Jr., charged them, prosecuted them, convicted them, and executed them for doing what you and I do every day.*

(Emphasis added.)

An argument "asking the jurors to put themselves in place of the victims will not be condoned. . . ." *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *United States v. Picknarcek*, 427 F.2d 1290, 1291 (9th Cir. 1970)). However, this is not what occurred in this case. The prosecutor did not ask the jurors to place themselves in the victims' place. Rather the prosecutor emphasized that the victims' behavior did not invite attack, they were not at a place where an attack could be reasonably anticipated, and they were not careless. They were merely engaging in activity common to all humanity. This argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

For the foregoing reasons, we conclude that the arguments of the prosecutor during the capital sentencing proceeding in this case, which are the subject of this assignment of error, did not create prejudicial error. Accordingly, this assignment of error is overruled.

[24] The defendant contends by another assignment of error that the trial court erred in denying his motion for allocution. The defendant argues that this was harmful because it denied him his right to offer evidence in mitigation to show his remorsefulness. He contends he was entitled to do this by personally making un-

sworn statements of fact to the jury without cross-examination during the closing arguments. Because there is no common law, statutory, or constitutional right to allocution in a capital case, we disagree.

At common law, the defendant in a felony case had a right, called "allocution," to be asked formally and to state whether he had "anything to offer why judgment should not be given against him." *See Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (1689); *Rex & Regina v. Geary*, 2 Salk. 630, 91 Eng. Rep. 532 (1689). However, since the common law judge generally had no discretion as to the quantum of punishment in felony cases, the point of this question to the defendant was not to elicit mitigating evidence, but to give the defendant a formal opportunity to present one of the strictly defined common law grounds which required the avoidance or delay of sentencing—he was not the person convicted, he had the benefit of clergy, he was insane, or, if a woman, she was pregnant. *See generally* 1 Joseph Chitty, The Criminal Law *698, *761-*62 (1841). These were the only allocutory pleas reported in common law cases. *See* Paul W. Barrett, Allocution, 9 Mo. L. Rev. 120-21 (1944).

The practice of allocution has been followed to varying degrees in many American jurisdictions, although in some the practice is regarded as "having no more than a ceremonial character because of the safeguards which modern criminal procedure now provides to the defendant." *People v. Gaines*, 88 Ill.2d 342, 430 N.E.2d 1046, *cert. denied*, 456 U.S. 1001, 73 L. Ed. 2d 1295 (1982); *see also* A.G. Barnett, Annotation, *Necessity and Sufficiency of Question to Defendant as to Whether He Has Anything to Say Why Sentence Should not be Pronounced Against Him*, 96 A.L.R.2d 1292 (1964). Common law allocution has long been part of this State's jurisprudence. However, in *State v. Johnson*, 67 N.C. 55 (1872), this Court reiterated that the purpose of common law allocution was to present legal grounds why sentence ought not be pronounced. *Johnson*, 67 N.C. at 60. *Johnson* does not suggest that the common law right of allocution has ever permitted the defendant, unsworn, to make statements of fact to the jury. When Johnson was tried for rape in 1872, the death penalty was mandatory for rape convictions. Thus, any right of allocution after the verdict and prior to the judgment and sentence could not have been directed to mitigation, but only to legal error.

Further, this limited common law right has been modified by statute as it relates to noncapital offenses in North Carolina. In N.C.G.S. § 15A-1334, the legislature has dealt with a defendant's right to address the court in noncapital cases as follows:

> (b) The defendant at hearing may make a statement on his own behalf. The defendant and prosecutor may present witnesses and arguments on the facts relevant to the sentencing decision and may cross-examine the other party's witnesses. No person other than the defendant, his counsel, the prosecutor, and one making a presentence report may comment to the court on sentencing unless called as a witness by the defendant, the prosecutor, or the court.

N.C.G.S. § 15A-1334 (1988). This statute is, by its own terms, restricted to noncapital cases. Section (d) of the statute states: "Sentencing in capital cases is governed by Article 100 of this Chapter." Thus, N.C.G.S. § 15A-1334—not a part of Article 100—has no application to capital sentencing proceedings which are conducted pursuant to N.C.G.S. § 15A-2000. For the foregoing reasons, we conclude that the only remanent of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered.

A defendant does not have a right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding. "The State and the defendant *or* his counsel shall be permitted to present argument for or against sentence of death. The defendant *or* defendant's counsel shall have the right to the last argument." N.C.G.S. § 15A-2000(a)(4) (1988) (emphasis added). However, the defendant has no right to testify without being subjected to cross-examination or to make unsworn statements of fact during any such argument or otherwise. There are no provisions in Article 100 of Chapter 15A which intimate any further right to allocution in capital cases exists than that contained in the common law and expressed in *Johnson*.

Further, in *McGautha v. California*, 402 U.S. 183, 28 L. Ed. 2d 711, *mandate stayed*, 403 U.S. 951, 29 L. Ed. 2d 862 (1971), *reh'g denied*, 406 U.S. 978, 32 L. Ed. 2d 677 (1972), discussing whether there is a constitutional right to allocution in a capital case, the Supreme Court stated that courts may require defendants to speak to the jury exclusively through sworn testimony subject to cross-

examination. 402 U.S. at 220, 28 L. Ed. 2d at 734; *see also Hill v. United States*, 368 U.S. 424, 7 L. Ed. 2d 417, *reh'g denied*, 369 U.S. 808, 7 L. Ed. 2d 556 (1962) (failure of a sentencing judge to ask a defendant whether he has anything to say prior to sentencing was not an error of constitutional significance). A failure to ask a convicted person whether he has anything to say before sentence is pronounced, alone, does not constitute grounds for a new trial or require a reversal of the verdict. *McGrady v. Cunningham*, 296 F.2d 600, 603 (4th Cir. 1961), *cert. denied*, 369 U.S. 855, 8 L. Ed. 2d 14 (1962). The constitution does not mandate a right of allocution in the form of unsworn testimony without cross-examination such as the defendant sought to introduce here. *See People v. Nicolaus*, 54 Cal. 3d 551, 817 P.2d 893 (1991); *State v. Hoyt*, 47 Conn. 518 (1880); *Dutton v. State*, 123 Md. 373, 91 A. 417 (1914); *Warner v. State*, 56 N.J.L. 686, 29 A. 505 (1894); *cf. Green v. United States*, 365 U.S. 301, 5 L. Ed. 2d 670 (1961) (must give defendant opportunity to present evidence in mitigation based on Federal Rules of Criminal Procedure Rule 32(a)).

The defendant contends a federal circuit court case sheds light on the issue. In *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978), *cert. denied*, 441 U.S. 966, 60 L. Ed. 2d 1072 (1979), a noncapital case, the court held that: [W]hen a defendant effectively communicates his desire to the trial judge to speak to the imposition of sentence, it is a denial of due process not to grant the defendant's request." *Ashe*, 586 F.2d at 336. However, the sentencing proceeding in a capital case is unlike any stage in noncapital cases. The defendant in a capital case may testify as to what penalty he feels is appropriate. He is allowed to present evidence as well as take the stand and testify before the jury that will recommend his sentence. Given this, we fail to see the need, much less a constitutional requirement, for a corresponding right of a defendant to make unsworn factual assertions to the jury during a capital sentencing proceeding without being subject to cross-examination.

This defendant had an opportunity to testify during the capital sentencing proceeding. Relying on his Fifth Amendment rights, the defendant waived his opportunity to testify before the jury concerning his remorsefulness. The common law right of allocution, to the extent it has not been abrogated by the passage of N.C.G.S. § 15A-2000 and § 15A-1334, lends no support to a defendant's request to make unsworn factual assertions to the jury. This assignment of error is without merit and is overruled.

By other assignments of error, the defendant has presented issues which he correctly acknowledges have previously been decided by this Court contrary to his position, but which he nonetheless brings forward in order to preserve them for possible further appellate review. We acknowledge that those assignments are properly preserved, but as we have previously found the issues raised by them to be without merit we do not address them here.

[25] Having concluded that the defendant's guilty pleas and capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. We must turn then to our final statutory duty of proportionality review.

In conducting proportionality review, we determine whether "the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983); N.C.G.S. § 15A-2000(d)(2) (1983).

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). The pool of available cases from which those roughly similar with regard to the crime and the defendant may be drawn for comparison purposes has been defined as

> *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.

Williams, 308 N.C. at 79, 301 S.E.2d at 355 (emphasis in original). "The pool, however, includes only those cases which this Court has found to be free of error in both phases of the trial." *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E.2d 653, 663 (1987).

In the present case, the defendant pled guilty to two counts of first-degree murder upon the theory of felony murder. As to each murder, the jury found: (1) that the murder was part of a course of conduct by the defendant which included the commission by the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11); (2) that the defendant had previously been convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (3) that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). As to each of the murders, the jury found as mitigating circumstances: (1) that the murder was committed while the defendant was under the influence of mental or emotional disturbance; (2) that the defendant, prior to his arrest, cooperated with law enforcement officers; (3) that the defendant confessed his crimes to law enforcement officers; (4) that the defendant, after his arrest, cooperated with law enforcement officers; (5) that the defendant provided financial assistance to his family while he was in the army; (6) that the defendant's parents divorced while he was a teenager; (7) the catch-all mitigating circumstance of any other circumstance arising from the evidence which one or more of the jurors deemed to have mitigating value.

In our proportionality review, we must compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *McCollum*, 334 N.C. at 240, 433 S.E.2d at 162. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank and waited for the victim to make a night deposit. When the victim arrived, the defendant demanded the money bag. The victim hesitated, and the defendant fired a shotgun striking him in both legs. The victim later died of cardiac arrest caused by

the loss of blood from the shotgun wounds. The jury found only the aggravating circumstance of murder for pecuniary gain. *Benson* is easily distinguishable from the present case. Here, in addition to the pecuniary gain aggravating circumstance, the jury also found both the aggravating circumstance that the defendant committed each of the murders while engaged in other crimes of violence against another person or persons and the aggravating circumstance that the defendant had previously been convicted of a felony involving the use or threatened use of violence to the person. Further, the defendant in the present case committed two murders rather than a single murder such as that committed by the defendant in *Benson.*

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant and several others planned to rob the victim's place of business. During the robbery, one of the assailants beat the victim, killing him. *Stokes* is also easily distinguishable from the present case, however, because the jury in *Stokes* found only one aggravating circumstance, that the murder was especially heinous, atrocious or cruel. In the present case, the jury found three aggravating circumstances. Additionally, the defendant in the present case, unlike the defendant in *Stokes*, killed two victims rather than one.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which the defendant was convicted was part of a course of conduct which included the commission of other crimes of violence against another person or persons. In the present case, the jury found that aggravating circumstance and two others. Also, the defendant in the present case murdered two victims, while the defendant in *Rogers* killed only one.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed him and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate in *Young*, this Court focused on the failure of the jury in *Young* to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel or the

aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons. The present case is easily distinguishable from *Young* because, among other things, the jury found as an aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person. Additionally, the defendant in this case murdered two victims, unlike the defendant in *Young*.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found by the jury was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found three entirely different aggravating circumstances. *Hill* is easily distinguishable from this case in which the defendant beat his male victim to death and strangled and beat his female victim to death.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Shortly thereafter, the victim's body was discovered in the truck. He had been shot twice in the head and his wallet was gone. The single aggravating circumstance found was that the murder was committed for pecuniary gain. *Jackson* is easily distinguishable from the present case in which the jury found two additional aggravating circumstances and in which the defendant murdered two victims, rather than one.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of friends were riding in a car when the defendant taunted the victim by telling him that he would shoot him and by questioning whether the victim believed that the defendant would shoot him. The defendant shot the victim, but then immediately directed the driver to proceed to the emergency room of the local hospital. In concluding that the death penalty was disproportionate there, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the evidence in the present case tended to show that the defendant made no efforts to assist either of his victims and placed their bodies at the rear of the cleaners where they would not be found easily.

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. In fact, the present case bears little similarity to any of those cases.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503.

> If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

McCollum, 334 N.C. at 242, 433 S.E.2d at 163. However, the factors to be considered and their relevance during proportionality review in a given capital case "will be as numerous and as varied as the cases coming before us on appeal." *Williams*, 308 N.C. at 80, 301 S.E.2d at 355. Therefore, the fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. Early in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared, will not be allowed to "become the last word on the subject of proportionality rather than serving as an initial point of inquiry." *Id.* at 80-81, 301 S.E.2d at 356. Instead, we stated plainly that the constitutional requirement of "individualized consideration" as to proportionality could only be served if the issue of whether the death penalty was disproportionate in a particular case ultimately rested upon the "experienced judgments" of the members of this Court, rather than upon mere numerical comparisons of aggravators, mitigators and other circumstances. Further, the fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have "consistently" returned life sentences in factually similar cases.

The defendant in the present case refers us to numerous cases in which juries during capital sentencing proceedings recommended life sentences. The defendant groups those cases into clusters, each of which is composed of cases which tend to share only one of the aggravating or mitigating circumstances found in the present case. None of those cases involved a defendant who committed double robbery murders with regard to which the jury found the same three aggravating circumstances and seven mitigating circumstances found by the jury in the present case. It suffices here to say that we have examined all of the numerous cases cited by the defendant and conclude that each of them is distinguishable from the present case.

It is also proper for this Court to "compare this case with the cases in which we have found the death penalty to be proportionate." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. Although we review all of the cases in the pool when engaging in our statutorily mandated duty of proportionality review, we reemphasize here "that we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* "The Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977." *Williams*, 308 N.C. at 81-82, 301 S.E.2d at 356. Here, it suffices to say that we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence disproportionate or those in which juries have *consistently* returned recommendations of life imprisonment. *E.g.*, *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985) (double robbery-murder as to which the jury found the aggravating circumstances that the murder was committed for pecuniary gain and that the murder was part of a course of conduct which included the commission by the defendant of another crime of violence against another person—death sentence proportionate); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983) (murder where the jury found as aggravating circumstances that the defendant had previously been convicted of a felony involving the use of violence to the person, the murder was part of a course of conduct which included a crime of violence by the defendant against another person, and the murder was especially heinous, atrocious or cruel—death sentence proportionate). After comparing this case carefully with all others in the pool used for

proportionality review, we conclude that it falls within the class of first-degree murders in which we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentences of death entered in the present case are not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's capital sentencing proceeding was free of prejudicial error and that the resulting sentences of death were not disproportionate punishment. Therefore, the sentences of death entered against the defendant must be and are left undisturbed.

No error.

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS MEDICAL CENTER; CHARLOTTE INSTITUTE OF REHABILITATION AND UNIVERSITY HOSPITAL; CAROLINA MEDICORP, INC.; FORSYTH MEMORIAL HOSPITAL, INC.; MEDICAL PARK HOSPITAL, INC.; DUKE MEDICAL CENTER; HIGH POINT REGIONAL HOSPITAL, INC.; MEMORIAL MISSION HOSPITAL, INC.; MOSES H. CONE MEMORIAL HOSPITAL; AND NORTH CAROLINA BAPTIST HOSPITALS, INC. v. NORTH CAROLINA INDUSTRIAL COMMISSION AND JAMES J. BOOKER, J. HAROLD DAVIS AND J. RANDOLPH WARD, IN THEIR OFFICIAL CAPACITIES AS ITS CHAIRMAN AND MEMBERS

No. 60PA93

(Filed 6 May 1994)

1. **State § 22 (NCI4th)— state commission and members—invalid regulation—sovereign immunity inapplicable**

The doctrine of sovereign immunity did not authorize the dismissal of plaintiff hospitals' complaint alleging that defendant Industrial Commission and its members, in excess of their statutory authority, adopted an invalid regulation.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 67-69; States, Territories, and Dependencies §§ 104-107.

2. Declaratory Judgment Actions § 5 (NCI4th)— validity of Industrial Commission rule—exhaustion of administrative remedies not required

Plaintiff hospitals were not precluded from seeking a declaratory judgment of the validity of an Industrial Commission rule pertaining to hospital charges for employees in workers' compensation cases on the ground that they failed to exhaust their administrative remedies since the Workers' Compensation Act only provides for hearings, awards, and review of awards in disputes between employees and employers with respect to specific claims for compensation and does not address challenges to rules and regulations promulgated by the Commission pursuant to the Act, and the Commission did not respond to plaintiffs' letter requesting an administrative hearing.

Am Jur 2d, Declaratory Judgments §§ 90-92.

3. Declaratory Judgment Actions § 13 (NCI4th)— hospital charges for workers' compensation patients—validity of Industrial Commission rule—justiciable controversy

Plaintiff hospitals stated a controversy justiciable under the Declaratory Judgment Act as to the validity of a *per diem* rule adopted by the Industrial Commission for hospital charges for services rendered to employees in workers' compensation cases and the concomitant repeal of the Blue Cross and Blue Shield of North Carolina rule, although the Commission has not yet refused to allow charges above the *per diem* rate, where plaintiffs alleged that they would sustain losses under the *per diem* reimbursement plan, and plaintiffs predict that, if denied the declaratory and injunctive relief sought, they will appeal the disallowed charges on a case-by-case basis for review by the Commission and then by the courts.

Am Jur 2d, Declaratory Judgments §§ 68-88.

4. Master and Servant § 75 (NCI3d)— workers' compensation—hospital charges—review by Industrial Commission

In enacting N.C.G.S. §§ 97-25, 97-26, and 97-90(a), the legislature intended (1) that medical compensation, including, *inter alia*, hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of

the Commission, be limited by the terms and conditions contained in § 97-25; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than the employee would have been had the employee paid for the services. Furthermore, the Commission's authority under § 97-90(a) is limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community.

Am Jur 2d, Workers' Compensation §§ 56, 57.

5. **Master and Servant § 75 (NCI3d)— workers' compensation—hospital charges—per diem rule invalid**

A *per diem* rule adopted by the Industrial Commission for reimbursement of hospital charges for services rendered to workers' compensation patients is inconsistent with the "prevailing charge" standard of N.C.G.S. § 97-26 and thus exceeds the Commission's statutory authority to review and approve such charges where the *per diem* rates are set for each hospital by establishing the average daily hospital charge for only five categories of inpatient services; charges for both similar and dissimilar hospital services will be averaged; the Commission will disapprove charges for reasonably required services, not because the hospital charged the patient more than other patients in the same category for the same or similar services, but because the hospital provided the patient with services that differed from the services provided on average to other patients in the same category; and the Commission will thus relieve the employer of its mandated liability for medical compensation.

Am Jur 2d, Workers' Compensation §§ 56, 57.

6. **Master and Servant § 75 (NCI3d)— workers' compensation—hospital charges—validity of repeal of BCBSNC rule**

The Industrial Commission did not exceed its statutory authority to review and approve hospital charges for medical compensation provided workers' compensation patients when

it repealed the Blue Cross and Blue Shield of North Carolina rule.

Am Jur 2d, Workers' Compensation §§ 56, 57.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of a judgment entered on 13 November 1992 by Bailey, J., in the Superior Court, Wake County, allowing plaintiffs' motion for judgment on the pleadings. Heard in the Supreme Court 10 May 1993.

Turner Enochs & Lloyd, P.A., by Wendell H. Ott and Laurie S. Truesdell; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., Anthony H. Brett, and Dale E. Nimmo, for plaintiff-appellees.

Michael F. Easley, Attorney General, by Isham B. Hudson, Jr., Senior Deputy Attorney General, for defendant-appellants.

WHICHARD, Justice.

The primary question is whether adoption of a *per diem* reimbursement rule and concomitant repeal of the Blue Cross and Blue Shield of North Carolina rule exceeded the North Carolina Industrial Commission's statutory authority to review and approve hospital charges for services rendered to patients entitled to care under the Workers' Compensation Act, N.C.G.S. Chapter 97 (1991) ("Act"). For reasons hereinafter stated, we hold that adoption of the *per diem* rule exceeded the Commission's statutory authority, but that repeal of the Blue Cross Blue Shield rule did not.

I.

The General Assembly enacted the Act in 1929 to both "provide swift and sure compensation to injured workers without the necessity of protracted litigation," and to "insure[ ] a limited and determinate liability for employers." *E.g., Rorie v. Holly Farms*, 306 N.C. 706, 709, 295 S.E.2d 458, 460 (1982).

> The philosophy which supports the Work[ers'] Compensation Act is "that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to the industry, and consequently to the employer or owner of the industry, even-

> tually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products."

Vause v. Equipment Co., 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951) (quoting *Cox v. Kansas City Refining Co.*, 108 Kan. 320, 195 P. 863 (1921)); *see also Barber v. Minges*, 223 N.C. 213, 216, 25 S.E.2d 837, 839 (1943) ("The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage.").

The basic operating principle of the Act is that an employee is automatically entitled to certain benefits whenever he suffers either a personal injury by accident occurring in the course of the employment and arising out of it, or incurs an occupational disease. Those benefits include both wage-based disability and medical compensation. "Medical compensation" includes hospital services "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will lessen the period of disability." N.C.G.S. § 97-2(19) (1991). "Medical compensation shall be provided by the employer." N.C.G.S. § 97-25 (1991). Medical compensation may be ordered by the Commission if not provided by the employer. *Id.* The pecuniary liability of the employer therefor "shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person." N.C.G.S. § 97-26 (1991). "[C]harges of hospitals for medical compensation . . . shall be subject to the approval of the Commission." N.C.G.S. § 97-90(a) (1991). The General Assembly created the Industrial Commission, *see* N.C.G.S. § 97-77, to administer the provisions of the Act, *Hanks v. Utilities Co.*, 210 N.C. 312, 319, 186 S.E. 252, 257 (1936), and authorized the Commission to "make rules, not inconsistent with [the Act], for carrying out the provisions [thereof]." N.C.G.S. § 97-80(a) (1991).

On 1 June 1992 the Industrial Commission announced that hospital charges for medical compensation rendered on or after 1 January 1993 would be approved, pursuant to N.C.G.S. § 97-90(a), under two alternative rules: a pre-existing fee schedule, which provided reimbursement according to a published schedule of uniform charges for inpatient services, and a *per diem* methodology. Charges in excess of these fees so scheduled or calculated would not be approved unless the hospital received prior approval thereof, or upon appeal to the full Commission.

In a memorandum dated 18 March 1992, the Commission described the *per diem* rule: the *per diem* "rate" would be set for each hospital by establishing the average daily hospital charge for five categories of inpatient services rendered to workers' compensation patients. Excluding any charges for treatment or services rendered to workers' compensation patients which are not paid or payable under the law, Category I aggregates all general, medical, and surgical charges, including rehabilitation, rendered to workers' compensation patients other than those covered by Categories II and III. Category II aggregates all intermediate or intensive care charges for medical intensive care unit or surgical intensive care unit services, including cardiac care, rendered to workers' compensation patients. Category III aggregates high cost specialty unit charges such as those for burn units, dialysis units, heart surgery or other specialty units. Category IV aggregates pain therapy care charges for pain therapy services, and Category V aggregates psychiatric care charges for psychiatric services rendered to workers' compensation patients. The first-year base *per diem* charge would be calculated for each category of cases by dividing the total workers' compensation inpatient charges for each separate category by the total number of workers' compensation inpatient days in each category for the most recent and complete fiscal year preceding the effective date, 1 January 1993. The resultant quotient, after adjustment for inflation by a factor equal to the Hospital Market Basket Index's annualized medical cost indicator for the South Atlantic Region, would be the *per diem* rate chargeable for such category during the first year. In subsequent years, that base year *per diem* would be adjusted for inflation by the Hospital Market Basket Index's indicator for the most recent year, not by an individual hospital's experience.

Further, the Commission advised, the *per diem* reimbursement system would replace a reimbursement rule in effect since 1 January 1990 whereby the Commission, furnished with a list of normal charges for services for that hospital by Blue Cross and Blue Shield of North Carolina, Inc. ("BCBSNC"), would approve charges for services rendered a workers' compensation patient which were the same as those for a BCBSNC patient.

Plaintiffs, a group of not-for-profit hospitals, addressed the Commission by letter on 14 July 1992, requesting an administrative forum by which they could "contest the regularity of the procedures used to adopt [the above] changes and the legal authority of the

Commission to adopt or enforce a Per Diem or a Hospital Fee Schedule reimbursement system." The Commission did not respond to this letter.

Proceeding under the Declaratory Judgment Act, N.C.G.S. §§ 1-253 to -267 (1983 & Supp. 1992), plaintiff hospitals then instituted this action in the Superior Court, Wake County, alleging that the Commission's actions in terminating the BCBSNC option and adopting the *per diem* option (1) failed to comply with applicable rulemaking procedures; (2) were arbitrary and capricious; (3) exceeded the Commission's statutory authority and were inconsistent with the Act, which provides that an employer's liability for medical services "shall be limited to such charges as prevail in the same community for similar treatment of injured persons"; and (4) deprived plaintiff hospitals of property without due process of law. Plaintiff hospitals requested that the court, pursuant to the Declaratory Judgment Act, declare the actions of the Commission null and void and enjoin the Commission from establishing or enforcing a reimbursement methodology for approval of inpatient hospital service charges except for the purpose of limiting such charges to the statutory standard contained in N.C.G.S. § 97-26, so that plaintiffs would be paid for inpatient hospital services provided to workers' compensation patients on the basis of the same schedule of charges applicable to the general patient population.

The trial court heard the case without a jury. It concluded that it had personal and subject matter jurisdiction pursuant to the Declaratory Judgment Act. It found that the Commission's actions exceeded its statutory authority to review and approve charges for hospital services based on prevailing community standards under the Act, and accordingly enjoined the Commission from implementing or enforcing the proposed changes in reimbursement options. It specifically excepted "the . . . continued use of those hospital inpatient reimbursement mechanisms in effect prior to defendants' adoption of [the *per diem* option]," including the extant fee schedule. In a subsequent order, the trial court clarified that it was enjoining both adoption of the *per diem* rule and repeal of the BCBSNC rule.

From this judgment, defendants appealed to the Court of Appeals and petitioned this Court for discretionary review prior to a determination by the Court of Appeals. On 11 March 1993, we allowed defendants' petition. We now affirm the determination that

defendants' adoption of the *per diem* rule exceeded their statutory authority, but we reverse the determination that defendants' repeal of the BCBSNC rule exceeded that authority.

II.

We first address three jurisdictional issues brought forward by defendants. They posit that the trial court lacked subject matter jurisdiction because (1) defendants are entitled to sovereign immunity, (2) plaintiffs failed to exhaust available administrative remedies, and (3) plaintiffs did not present an actual controversy as required under the Declaratory Judgment Act. We reject these arguments and conclude that plaintiff hospitals were entitled to seek declaratory and injunctive relief under the Declaratory Judgment Act.

A.

[1] The doctrine of sovereign immunity—that the state cannot be sued in its own courts without its consent—is firmly established in North Carolina law. *E.g., Ferrell v. Dept. of Transportation*, 334 N.C. 650, 654, 435 S.E.2d 309, 312 (1993). It is also well established that a suit against a state commission or members thereof to prevent it or them from performing official duties is a suit against the state within the meaning of this doctrine. *See, e.g., Lewis v. White*, 287 N.C. 625, 643, 216 S.E.2d 134, 146 (1975), *superseded on other grounds by statute as recognized in Corum v. University of North Carolina*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961); *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 500, 8 S.E.2d 619, 622 (1940).

> On the other hand, the official status of the defendants, standing alone, does not immunize them from suit. . . . "When public officers whose duty it is to supervise and direct a State agency *attempt to enforce an invalid ordinance or regulation*, or invade or threaten to invade the personal or property rights of a citizen *in disregard of law*, they are not relieved from responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State."

Lewis v. White, 287 N.C. at 643, 216 S.E.2d at 146 (quoting *Schloss v. Highway Commission*, 230 N.C. 489, 492, 53 S.E.2d 517, 519

(1949)) (emphasis added) (citation omitted) (plaintiff taxpayers alleged that the members of a State commission, in excess of their statutory authority or contrary to law, proposed a diversion of state tax funds from the purpose for which such funds were appropriated; held, doctrine of sovereign immunity does not authorize dismissal of complaint). *See also Shingleton v. State*, 260 N.C. 451, 458-59, 133 S.E.2d 183, 188-89 (1963) (individual may sue state under Declaratory Judgment Act to determine extent of easement granted to the individual by the state); *Teer v. Jordan*, 232 N.C. 48, 51, 59 S.E.2d 359, 362 (1950) (citizen-taxpayer may maintain action against members of government agency to restrain unlawful use of public funds to his injury); *Schloss v. Highway Commission*, 230 N.C. 489, 492, 53 S.E.2d 517, 519 ("courts are open" to party injured by acts of public officers that invade party's personal or property rights, and "he may there obtain prompt and adequate relief").

There is no difference in principle between an attempt to enforce an invalid regulation and the initial adoption or enactment of such a regulation; both are in excess of the authority granted the agency under the statute and invade or threaten to invade personal or property rights of a citizen in disregard of the law. We therefore hold that the doctrine of sovereign immunity does not authorize the dismissal of plaintiff hospitals' complaint alleging that defendant Commission and its members, in excess of their statutory authority, adopted an invalid regulation.

B.

[2] The next question is whether plaintiff hospitals' claim should be dismissed for failure to exhaust administrative remedies. Defendants contend that where there is an adequate and complete statutory remedy, plaintiffs are not entitled to seek nonstatutory remedies pursuant to the Declaratory Judgment Act. Defendants characterize N.C.G.S. §§ 97-83 to -86 as providing such a remedy.

In *Worley v. Pipes*, 229 N.C. 465, 50 S.E.2d 504 (1948), this Court held that the exclusive remedy of a physician to recover for services rendered to an injured employee in cases where the employer and employee are subject to the Act is by application to defendant Commission in accordance with sections 97-83 through -86 of the Act, with right of appeal to the courts for review. *Id.* at 471, 50 S.E.2d at 508. Defendants contend that *Worley* is equally applicable here, and plaintiff hospitals have not availed themselves of that exclusive remedy—*i.e.*, that plaintiffs must choose the *per*

diem reimbursement option; seek approval of charges for services rendered an injured worker in excess of the *per diem*; and, when denied, appeal to the full Commission for review of the disapproved charges. Only then, they argue, can plaintiffs appeal the Commission's decision to the Court of Appeals. Instead, plaintiffs requested a forum and, when ignored, immediately sought declaratory relief.

"[W]hen an *effective* administrative remedy exists, that remedy is exclusive." *Lloyd v. Babb*, 296 N.C. 416, 428, 251 S.E.2d 843, 852 (1979). "When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. . . . Our Court has not permitted the Declaratory Judgment Act to supplant or substitute for the specific statutory proceeding for testing a . . . statute." *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. at 173-74, 118 S.E.2d at 795-96; *see also Porter v. Dept. of Insurance*, 40 N.C. App. 376, 378-80, 253 S.E.2d 44, 46-47, *cert. denied*, 297 N.C. 455, 256 S.E.2d 808 (1979) (plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where plaintiff failed to exhaust available administrative remedies).

We agree with defendants that *Worley* is equally applicable to charges for hospital services rendered to employees in workers' compensation cases. Section 97-90(a) provides that *both* "[f]ees for . . . physicians *and* charges of hospitals for medical compensation under this Article shall be subject to the approval of the Commission." N.C.G.S. § 97-90(a) (emphasis added). "[T]he General Assembly has prescribed an adequate remedy [in N.C.G.S. §§ 97-83 through -86] by which *any matter in dispute and incident to any claim* under the provisions of the Work[ers'] Compensation Act may be determined and settled." *Worley v. Pipes*, 229 N.C. at 471, 50 S.E.2d at 508 (emphasis added).

Plaintiff hospitals, however, do not seek review of an award of any *specific claims* for compensation before defendant Commission; rather, they seek a declaratory ruling that the *per diem* reimbursement rule is invalid, and injunctive relief therefrom. Sections 97-83 through -86 only provide for hearings, awards, and review of awards in disputes between employees and employers with respect to specific claims for compensation, and do not address challenges

to rules and regulations promulgated by the Commission pursuant to the Act.[1]

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1. These sections provide:

§ 97-83. In event of disagreement, Commission is to make award after hearing.

If the employer and the injured employee or his dependents fail to reach an agreement, in regard to compensation under this Article[,] within 14 days after the employee has knowledge of the injury or death, or if they have reached such an agreement which has been signed and filed with the Commission, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payment under such agreement, either party may make application to the Industrial Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

§ 97-84. Determination of disputes by Commission or deputy.

The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings, within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and a copy of the award shall immediately be sent to the parties in dispute.

§ 97-85. Review of Award.

If application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

See also Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 407(1) (1993) ("Persons who disagree with the allowance of such fees in any case may make application for and obtain a full review of the matter before the Commission as in all other cases provided"; the published fees govern "except that in special hardship cases where sufficient reason therefor is demonstrated to the Commission, fees in excess of those so published may be allowed.").

Nor has the General Assembly provided procedures to challenge an invalid rule or regulation in any other section of the Act.[2] Thus, the General Assembly has not provided, within the Act, an adequate remedy for plaintiffs. Nonetheless, plaintiff hospitals requested, by letter, an administrative hearing at which they could "contest the regularity of the procedures used to adopt and the legal authority of the Commission to adopt or enforce a Per Diem or a Hospital Fee Schedule reimbursement system." Defendants did not respond to the letter.

Under these circumstances we cannot hold that plaintiff hospitals were not entitled to seek relief under the Declaratory Judgment Act on the ground that they have not exhausted their administrative remedies. To the extent that *Wake County Hospital v. Industrial Comm.*, 8 N.C. App. 259, 174 S.E.2d 292 (1970), determined that an action by a nonprofit hospital which challenged the validity of a schedule of hospital charges approved by the Industrial Commission in the treatment of workers' compensation cases presents a question arising under the Act which is determinable by the Commission, it is overruled.

C.

[3] The third and final jurisdictional question is whether plaintiff hospitals have stated a controversy justiciable under the Declaratory

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2. Compare the procedures provided in the North Carolina Administrative Procedure Act, Chapter 150B (1991), from which the Industrial Commission is exempted, N.C.G.S. § 150B-1(c)(4) (1991): an agency must submit a rule adopted by it to the Rules Review Commission before the rule can be included in the North Carolina Administrative Code. N.C.G.S. § 150B-21.8 (1991). The Commission must determine whether a rule (1) is within the authority delegated to the agency by the General Assembly, (2) is clear and unambiguous, and (3) is reasonably necessary to fulfill a duty delegated to the agency by the General Assembly. N.C.G.S. § 150B-21.9 (1991). A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objections and requests in writing that the Commission return the rule to the agency, and if entered into the North Carolina Administrative Code ("NCAC"), the entry reflects the Commission's objection. N.C.G.S. § 150B-21.12(a)(2), (b) (1991). A person aggrieved by a permanent rule entered in the NCAC with an objection by the Commission based on a lack of statutory authority may file an action for declaratory judgment in Superior Court, Wake County, pursuant to the Declaratory Judgment Act; in the action the court determines whether the agency exceeded its authority in adopting the rule. N.C.G.S. § 150B-21.15(a) (1991). These procedures replaced those provided in N.C.G.S. § 150B-17 (1987) (repealed 1991), requiring that any party dissatisfied with an administrative rule or regulation petition the agency for a declaratory ruling with regard to the validity of the rule as a condition precedent to review by the courts.

Judgment Act. Section 1-264 of that act states: "This Article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." N.C.G.S. § 1-264 (1983). Section 1-254 provides:

> Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . ., and obtain a declaration of rights, status or other legal relations thereunder.

N.C.G.S. § 1-254 (1983).

Courts have stated on numerous occasions that declaratory judgment proceedings are particularly useful in determining the rights of individuals vis-a-vis administrative agencies; a judicial determination as to the power of public regulatory agencies and the validity of their rules and regulations enables the private individual to avoid uncertainty as to his rights and duties. 22A Am. Jur. 2d *Declaratory Judgments* § 89 (1988). *See, e.g., Avery Freight Lines v. White*, 245 Ala. 618, 624, 18 So. 2d 394, 400 (1944) ("A well-known field of jurisdiction under the Declaratory Judgment Law is the adjudication of legal rights in controversy between the citizen and public officials, including members of administrative agencies, in advance of threatened and erroneous action to the injury of the party plaintiff.").

Declaratory judgments will be denied, however, where no actual controversy exists.

> An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations."

Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R., 295 N.C. 683, 703, 249 S.E.2d 402, 414 (1978) (quoting *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949)). "It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the Courts be convinced that

the litigation appears to be unavoidable." *Consumers Power v. Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974).

We do not require that the challenged regulation have taken effect, only that it have been enacted or adopted by the administrative agency. *Cf. City of Raleigh v. R. R. Co.*, 275 N.C. 454, 463, 168 S.E.2d 389, 395 (1969) ("Indeed, it is unnecessary for the assailed statute to have taken effect in order to entitle one whose rights it affects to contest the same by declaratory action. However, it is well settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment." (quoting 2 Walter Anderson, *Actions for Declaratory Judgments* § 621, at 1415 (2d ed. 1951))). Further, we require that plaintiffs be directly and adversely affected by the regulation. *Cf. City of Greensboro v. Wall*, 247 N.C. 516, 519-20, 101 S.E.2d 413, 416 (1958) ("[T]he validity of a statute, when *directly and necessarily* involved, may be determined in a properly constituted action under [the Declaratory Judgment Act]; but this may be done only when some specific provision(s) thereof is challenged by a person who is directly and adversely affected thereby." (citations omitted)).

Plaintiff hospitals provide inpatient care to employees who are subject to the Act. On 2 June 1992, defendant Commission adopted minutes announcing that hospital charges for services rendered after 1 January 1993 would be approved if less than or equal to the rates calculated under the *per diem* rule. Plaintiffs petitioned the Commission for a hearing on the new rule; the Commission did not respond to the letter. Plaintiffs alleged that they would receive, under the new *per diem* rule, less than the amounts they charge the general patient population; in other words, plaintiffs alleged that they would sustain losses under the *per diem* reimbursement option. Plaintiffs predict that, if denied the declaratory and injunctive relief sought, they will appeal the disallowed charges on a case-by-case basis for review by the Commission and then to the courts.

Defendants argue it is possible that litigation may not arise. They point out that they have not yet refused to allow, and might ultimately approve, charges above the *per diem* rate. Defendants refer to defendant Commission's rules which allow it to approve any given hospital charges in excess of the approved *per diem* rate when the hospital demonstrates "special hardship" therefrom.

Defendants also assert that they plan to approve the *per diem* rate even if the actual charges are less than those set *per diem*, and notwithstanding the statutory proscription against employers paying more than the prevailing charges; therefore, they argue, the hospitals will be fully reimbursed on average. Defendants predict that neither employers nor their insurance carriers will complain about paying in excess of the actual charges because they realize that the *per diem* rule will reduce costs.

These "contingencies and possibilities, however, do not make the case nonjusticiable. We do not require the plaintiff to show with absolute certainty that litigation will arise; the plaintiff must merely demonstrate to a 'practical certainty' that litigation will ensue." *Ferrell*, 334 N.C. at 656, 435 S.E.2d at 314. Plaintiffs are not required to sustain actual losses in order to make a test case; "[s]uch a requirement would thwart the remedial purpose of the Declaratory Judgment Act." *Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971). Plaintiff hospitals have sufficiently demonstrated a "practical certainty" that litigation will ensue. We thus hold that they have presented an actual controversy justiciable under the Declaratory Judgment Act.

III.

The substantive question presented is whether the trial court erred in determining that the Commission's adopting of the *per diem* reimbursement rule and concomitant repealing of the BCBSNC schedule exceeded its authority under the Act to review and approve hospital charges for medical compensation provided to workers' compensation patients. To answer this question, we must first clarify the scope of the Commission's authority under the statute with regard to the measure of hospital charges thereunder. *In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980) ("[T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform."). That is primarily a question of statutory construction. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) ("An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction.").

A.

The following statutory provisions are pertinent:

§ 97-2. Definitions.

(19) Medical Compensation—The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period.

§ 97-25. Medical treatment and supplies.

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employer is called to treat the injured employee, the reasonable cost of such service

shall be paid by the employer if so ordered by the Industrial Commission.

Provided, however, if he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

§ 97-26. Liability for medical treatment measured by average cost in community; malpractice of physician.

The pecuniary liability of the employer for medical, surgical, hospital service, nursing services, medicines, sick travel or other treatment required when ordered by the Commission, shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

§ 97-80. Rules and regulations . . . .

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes and procedure under this Article shall be as summary and simple as reasonably may be.

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission . . . .

(a) Fees for attorneys and physicians and charges for hospitals for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case. Unless otherwise provided by the rules, schedules, or orders of the Commission, a request for a specific prior approval to charge shall be submitted to the Commission for each such fee or charge.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or such court, or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor,

> and upon conviction thereof shall, for each offense, be punished by a fine of not more than five hundred dollars ($500.00) or by imprisonment not to exceed one year, or by both such fine and imprisonment.
>
> . . . .
>
> (e) The fees provided for in subsection (a) of this section shall be approved by the Commission no later than June 1 of the year in which the Commission exercises its authority under subsection (a) of this section, but shall not become effective until July 1 following such approval.

Defendants apparently perceive in these provisions and numerous others (*see infra*) unrelated to hospital charges but incorporating the term "reasonable," a broad grant of authority to set maximum hospital charges in order to keep charges "reasonable" and contain rising costs of medical compensation. They contend that section 97-26 is either "vague and outdated" because insurance carriers, not injured persons, now pay hospital bills, and hospitals do not charge according to the patient's "standard of living"; that it applies only to hospital services ordered by the Commission, not to hospital services voluntarily provided by the employer; or that it denominates the maximum charge per hospital service which may be set by the Commission under its broad grant of authority. According to defendants, the Commission may set rates less than the prevailing community charge described in section 97-26.

[4] While defendants' interpretation "may be helpful and [is] entitled to . . . consideration," it is not controlling; "[i]t is the Court and not the agency that is the final interpreter of legislation." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 211-12, 306 S.E.2d 435, 444-45 (1983). We reject defendants' interpretation of these provisions, and conclude that section 97-26 contains the correct measure for employer liability for hospital charges; the authority to approve hospital charges under section 97-90(a) is provided to ensure that hospitals do not provide services not reasonably required to effect a cure or give relief or tend to lessen the period of disability, and that hospital charges therefor do not exceed the prevailing community charge described therein.

> In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature

> in enacting the law, sometimes referred to as legislative intent, is accomplished. The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." In addition, a court may consider "circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied."
>
> We should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent.

Comr. of Insurance v. Rate Bureau, 300 N.C. at 399-400, 269 S.E.2d at 561 (citations omitted).

Applying the foregoing rules, we conclude that the legislature intended (1) that medical compensation, including, *inter alia*, hospital services provided by the employer, ordered by the Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in section 97-25; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. It intended, further, that the Commission's authority under the statute be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community.

Defendants, focusing on the language of section 97-26 limiting charges to "such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person," contend that hospitals no longer charge according to standard of living, and further, that most people have health insurance; therefore, they posit, section 97-26 is "vague and outdated." We disagree; indeed, this language, read in historical context, is the key to understanding the "evils sought to be remedied."

Before the 1930s, most people did not have private health insurance; the only extensive private health plans offered direct services, usually to employees in an industry. Paul Starr, *The Social Transformation of American Medicine* 294 (1982) [hereinafter "Starr"]. Hospitals generally provided three classes of service: wards for the poor and working-class, semi-private rooms for the middle-class, and private rooms for the wealthy.[3] Starr at 159. In some communities, hospitals were segregated by race. Anne M. Dellinger, "A History of Hospitals in North Carolina," in *Hospital Law in North Carolina* 1-History, 7-History to 8-History (Anne M. Dellinger ed., 1985) [hereinafter "Dellinger"] (In Greensboro, L. Richardson Hospital, established in 1927, "remained the only facility open to blacks on a non-discriminatory basis until 1963, when Wesley Long and Cone Memorial hospitals were integrated by court order."). Physicians and hospitals could increase profits both by providing additional services and by charging according to the patient's ability to pay. *See* Starr at 291.

While "[t]he words of a statute must be taken in the sense in which they were understood . . . when the statute was enacted," this rule does not preclude a statute from applying to things and conditions not in existence at the time of enactment where the language is sufficiently broad to fairly include them. *Hedrick v. Graham*, 245 N.C. 249, 259, 96 S.E.2d 129, 136-37 (1957) (citation omitted). We find the language of the statute here sufficiently broad to include modern hospital practices; the legislature clearly intended to ensure that employers pay only for those services reasonably required to effect a cure or give relief or tend to lessen the period of disability, and that hospitals not charge employers more for the same services than they charge other patients not covered by workers' compensation. We note, for example, that the Commission now generally approves only ward and semi-private services. N.C. Industrial Commission, *Evaluation of Permanent Physical Impairment: Rating Guide and Fee Schedule for Physicians and Hospitals for Services Rendered Under the North Carolina Workers' Compensation Act* 292 (1990).

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3. Few class distinctions could be more sharply delineated. While ward patients were attended by the hospital staff, private patients were attended by doctors of their choice. Ward and private patients usually received two different kinds of food, and ward patients were often not permitted to see friends and relatives as frequently as were private patients.

Starr at 159.

Defendants next focus on the language of the phrase modifying the enumerated treatments, "when ordered by the Commission," apparently arguing that section 97-26 applies only when medical treatment is ordered by the Commission and not when the employer provides hospital services or when, in emergencies, the employee secures hospital services of his own choosing. *See* N.C.G.S. § 97-25. We also reject this argument.

We previously have decided, at least implicitly, that the pecuniary liability of the employer for medical treatment voluntarily provided is to be measured by section 97-26. In *Biddex v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953), we held that even when medical compensation is voluntarily provided by the employer, the bills must be approved based on the standard set forth in section 97-26:

> A commendably large number of our employers provide prompt medical examination, first aid, and hospital care for their employees in case of accident without regard to the nature of the injury, if any, that may result. Frequently, it is purely precautionary. When liability for the medical care of an employee who has suffered an accident is voluntarily incurred by the employer, the bills therefor must be approved by the Commission before the employer can demand reimbursement from its insurance carrier. In this manner such expenditures are kept within the schedule of fees and charges adopted by the Commission [pursuant to] G.S. 97-26.

Id. at 664, 75 S.E.2d at 780-81. We assume that the legislature was satisfied with this interpretation, in that it has since considered and amended both sections 97-25 and 97-26 without altering it. *See Hewett v. Garrett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375 (1968) ("We may assume the law-making body is satisfied with the interpretation this Court has placed upon its Work[ers'] Compensation Act [when it has convened numerous times following that interpretation and failed to make any change in the statute].").

Defendants correctly point out that the legislature did not expressly limit the pecuniary liability for medical treatment rendered pursuant to an emergency, or to the proviso allowing an employee to choose his own physician. In *Schofield v. Tea Co.*, 299 N.C. 582, 594-95, 264 S.E.2d 56, 64-65 (1980), we held that fairness requires that such medical treatment be subject to the same limitations, terms, and conditions as apply to medical treatment provided

by the employer, as set forth in section 97-25, namely, that such medical treatment be reasonably required to effect a cure, give relief, or tend to lessen the period of disability.

Similarly, fairness requires that the employers' pecuniary liability for such medical treatment also be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person, as set forth in section 97-26. The provisions of sections 97-25 and 97-26 are *in pari materia* and must be construed together.

Defendants contend, apparently in the alternative, that the legislature impliedly granted them authority to set "reasonable" hospital rates at or below the prevailing community charge described in section 97-26, so as to contain rising costs of medical compensation. *See In re Community Association*, 300 N.C. at 280, 266 S.E.2d at 654 ("The agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority."). We have stated that "the Legislature may . . . delegate [ratemaking] authority to an administrative officer provided it prescribes sufficiently clear standards to control his discretion." *Comr. of Insurance v. Rate Bureau*, 300 N.C. at 399, 269 S.E.2d at 561. In support of their contention that the legislature gave them the authority to set "reasonable" hospital rates, defendants rely on numerous provisions unrelated to hospital charges incorporating the term "reasonable": N.C.G.S. §§ 97-25 (providing that employers pay reasonable costs for emergency medical services provided their employee); 97-73 (providing for a schedule of reasonable charges for examinations of employees exposed to the hazard of asbestosis or silicosis, which examinations are to be conducted by physicians chosen by the Commission); 97-74 (providing for awards of costs in hearings arising out of claims for disability or death benefits, which costs are to include "a reasonable allowance for the services of members of the advisory medical committee attending such hearings"); 97-88.1 (providing for awards of attorneys' fees in hearings brought or defended without reasonable grounds); 97-90(c) (providing for approval of attorneys' fees at the time the Commission renders a decision at the hearing); and 97-100(a) (requiring that rates charged by workers' compensation insurance carriers be "fair, reasonable and adequate"). We do not perceive in these provisions the "sufficiently clear standards" necessary to establish

ratemaking authority in the Commission. *Cf.*, *e.g.*, Public Utilities Act, N.C.G.S. §§ 62-130 to -133 (1989) (providing detailed criteria for setting rates for public utilities). We thus conclude that the legislature did not intend to delegate such authority.

While defendants' concern about the rising costs of medical compensation is valid, hospital charges not paid by the employer (as self-insurer or by the insurance carrier) are spread to other patients, or, in the case of state or municipal hospitals, to the general taxpaying public. *See* Dellinger at 12-13. Such a result conflicts with the primary purpose of the Act, *i.e.*, allocating the cost of work-related injuries first to the industry and ultimately to the consumer of the industry's products. *See, e.g., Vause v. Equipment Co.*, 233 N.C. at 92, 63 S.E.2d at 176; *Barber v. Minges*, 223 N.C. at 216, 25 S.E.2d at 839. Indeed, such allocation of cost to the employer is fundamental to the American compensation system, "largely private in structure, being a matter between employers, insurance carriers, and employees," and distinguishes it from the "typical [European] 'socialistic' schemes" in which "the government becomes the central figure." 1 Arthur Larson, *The Law of Workmen's Compensation* § 3.10, at 1-15 (1993).

> Unlike pure social-insurance plans, the American compensation system does not place the cost on the "public" as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product.
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> . . . [Thus,] [i]n the United States it is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture.

Id. § 3.20, at 1-16.

For these reasons, we decline to adopt defendants' interpretation that the legislature intended to grant them the authority to set rates for hospital services. Rather, we conclude that the legislature intended (1) that medical compensation, including, *inter alia*, hospital services provided by the employer, ordered by the Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in section 97-25; (2) that such medical compensation be reasonably required to effect a cure

or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. We therefore hold that the Commission's authority under the statute is limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that for such services the employer is not charged more than the prevailing hospital charge for the same or similar hospital service.

B.

[5] Having determined that the Commission's authority to review and approve hospital charges is thus limited, we turn to the question of whether the *per diem* rule is consistent with the statute and results in a schedule of prevailing charges.

Defendants do not argue that the rule calculates a schedule of prevailing charges. Rather, they justify the rule as establishing "reasonable rates" to constrain rising medical costs. In the alternative, they contend that under the rule the hospitals will receive their prevailing charge "on average" over all workers' compensation patients or that such a rule is not inconsistent with the "prevailing charge" standard because the Commission can still determine, on a case-by-case basis, that charges assessed do not exceed prevailing charges.

Plaintiffs essentially respond that the rule is fatally compromised by statistical sampling and aggregation problems. We agree with plaintiffs.

Under the *per diem* rule, the Commission will disapprove prevailing charges for hospital services that are reasonably required under the statute, thereby relieving employers of their mandatory liability therefor. Thus the rule is inconsistent with the statute, and the Commission has exceeded its authority in promulgating such a rule. *See* N.C.G.S. § 97-80(a) (authorizing the Commission to "make rules, not inconsistent with this Article, for carrying out the provisions of this Article"). *Cf., e.g., States' Rights Democratic Party v. Board of Elections*, 229 N.C. 179, 186-87, 49 S.E.2d 379, 384 (1948) (" 'Administrative rules and regulations, to be valid, must be within the authority conferred upon the administrative agency. The power to make regulations is not the power to legislate in the true sense, and under the guise of regulation legislation may

not be enacted. The statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder.' " (quoting 42 Am. Jur. *Public Administrative Law* § 99)).

The *per diem* "rate" would be set for each hospital by establishing the average daily hospital charge for five categories of inpatient services, discussed *supra*, rendered to workers' compensation patients. The first-year base *per diem* charge for any of the five categories is, basically, the average of the average daily patient charges over all categories of patients. Such an average daily patient charge would be calculated for each category by totaling the charges for the diverse and distinct services (line items on the hospital bill) provided a patient in that category unit,[4] then dividing that total by the number of days (or fractions thereof) spent in the hospital by the patient. The resulting quotient, the average daily patient charge, is then averaged over all patients in the category. After adjustment for inflation, this average would be the *per diem* amount chargeable for such category during the first year.[5]

We believe the legislature contemplated that the Commission calculate some average charge because it used the phrase "such charges as *prevail*" within section 97-26. Also, the section is titled "Liability for medical treatment measured by *average* cost in com-

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4. These hospital services, medicines, supplies, and other treatment provided the patient, thus aggregated, are numerous and varied, including ambulance, emergency room, and admission services; room and board; diagnostic procedures; physical and/or occupational therapy; nursing services; laboratory services; and pharmacy services. *See, e.g.*, N.C. Industrial Commission, *Evaluation of Permanent Physical Impairment: Rating Guide and Fee Schedule for Physicians and Hospitals for Services Rendered Under the North Carolina Workers' Compensation Act* 292-97 (1990). Indeed, the Commission enumerates more than sixty different services for room and board; eight different services, with no "fee" specified, for general intensive care services; five, with no fee specified, for general coronary care services; seven, with no fee specified, for nursing services including intensive care and coronary care nursing; ten, with no fee specified, for pharmacy, including drugs, non-prescription drugs, drugs incident to radiology, intravenous therapy, etc.; more than thirteen, with no fee specified, for medical supplies, including medical, surgical, non-sterile, medical prosthetic devices, pacemaker, and intraocular lens; and more than thirty-five codes, with no fee specified, for laboratory, pathology, radiology, and nuclear medicine services. *Id.*

5. In subsequent years, that base year *per diem* would be adjusted for inflation by the Hospital Market Basket Index's indicator for the most recent year, not by an individual hospital's experience.

munity." N.C.G.S. § 97-26 (emphasis added); *see Raleigh v. Bank*, 223 N.C. 286, 290, 26 S.E.2d 573, 575 (1943) ("[W]hen the heading of a section is misleading or is not borne out by the explicit language of the statute itself, it may be disregarded, but where the meaning is not clear or there is ambiguity the heading which the Legislature has adopted in enacting the statute becomes important in determining the legislative intent."). "Prevail" is defined as "be frequent," "common or widespread," or "predominate." *Webster's Third New International Dictionary* 1797 (1976). Calculating an average charge reaches, in theory, the most common, or the most frequent, or the representative charge, because it mediates the variation over sample charges.[6] Thus, within a modern hospital serving a community, the average charge assessed patients for any of the numerous, diverse services provided a patient—the line items on a hospital bill—would constitute "such charges as *prevail* in the same community for *similar* treatment of injured persons of a like standard of living when such treatment is paid for by the injured person." Indeed, within a modern hospital that charges according to a uniform rate schedule, *i.e.*, that does not price discriminate by charging patients according to their ability to pay, the uniform charge for each such line-item service would be the prevailing charge therefor.

Calculating an average camouflages variation across patients; in theory, that makes the average a prevailing charge. The *per diem* rates, however, are set by averaging charges over both similar and dissimilar hospital services. The variation camouflaged and confounded by the *per diem* rule thus arises from two sources: first, the variation in charges across the patients within the category for the same or similar hospital services, and, second, the variation in services provided patients as dissimilar, for example, as a burn and a heart-surgery patient, both Category III patients. Indeed, in any hospital that charges according to a uniform charge schedule and does not price discriminate or charge patients according to their ability to pay, the variation arises *solely* from variation in the services provided.

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6. There are three kinds of statistical averages: the mean, median, and mode. The *per diem* is an arithmetic mean, the sum of the average daily patient charges divided by the number of charges thus summed. A median would be the charge falling midway in the distribution of sample charges. The mode would be the most frequent charge. *See generally* David W. Barnes and John M. Conley, *Statistical Evidence in Litigation* 60-61 (1986).

The legislature has mandated employer liability for hospital services reasonably required to effect a cure or give relief or tend to lessen the period of disability. Under the *per diem* rule, however, the Commission will disapprove charges for such reasonably required services, not because the hospital charged the patient more than other patients in the same category for the same or similar services, but because the hospital provided the patient with services that differed from the services provided on average to other patients in the same category; the Commission will thus relieve the employer of its mandated liability for medical compensation.[7] Thus, the *per diem* rule is inconsistent with the statute. *Cf. Evans v. Times Co.*, 246 N.C. 669, 670-71, 100 S.E.2d 75, 76-77 (1957) (defendant challenged the rule applied by the Industrial Commission for the measurement of disability compensation to be allowed; held, N.C.G.S. § 97-30 required that the employee receive sixty percent of the difference between wages earned before and after the injury, and therefore the rule providing for less than sixty percent was inconsistent with the Act and invalid).

Defendants attempt to assure us that they would always approve the *per diem* rate; although some employers (or their insurance carriers) would pay more than the actual or prevailing charges for services rendered their employees, they would not challenge the *per diem*, defendants say, because they realize that employers' medical costs, viewed as a whole, would be contained. The hospitals would thus receive "on average" prevailing charges for all services rendered; therefore, the *per diem* rule is consistent with the statute.

We reject this argument. It is based on the premise that the Commission, in derogation of its statutory obligation, would review and approve hospital charges that exceeded the actual prevailing charges for services provided a patient. Our workers' compensation system is not a "one payor" system. Rather, each employer is liable for medical compensation that may be required under the statute for its employees, and chooses thereunder to either self-

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7. N.C.G.S. § 97-90(b) requires that "[a]ny person . . . who receives any fee . . . on account of [medical services rendered under the Act], unless such consideration . . . is approved by the Commission or . . . court . . . shall be guilty of a misdemeanor." If the hospital provides services that are not reasonably required to effect a cure or give relief or tend to lessen the period of disability, the employer would not be liable therefor; however, the employee would be liable, and the hospital would be able to seek payment from the employee.

insure or cover its risk through an approved workers' compensation insurance carrier, N.C.G.S. § 97-93; rates for such insurance are generally tied to the prior experience of the employer. Nor is our system serviced by "one provider"; that any hospital would receive, on average, its actual prevailing charges, based on that hospital's historical charges, would be a mere fortuity.

We recognize that the *per diem* rule would simplify the process of approval of hospital charges and that the legislature has authorized the Commission to make rules establishing processes and procedures "as summary and simple as reasonably may be." N.C.G.S. § 97-80(a). There may be some level of aggregation over some of the numerous, diverse, and distinct services provided by modern hospitals that is consistent with the statute. Aggregation to a mere five categories, however, does not suffice. *Cf.* Social Security Act, 42 U.S.C. § 1395ww (1993) (Payments to hospitals for inpatient hospital services) and regulations promulgated pursuant thereto, 42 C.F.R. §§ 412.1-412.374 (1993) (The federal agency administering Medicare and Medicaid has established 460 diagnostically related groups, and thus 460 rates to effect the Congressional mandate therein to establish prospective hospital charges for each hospital participating in the program.).[8]

Defendants finally contend that the *per diem* rule is not inconsistent with the statute because plaintiff hospitals are free to contest, on a case-by-case basis, the "reasonableness" of any approved hospital charge. Under the *per diem* rule, the hospital may appeal the approved hospital charges, first to the Chief Medical Examiner, who institutes a review of the disputed fee using the established *per diem* schedule. If the hospital disputes that determination, it may request a hearing before a Deputy Commissioner, for which it may submit expert depositions. If dissatisfied with the Deputy

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8. The Medicare and Medicaid programs are massive medical assistance programs involving millions of Americans and billions of dollars. The cost containment system thereof, enacted pursuant to 42 U.S.C. § 1395ww, establishes a method for paying hospitals for their operating costs of inpatient hospital services on the basis of rates that are prospectively determined and that vary for each patient according to the diagnostic-related group (DRG) in which the patient is classified; direct operating costs, including wages, capital-related costs, and direct medical and nursing education costs for each participating hospital, are considered in determining the hospital-specific prospective rates for each DRG. The regulations promulgated by the Secretary are extensive and detailed. *See generally* Harvey L. McCormick, *Medicare and Medicaid Claims and Procedures* § 24, at 102 (1986).

Commissioner's order, it is entitled to review by the Full Commission upon timely application.

We again reject defendants' contention. The right to appeal the application of an invalid rule does not cure its fundamental invalidity.

We conclude, for the reasons stated, that the *per diem* rule is inconsistent with the Act and that defendants exceeded their authority in promulgating it.

C.

[6] The final question is whether the trial court erred in determining that the Commission's repeal of the BCBSNC option exceeded its authority under the Act to review and approve hospital charges for medical compensation provided workers' compensation patients. The legislature has authorized the Commission to "make rules, not inconsistent with this Article, for carrying out the provisions of this Article." N.C.G.S. § 97-80(a). Defendants conceded in oral argument that the BCBSNC rule is consistent with the statute; they sought to replace the BCBSNC rule with the *per diem* rule, they say, to contain rising medical costs. However, plaintiff hospitals did not challenge the extant fee schedule. We cannot conclude that the BCBSNC rule is the only rule that results in a schedule of charges consistent with the statute, and we therefore hold that the trial court erred in determining that the Commission exceeded its authority by repealing that rule.

IV.

In summary, we hold that plaintiff hospitals were entitled to seek declaratory and injunctive relief under the Declaratory Judgment Act. We hold, further, that the trial court did not err in adjudging that defendants exceeded their statutory authority in promulgating the *per diem* rule; under the rule, defendant Commission will disapprove prevailing charges for hospital services reasonably required under the Act, thus relieving the employers from mandatory liability therefor. The trial court did err, however, in adjudging that defendants exceeded their authority in repealing the BCBSNC rule; plaintiffs did not challenge the extant fee schedule, and we cannot conclude that the BCBSNC rule is the only rule consistent with the Act.

Accordingly, we affirm the determination that defendants' adoption of the *per diem* rule exceeded their statutory authority. We reverse the determination that defendants' repeal of the extant BCBSNC rule exceeded their statutory authority. We remand to the Superior Court, Wake County, for entry of a judgment consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice Meyer concurs in the result.

STATE OF NORTH CAROLINA v. WILLIAM QUENTIN JONES

No. 395A91

(Filed 6 May 1994)

1. Jury § 141 (NCI4th)— first-degree murder—jury selection—questions concerning parole

There was no prejudicial error in a first-degree murder prosecution where one of the jurors indicated during jury selection that he did not feel that a life sentence actually meant life and that if sentenced to life defendant would be paroled within fifteen years; the court instructed the jury that they should consider a life sentence to mean life imprisonment and not to take the possibility of parole into account; the first juror indicated that he would have trouble following this instruction and was excused for cause; another prospective juror said he would have trouble following this instruction and was excused for cause; and defendant's attorney requested that he be allowed to ask other prospective jurors whether they could follow the instruction and was refused. The defendant was not attempting to stake out the jury and had a right to inquire as to whether a prospective juror would follow the court's instruction; however, the act of the first two jurors in speaking out and being excused should have signaled the other prospective jurors to so indicate if they were of the

same mind. None did, and it is not likely that they would have done so if the question had been put to them directly.

Am Jur 2d, Jury §§ 197, 201, 202.

2. **Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—mitigating circumstance—sentence for other crimes—not submitted**

The trial court did not err in a sentencing hearing for first-degree murder by refusing to allow introduction of or to submit to the jury as a mitigating circumstance the fact that defendant had been sentenced to a total of sixty years in prison on armed robbery and assault charges to which he had pled guilty. The fact that defendant was serving a prison sentence did not make the defendant less culpable for the murder and evidence of prison sentences being served would not have rebutted evidence that the crimes had been committed.

Am Jur 2d, Criminal Law §§ 598 et seq.

3. **Jury § 138 (NCI4th)— first-degree murder—jury selection—questions**

The trial court did not unduly restrict a first-degree murder defendant in the questions he was allowed to ask prospective jurors on voir dire where an objection was sustained to a question dealing with the age of the defendant but defendant was then allowed to ask a question as to how the prospective juror would consider evidence of mitigating circumstances. The juror was bound to have known in the context of the question that the circumstance to which defendant referred was the age of the defendant.

Am Jur 2d, Jury §§ 197, 201, 202.

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

4. **Jury § 141 (NCI4th)— first-degree murder—jury selection—knowledge of parole procedures**

The trial court did not err during jury selection for a first-degree murder sentencing hearing by not allowing defend-

ant to inquire of prospective jurors regarding their attitudes and knowledge of parole eligibility for a person sentenced to life in prison.

Am Jur 2d, Jury §§ 197, 201, 202.

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

5. Criminal Law § 1309 (NCI4th)— first-degree murder—sentencing hearing—videotape of murder—admissible

The trial court did not err in a sentencing hearing for a first-degree murder at a convenience store by admitting into evidence a videotape which included audio and video tracks and showed the robbery and shooting where the State relied on two aggravating circumstances, that the murder was committed for pecuniary gain and that the murder was part of a course of conduct, and the tape provided evidence of both.

Am Jur 2d, Criminal Law §§ 598 et seq.

6. Evidence and Witnesses § 1227 (NCI4th)— confession—interval between coerced confession and second confession

The Supreme Court declined to reconsider its prior ruling upholding the admission of a second confession following a coerced confession in light of *Arizona v. Fulminante*, 499 U.S. 279.

Am Jur 2d, Evidence § 537.

7. Jury § 217 (NCI4th)— first-degree murder resentencing—jury selection—reservations about death penalty

The trial court did not err during jury selection for a first-degree murder resentencing hearing where three prospective jurors were removed for cause after expressing reservations about the death penalty. The question posed by the court to each of the jurors was taken directly from *Wainwright v. Witt*, 469 U.S. 412; the answers received were consistent with the prior answers given by the prospective jurors and did not indicate any ambiguity or ambivalence on the part of the jurors; defendant was afforded the opportunity to question two of the jurors and did so in one case; there was no indication that further questioning of the third would have

reached a different result; and the answers of all three clearly indicated their inability to carry out their duties as jurors.

Am Jur 2d, Jury § 290.

8. **Criminal Law § 1355 (NCI4th)— first-degree murder—sentencing—mitigating circumstance—no significant history of prior criminal activity—not submitted**

The trial court did not err during jury selection for a first-degree murder resentencing hearing by not submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where defendant had introduced evidence that he was using illegal drugs for several weeks before the murder; he had broken into a Fast Fare "six or seven times" and stolen various articles; he had broken into a pawn shop and stolen several guns; he had sold some of the guns and used one of them to kill the victim in this case; and members of his family testified that he had shoplifted and "hustled" as a child.

Am Jur 2d, Criminal Law §§ 598 et seq.

9. **Criminal Law §§ 1323, 1352 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—instructions**

The trial court did not err in its instructions in a resentencing hearing for first-degree murder on nonstatutory mitigating circumstances. It is not for the court to determine whether there is or is not mitigating value in the evidence; that remains the province of the jury. Moreover, the instruction did not indicate a requirement of unanimity by the jury on any of the nonstatutory circumstances.

Am Jur 2d, Criminal Law §§ 598 et seq.; Trial §§ 888 et seq.

10. **Constitutional Law § 228 (NCI4th)— first-degree murder—resentencing—mitigating circumstances—double jeopardy**

There was no double jeopardy in a first-degree murder resentencing where some of the mitigating circumstances found at the original hearing were not found at this hearing. This hearing was a *de novo* hearing granted at defendant's request; defendant cannot claim he was subjected to a second jury trial.

Am Jur 2d, Criminal Law §§ 309 et seq.

11. Criminal Law § 1322 (NCI4th)— first-degree murder—resentencing—instructions—parole eligibility

The trial court did not err when instructing the jury during a first-degree murder resentencing hearing by not instructing the jury as to parole eligibility even though the issue was raised during jury selection and in the prosecutor's closing arguments. Parole eligibility is not a proper issue for consideration by a jury in a capital case.

Am Jur 2d, Trial §§ 100, 890.

Prejudicial effect of statement or instruction of court as to possibility of parole or pardon. 12 ALR3d 832.

12. Criminal Law § 1363 (NCI4th)— first-degree murder—resentencing—nonstatutory mitigating circumstance—defendant confined for considerable amount of time—not submitted

The trial court did not err in a resentencing hearing for first-degree murder by refusing to submit the nonstatutory mitigating circumstance that defendant has been confined for a considerable amount of time prior to his sentencing. The fact that defendant had spent a considerable amount of time in jail does not relate to his character, record, or any aspect of the crime.

Am Jur 2d, Criminal Law §§ 598 et seq.

13. Criminal Law § 1323 (NCI4th)— first-degree murder—mitigating circumstances—instructions

The trial court did not err in a first-degree murder resentencing in its instruction regarding mitigating circumstances. Reference to "circumstances found by one or more of you" indicates to all jurors that they should consider each of the circumstances found to exist and the instruction also directs the jurors to consider "the totality of the mitigating circumstances," and requires the jury to be "satisfied beyond a reasonable doubt" that the aggravating circumstances found "when considered with mitigating circumstances found by one or more of you" are sufficiently substantial to call for the death penalty. These phrases all serve to signal reasonable jurors that they must consider and reconsider all of the evidence

in mitigation and all of the circumstances found to have mitigating value before making their final decision.

Am Jur 2d, Trial §§ 888 et seq.

14. Criminal Law § 455 (NCI4th)— first-degree murder—sentencing—prosecutor's argument

There was no error in a sentencing hearing for first-degree murder where defendant cited two passages in the prosecutor's argument as examples of the alleged dominant theme of the prosecution, that the jury needed to kill the defendant to protect themselves and their loved ones, but, read in context, the first passage was followed by a verbal recreation of defendant's actions in sequence with the actions of others in and around the site of the murder to illustrate the cold calculated thought processes and actions displayed by defendant and rebut the contention in mitigation that he was physically and mentally impaired due to substance abuse, and the point of the second passage was that pecuniary gain placed the value of money above consideration of human life and therefore justified the imposition of the death penalty.

Am Jur 2d, Trial § 229.

15. Criminal Law § 425 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—defendant's failure to offer psychiatric testimony

There was no error in a sentencing hearing for first-degree murder where the prosecutor argued that defendant did not present a psychiatrist or psychologist to testify in regards to defendant's mental impairment. Defendant had the burden of proving the mitigating circumstances and, since defendant offered no expert testimony in support of those circumstances involving his mental health and condition, commenting on this void and drawing inferences from the absence was not error.

Am Jur 2d, Trial §§ 244-249.

16. Criminal Law § 425 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—comment on nonstatutory circumstance

There was no error in a sentencing hearing for first-degree murder where defendant contended that he had maintained meaningful relationships while in prison which provided him

with guidance and positive support and offered letters in support of that nonstatutory mitigating circumstance, but the prosecutor argued that there were other letters not made available to the jury. There was testimony which indicated that the contents of these letters could have been beneficial to defendant; therefore, it is a logical inference that defendant's decision not to introduce them could be due to contents which were detrimental to defendant.

Am Jur 2d, Trial §§ 244-249.

17. **Criminal Law § 468 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—defendant's guilty plea**

There was no error in a first-degree murder sentencing hearing where the prosecutor belittled the nonstatutory mitigating circumstance that the defendant pled guilty without any prior promises or concessions, thus insuring the prompt and certain application of correctional measures. The plea of guilty would seem to have little mitigating value in the face of overwhelming evidence and the argument only serves to point out the evidence in an effort to focus the jury on the logical inference.

Am Jur 2d, Trial §§ 497 et seq.

18. **Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—jury as conscience of community**

There was no error in a first-degree murder sentencing hearing where the prosecutor during closing arguments made a reference to the jury as the "voice of the community."

Am Jur 2d, Trial §§ 225 et seq.

19. **Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—burden of jury**

There was no error in a first-degree murder prosecution where the prosecutor argued that the jury must live up to its responsibilities even if that did not feel good. Defendant contended that the prosecutor's argument lessened the responsibility of the jury, but the Supreme Court read the argument as emphasizing the responsibility and duty of each juror and of the jury as a whole.

Am Jur 2d, Trial §§ 225 et seq.

20. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—sympathy

There was no error in a first-degree murder sentencing hearing where the prosecutor argued that the jury should not base its decision on its feelings. Although many of the nonstatutory mitigating circumstances requested by the defendant asked the jury to consider the mitigating value of his background and character, and so necessarily to use their compassion and mercy, a reasonable juror would not have understood the prosecutor's argument as calling for the jury to disregard mitigating evidence simply because it appeals to sympathies. The argument served to reinforce the responsibility of the jury to reach its decision based on the evidence and the law.

Am Jur 2d, Trial §§ 225 et seq., 497 et seq.

21. Criminal Law § 1325 (NCI4th)— first-degree murder—sentencing—instructions—consideration of nonstatutory mitigating circumstances

There was no error in a first-degree murder sentencing hearing in the court's instruction on nonstatutory mitigating circumstances where the court charged the jury that if it found one or more mitigating circumstances it must consider the aggravating circumstances in connection with any mitigating circumstances found by one or more of them and that, "when making this comparison, each juror may consider any mitigating circumstance or circumstances that juror determines to exist by a preponderance of the evidence." Although defendant contended that the use of the word "may" told the jury that they need not consider mitigating circumstances, the sentence in which the word "may" was used told the jury which mitigating circumstances they may consider, which are those found by a preponderance of the evidence. The jury was unequivocally instructed that they must consider the aggravating circumstances in connection with the mitigating circumstances.

Am Jur 2d, Criminal Law §§ 598 et seq.

22. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—instructions—definition of mitigating circumstance

There was no error in a first-degree murder sentencing hearing in the part of the charge which defined a mitigating

circumstance where defendant contended that the charge given by the court failed to give him the full benefit of relevant mitigating evidence, but, of the points raised by defendant, the court charged specifically on evidence reducing the moral culpability of the defendant without lessening the seriousness of the crime; there was little difference between the statements in the contention that the evidence need not make a killing less deserving of extreme punishment than other first-degree murders, but need only suggest some particular basis for a particular defendant to receive a sentence less than death; and the contention that mitigation need not extenuate or reduce the moral culpability of the crime but need only lessen the seriousness of the murder is not a correct statement of the law.

Am Jur 2d, Criminal Law §§ 598 et seq.

23. **Jury § 262 (NCI4th)— first-degree murder—jury selection—opposition to death penalty—use of peremptory challenges**

There was no error in a first-degree murder sentencing hearing where the State used peremptory challenges to remove jurors who expressed reservations about the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

24. **Criminal Law § 1327 (NCI4th)— first-degree murder—sentencing—instructions—Issue Four**

The trial court properly instructed the jury in a sentencing hearing for first-degree murder that if they answered Issue Four yes, it would be their duty to recommend the death sentence.

Am Jur 2d, Criminal Law §§ 598 et seq.

25. **Jury § 103 (NCI4th)— first-degree murder—sentencing—individual voir dire and sequestration of jury—denied**

The trial court did not abuse its discretion in a sentencing hearing for first-degree murder by denying defendant's motion for individual *voir dire* and jury sequestration.

Am Jur 2d, Jury § 197.

26. **Constitutional Law § 371 (NCI4th)— first-degree murder—death penalty—constitutional**

The North Carolina death penalty statute is constitutional.

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

27. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—sympathy

The trial court did not commit plain error in a first-degree murder sentencing hearing when instructing the jury on sympathy and mercy. The cited section of the argument does not direct the jury not to consider sympathy or mercy, but rather reminds the jurors that irrelevant, outside, arbitrary factors should not enter into their deliberations.

Am Jur 2d, Trial §§ 888 et seq.

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

The aggravating circumstances for a death sentence for a first-degree murder arising from a convenience store robbery were supported by the record, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence was not excessive or disproportionate to the penalty imposed in other first-degree murder cases. The murder was committed in a cold blooded and deliberate way; defendant entered the premises and opened fire without warning, killing one patron and wounding another, apparently intending to so intimidate people in the store that they would not interfere with his plan to rob the store.

Am Jur 2d, Criminal Law § 628.

Chief Justice EXUM concurring.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Farmer, J., at the 1 July 1991 Criminal Session of Superior Court, Wake County. Heard in the Supreme Court 16 September 1993.

This case arises from a robbery and shooting at a Fast Fare convenience store in Raleigh on 7 March 1987. The defendant pled guilty to first degree murder, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to death for the murder, forty years on the robbery charge and twenty years for the assault. The two prison sentences

are to be served consecutively. In *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990), we found no error in the convictions and sentences on the robbery and assault charges, but ordered a new sentencing hearing on the murder charge pursuant to *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990).

Some of the evidence at the new sentencing hearing showed that at approximately 11:45 p.m., on 7 March 1987, six people including Edward Peebles and Orlando Watson were in the convenience store. At that time, the defendant entered the store and began firing an Uzi assault rifle. Edward Peebles was killed and Orlando Watson was wounded by the rifle fire. The defendant took the cash register and left the convenience store. A video camera recorded what had happened. The police apprehended the defendant a few minutes later.

The jury found two aggravating circumstances, which were that the murder was committed for pecuniary gain and that it was part of a course of conduct which included the commission of other crimes of violence, and four mitigating circumstances. The jury found that the aggravating circumstances outweighed the mitigating circumstances and recommended the defendant receive the death penalty, which was imposed.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda M. Fox, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant's first assignment of error deals with the refusal of the court to let him ask certain questions of prospective jurors. During the selection of the jury, one of the prospective jurors indicated that he did not feel that a life sentence actually meant life and that if sentenced to life the defendant would be paroled "within fifteen years." The court then instructed the jury pursuant to *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955), that they should consider a life sentence to mean that defendant would be imprisoned for life and they should not take the possibility of parole into account in reaching a verdict. The juror indicated he would

have trouble following this instruction and he was excused for cause. Another prospective juror then said he would have trouble following this instruction and he was excused for cause.

At this point, the defendant's attorney requested that he be allowed to ask the other prospective jurors whether they could follow the *Conner* instructions as given to them by the court. The court would not allow this interrogation. This was error.

When the juror raised the question of parole, the court properly told him he should not consider it. This does not mean, however, that because the jury cannot or should not consider parole, a party cannot ask the jury whether it will follow the court's instructions in this regard after a prospective juror has raised the question. The defendant has a right to inquire as to whether a prospective juror will follow the court's instruction. *State v. Clark*, 319 N.C. 215, 353 S.E.2d 205 (1987). The defendant was not attempting to stake the jury out as to their potential verdict. *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980).

The question then becomes whether the error in not allowing this question was prejudicial. We hold that it was not. We note that after one prospective juror had been excused because he said he would have difficulty following the court's instruction, that a second juror spoke out and said he was in the same situation. This juror was then excused. This should have been a signal to the other prospective jurors who were in the box that if they were of the same mind they should so indicate. None of them did. It is not likely they would have done so if the question had been put to them directly. We can conclude from this that allowing the defendant to ask this question would not have produced an answer favorable to the defendant.

[2] The defendant next assigns as error the refusal of the court to submit to the jury as a mitigating circumstance the fact that the defendant had been sentenced to a total of sixty years in prison on the armed robbery and assault charges to which he had pled guilty. The court also excluded from the hearing evidence as to these sentences and the defendant contends this was error. The defendant says this fact was a part of his background and record and should have been submitted to the jury as a mitigating circumstance.

We are bound by *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded on other grounds*, --- U.S. ---, 122 L. Ed. 2d 113 (1993), to overrule this assignment of error. In that case, we held that a prison sentence a defendant may be serving for some other crime is not an aspect of the defendant's character or of a circumstance of the offense which may be considered a mitigating circumstance at a sentencing hearing after the defendant has been convicted of first degree murder. It was not error for the court not to submit as a mitigating circumstance the fact that defendant was serving sentences for other crimes.

The defendant also argues under this assignment of error that he should have been permitted to introduce evidence of the sentences he had received in order to rebut the evidence that the crimes had been committed. Evidence of prison sentences being served would not have been evidence the crimes had not been committed and the fact that defendant was serving a prison sentence did not make the defendant less culpable for the murder. Evidence of the prison sentences being served by the defendant was irrelevant. This assignment of error is overruled.

[3] The defendant argues under his next assignment of error that he was unduly restricted in questions he was allowed to ask prospective jurors on *voir dire*. The following colloquy occurred during the questioning of the jury by the defendant:

> Now, back to the mitigating circumstances one moment, okay? When we talk about mitigating circumstances the defendant will introduce, the defendant will introduce things that he contends are mitigating circumstances, things like his age at the time that the crime was committed, things like that.
>
> Do you feel like you can consider the defendant's age at the time the crime was committed or any other thing that we propose mitigating like that and give it fair consideration?
>
> MS. HILL: I object, Your Honor, to the form of the question.
>
> THE COURT: Objection sustained.
>
> Q. Do you feel like whatever we propose to you as a potential mitigating factor that you can give that fair consideration and not already start out dismissing those and saying those don't count because of the severity of the crime and that sort of thing?

A. Well, I think I can consider the mitigating factors, yes.

Q. Well, I don't mean to hash words, but this is real important. Do you think you can fairly consider those mitigating factors?

A. Absolutely.

The defendant contends it was error not to let the prospective juror answer the question to which the objection was sustained.

Assuming it was error to sustain the State's objection to this question, we hold it was not prejudicial to the defendant. The defendant had explained to the jury that he would offer certain evidence, including his age, as a mitigating circumstance. The court then sustained an objection as to the form of the question dealing with the age of the defendant. The defendant was then allowed to ask a question as to how the prospective juror would consider evidence of mitigating circumstances. In the context that this question was propounded, the juror is bound to have known the circumstance to which the defendant referred was the age of the defendant. The defendant was not prejudiced.

[4] The defendant, under this assignment of error, also argues that it was error not to let him inquire of the prospective jurors in regard to their attitudes and knowledge of parole eligibility for a person sentenced to life in prison. We have held that such an inquiry is not permitted. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *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. 918, 98 L. Ed. 2d 226 (1987). It was not error to refuse to let the defendant make this inquiry. This assignment of error is overruled.

[5] The defendant next assigns error to the showing of a videotape of the incident. There was a camera mounted on the rear wall of the convenience store which was focused on the cashier's area and front door. The tape from the video camera included both audio and visual tracks, so that the words and sounds of the store were recorded as well as the actions occurring therein. The tape ran for approximately eleven minutes and showed the robbery and shooting of the two men.

At the sentencing hearing, the videotape was shown a total of four times. It was shown twice to illustrate the testimony of two witnesses. It was also admitted as substantive evidence and

shown in its entirety without comment. The jury requested during its deliberation to see the tape for the fourth time and it was shown to them without objection.

The defendant contends that because he pled guilty, the showing of the tape was not needed to prove the elements of murder and the tape did not make the existence of any fact that was of consequence to the determination of the action more probable. He says this made the tape irrelevant under N.C.G.S. § 8C-1, Rule 401. The defendant says further that if the tape is somehow relevant it should have been excluded under N.C.G.S. § 8C-1, Rule 403, because its probative value is substantially outweighed by the danger of unfair prejudice. The defendant says the videotape is poignant and sensational. It should not have been admitted when it was not proof of any contested issue and its only effect was to prejudice the jury.

In addressing this issue, we first note that

> in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. . . . It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. . . .

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973).

In this case, the State was relying on two aggravating circumstances, that the capital felony was committed for pecuniary gain and that the murder to which the defendant pled guilty was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons. The videotape showed the defendant remove the cash register from the convenience store. This was competent evidence that the murder was committed for pecuniary gain. The videotape showed the defendant shoot two people, including the deceased. This was evidence that the murder was part of a course of conduct which included a crime of violence against another person.

[6] The defendant next assigns error to the admission of testimony by an officer as to a statement the defendant made to him. The

defendant concedes that he assigned this as error on his first appeal and this Court found no error in the admission of this testimony. *State v. Jones*, 327 N.C. 439, 449, 396 S.E.2d 309, 314. He asks us to reconsider our decision in light of two federal cases, one of them from the United States Supreme Court, which have been decided after our first opinion in this case. *Arizona v. Fulminante*, 499 U.S. 279, 113 L. Ed. 2d 302 (1991); *Williams v. Withrow*, 944 F.2d 284 (6th Cir. 1991), *aff'd in part and rev'd in part on other grounds*, --- U.S. ---, 123 L. Ed. 2d 407 (1993).

The defendant does not show how these two opinions affect our decision in the previous appeal. We decline to reconsider our decision in the previous opinion.

[7] Under his next assignment of error, the defendant returns to the jury selection. The defendant assigns as error the trial court's decision to remove three prospective jurors for cause when those jurors expressed reservations about the death penalty. The defendant asserts neither the prosecution nor the trial court adequately informed the jurors of the law relative to capital punishment, nor did either sufficiently question the jurors to determine their ability to follow the law.

During *voir dire* questioning of prospective jurors, the court excused several jurors for cause based on their inability to follow the law. The defendant contends three of these jurors were improperly excused. The three prospective jurors were: Mr. Sabhilchi, Mrs. Stokes, and Mrs. Krishen. Mr. Sabhilchi was originally from India and was raised in the Hindu religion. In the course of questioning, he expressed a belief that life imprisonment was a harsher penalty than the death penalty. Throughout extended questioning about the impact of his beliefs and life experience on his decision-making in this case, Mr. Sabhilchi promised to do his best, but continually expressed reservations about his ability to apply the law as given. The questioning culminated in the following exchanges:

> [MR. WILLOUGHBY:] If we ask you the question that we've asked other people, do you feel that your life experiences or your personal or your makeup is going to prevent you or substantially impair you from following the law and the procedure as set out—and only you can answer that—but do you think that those feelings are so strong that they are going to impair or prevent you from following the law?

[MR. SABHILCHI:] In all honesty, I say yes.

. . . .

THE COURT: Do you feel that your feelings or personal convictions about the death penalty would prevent or substantially impair the performance of your duty in accordance with the instructions that I would give you on the law and your oath as a juror?

[MR. SABHILCHI:] Yes, sir, Your Honor, because of my religious belief growing up that suggests I might not come to the right conclusion at the end.

After this exchange, the court excused Mr. Sabhilchi for cause.

Mrs. Stokes was also questioned at length regarding her view of the death penalty and her ability to weigh the decision according to the law and instructions. After the State's motion that she be excused, the defendant requested the opportunity to question her prior to a ruling on the motion. This request was granted and Mrs. Stokes was extensively questioned and guided through the decision-making process by the defendant. Finally, the court asked:

THE COURT: Let me ask you again, Mrs. Stokes, the question which I asked you yesterday and just a few minutes ago.

You understand and have heard the law that I read to you yesterday about the procedure that is followed, questions by the attorneys as to how this case will be conducted, what a jury must do in deciding this case.

You indicated that you do have some feelings about the death penalty one way or the other, whatever your feelings maybe [sic]. The question that we must know, the court must know, attorneys must know is whether or not your personal feelings that you have, your personal convictions about the death penalty, regardless of what it is, would prevent you or would substantially impair your performance of your duty in accordance with the instructions given to you by the court in this case and the oath that you're given as a juror.

[MRS. STOKES:] I'm not sure. I mean, part of me says my feeling will get in the way and part of me says I can follow the guideline that he said.

Following this answer, the court allowed the State to resume its examination of this juror. At the close of the State's questioning, the court again asked:

> Would your personal feelings or convictions about the death penalty prevent or substantially impair the performance of your duties in accordance with the instructions given to you by the court in this case and the oath that you received as a juror?

This time, Mrs. Stokes responded, "[y]es." The defendant was given the opportunity to rehabilitate the juror and elected to ask no further questions. The court then excused Mrs. Stokes for cause.

Mrs. Krishen, the last of the three jurors who the defendant contends was improperly excused, was also questioned extensively by the State. She was originally from Vietnam and professed to follow Buddhism. After expressing doubts about the prospect of having to decide on the death penalty, the following exchange occurred:

> [MR. WILLOUGHBY:] Do you think that those feelings that you have might prevent you or substantially impair you from following the law and returning a verdict according to the law?
>
> [MRS. KRISHEN:] Yes.
>
> MR. WILLOUGHBY: Thank you. Your Honor, I would tender Ms. Krishen for cause.
>
> MR. MANNING: Object.
>
> THE COURT: Do you have some personal feelings or personal convictions about the death penalty that you feel would prevent or substantially impair your performance as a juror and your duty as a juror in accordance with the instructions that you receive from the court about the law and your oath which you take as a juror?
>
> [MRS. KRISHEN:] Yes, sir.
>
> THE COURT: Do you have any questions of the juror before I rule on the motion?
>
> MR. MANNING: No, Your Honor.

The court then excused the juror for cause.

The defendant cites specific question and answer sequences from each juror's examination. When viewed out of context of the whole examination, these answers appear to indicate the juror could follow the law. This is not the correct manner of evaluation.

The question posed by the court to each of the jurors was taken directly from *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 852 (1985). The answers received were consistent with the prior answers given by the prospective jurors and did not indicate any ambiguity or ambivalence on the part of the jurors. There is no indication the defendant was given an opportunity to rehabilitate Mr. Sabhilchi, but there is also no indication that any manner of further questioning would have reached a different result. *See State v. Reese*, 319 N.C. 110, 120-121, 353 S.E.2d 352, 358 (1987). In regards to Mrs. Stokes and Mrs. Krishen, the defendant was afforded the opportunity to question them and did so in the case of Mrs. Stokes. In all three instances, the answers given by the prospective jurors clearly indicated their inability to carry out their duties as jurors and it was not error to excuse them. This assignment of error is overruled.

[8] The defendant next assigns error to the court's failure to submit the statutory mitigating circumstance that he had no significant history of prior criminal activity. The defendant did not request that this circumstance be submitted to the jury but we held in *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988), *death penalty vacated*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988), that it must be submitted if his record as a whole would reasonably support a finding by the jury that the defendant had no significant history of prior criminal activity.

The defendant introduced evidence that he was using illegal drugs for several weeks before the murder. He had broken into the Fast Fare on Person Street "six or seven times" and stolen various articles. He had broken into a pawn shop and stolen several guns. He sold some of the guns and used one of them to kill the victim in this case. Members of the defendant's family testified that he had shoplifted and "hustled" as a child. The court could conclude based on this evidence that the jury could not have reasonably found the defendant had no significant history of prior criminal activity. *See State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983). This assignment of error is overruled.

[9] The defendant in his next assignment of error asserts the trial court committed reversible error in instructing the jury that it could refuse to consider mitigating evidence if it deemed the evidence to have no mitigating value. The defendant contends the jury apparently determined there was no mitigating value in a number of the twenty-five submitted nonstatutory mitigating circumstances upon which they were instructed. Further, the defendant asserts that a number of these circumstances were supported by uncontroverted evidence. Finally, the defendant contends the instruction requires the jury to conclude unanimously the evidence had mitigating value.

The challenged instruction, given after each of the nonstatutory mitigating circumstances, stated:

> If one or more of you finds by a preponderance of the evidence that this circumstance exists and one or more of you finds it has mitigating value, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the Issue and Recommendation form. If none of you finds this circumstance to exist and none of you find it to have mitigating value, you would so indicate by having your foreman write "no" in that space.

The court must submit to the jury the nonstatutory mitigating circumstances which the defendant requests if they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value[.]" *State v. Pinch*, 306 N.C. at 26, 292 S.E.2d at 223 (1982) (quoting *State v. Johnson*, 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979)). *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). The instruction as given fulfills the requirement. It is not for the court to determine whether there is or is not mitigating value in the evidence, that remains the province of the jury.

Our reading of this instruction does not indicate a requirement of unanimity by the jury on any of the nonstatutory circumstances. In the past, the instruction above has often included the word "unanimously" and we have consistently held this to be error. *See, e.g., State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). However, the corrected instruction without the word "unanimously" has consistently been found not to be error. *See State v. McKoy*, 327 N.C. 31,

394 S.E.2d 426 (1990); *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684 (1993).

[10] The defendant raises the issue of whether there is double jeopardy inasmuch as some of the mitigating circumstances not found in this sentencing hearing were found in the original hearing. This hearing constitutes a *de novo* hearing granted at the defendant's request and therefore, the hearing begins with a clean slate. The defendant cannot then claim he is being subjected to a second jury trial.

We do not believe that *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982), requires, as argued by the defendant, a different result. In *Eddings*, the defendant was granted a new sentencing hearing because the trial judge who determined the punishment said he would not consider certain mitigating evidence. In this case, the jury was allowed to consider the mitigating evidence and determine if it had value. This distinguishes this case from *Eddings*. This assignment of error is overruled.

[11] The defendant next assigns as error the trial court's failure to instruct the jury as to parole eligibility in light of the fact the issue had been raised during the jury selection and again during the prosecution's closing arguments.

As the defendant acknowledges, we have held that parole eligibility is not a proper issue for consideration by a jury in a capital case. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991). The defendant offers no new arguments to change this position. We find no merit in this assignment of error.

[12] The defendant next assigns error to the court's refusal to submit to the jury, as requested by the defendant, the nonstatutory mitigating circumstance that "[t]he defendant has been confined for a considerable amount of time prior to his sentencing." A mitigating circumstance involves some aspect of the defendant's character or record or some extenuating aspect of the crime charged which, while it does not prevent the defendant from being found guilty, it does make him less deserving of the death penalty. *State v. Williams*, 305 N.C. 656, 686, 292 S.E.2d 243, 261, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The fact that the defendant had spent a considerable amount of time in jail does not relate

to his character, record, or any aspect of the crime. It should not have been submitted as a mitigating circumstance.

[13] The defendant's next assignment of error challenges the instruction given by the court regarding the consideration of mitigating circumstances. The defendant asserts that the instructions permit only those jurors who found mitigating value in a specific circumstance to consider that specific circumstance when weighing the aggravating and mitigating circumstances.

The challenged instruction states:

> In deciding this issue, 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 determines to exist by a preponderance of the evidence. After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "yes."

After additional instructions, the charge continued:

> You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. After so doing if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with mitigating circumstances found by one or more of you, it would be your duty to answer this issue "yes." If you are not so satisfied or have a reasonable doubt, it would be your duty to answer that issue "no."

Reference to "circumstances found by one or more of you" indicates to all jurors that they should consider each of the circumstances found to exist. The instruction also directs the jurors to consider "the totality of the mitigating circumstances" and requires the jury to be "satisfied beyond a reasonable doubt" that the aggravating circumstances found, "when considered with mitigating circumstances found by one or more of you," are sufficiently substantial to call for the death penalty. These phrases all serve to signal reasonable

jurors that they must consider and reconsider all of the evidence in mitigation and all of the circumstances found to have mitigating value before making their final decision. We find the language of this instruction permits and even encourages jurors to take into consideration all mitigating circumstances found to exist under Issue Two. This assignment of error is overruled.

The defendant contends the trial court committed reversible error both in overruling the defendant's objections to numerous improper arguments made by the prosecution and in failing to intervene to correct grossly improper arguments *ex mero motu*.

A.

[14] The defendant first cites to the following portion of the prosecution's argument:

> William Quentin Jones knew on March 7 that if he waited for Ed Peebles to go home to his family, if he waited then he wouldn't get all the money in the cash register and that's what he wanted. An innocent customer, innocent people like you and like me were not going to deter him.

The defendant also points to a subsequent passage in which the prosecutor said:

> Now, why does the fact that a murder and this murder of Ed Peebles was committed for pecuniary gain, why does that make this murder and this murderer worthy of the maximum penalty under law? First of all, it's arbitrary. It means it could have been anyone. It could have been L. E. Williams. Do you remember the older black gentleman who came in and said he stopped there every night? Remember he told you that. I stop there every night to get pork rinds and peanuts because I work a third shift. It didn't matter to William Quentin Jones that it was Ed Peebles. It may have mattered to Ed Peebles' family but didn't matter to the defendant. It could have been anybody. Could have been Richard Houser, could have been you, if you had been in that store.

These two passages, according to the defendant, are examples of the dominant theme of the prosecution which was that the jury needed to kill the defendant to protect themselves and their loved ones.

Reading the entire text of the argument casts a different light on both passages. The first passage is preceded and followed by a verbal recreation of the defendant's actions in sequence with the actions of others in and around the Fast Fare at the time of the incident. The description rebutted the defendant's main contention in mitigation which was that he was physically and mentally impaired due to substance abuse at the time of the robbery and shooting. The argument sought to illustrate the cold, calculated thought processes and actions displayed by the defendant. The argument placed the defendant at the telephone outside the Fast Fare while a police officer was inside and moved him into the store shortly before closing time in anticipation of collecting the maximum sum of money possible. The second passage described why the aggravating circumstance of pecuniary gain was deserving of the death penalty. The cited section was preceded by a section recounting the defendant's own statement as to his motivation in robbing the store. The point of the cited passage being that pecuniary gain placed the value of money above consideration of human life and therefore justified the implementation of the death penalty. It is not improper for the prosecution to argue vigorously for the death penalty. *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979). Counsel is given wide latitude to argue the pertinent law and the facts and all reasonable inferences which may be drawn from the facts. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). We find no error in the arguments and hold that assignment of error to the court's actions regarding this portion of the argument is overruled.

B.

[15] The defendant also argues that the prosecution went outside the evidence during its arguments and improperly commented on evidence not presented by the defendant. First, the defendant cited to the prosecutor's argument that the defendant did not present a psychiatrist or psychologist to testify in regards to the defendant's mental impairment. The defendant objected to this comment during the argument, but the objection was overruled. The State asserts the argument was proper inasmuch as the defendant had the burden of proving the mitigating circumstances. Since the defendant offered no expert testimony in support of those circumstances involving his mental health and condition, we agree that commenting on this void and drawing inferences from the absence was not error.

[16] The defendant further contends the prosecutor went beyond the scope of the evidence in commenting on a nonstatutory mitigating circumstance when she said:

> (22) While in prison, the defendant has maintained meaningful relationships which provide him with guidance and positive support.
>
> What do his letters show you? He offered these to you. He picked which letters he wanted you to read. You know he picked them. Would you like to have read the ones you didn't get?
>
> MR. MANNING: Objection.
>
> THE COURT: Overruled.
>
> MS. HILL: These are his letters, his evidence that he picked for you to read. . . .

The defendant stops quoting at that point but the State contends the rest of Ms. Hill's argument must be considered. That argument continues:

> Lonnie Gerard Smith testified he got some letters, too. What do these letters show? Remember, we're talking about meaningful relationships that provide him with guidance and positive support. What do his letters show you? Send me money, send me necklaces, rings, watches, stuff like that. P.S. I need some money. Send me $20. Bring me some money and a silver rope. I need some new tennis shoes because mine are six months old.
>
> Never once does he say send me a religious book, or just seeing you would be enough. And what does he need money for? He's provided food and clothing and shelter. Granted, the clothing, he writes, the color is bad. He tells you, he says, "I need the money to keep myself looking good."
>
> The same old William Quentin Jones there has always been, but maybe the meaningful relationships he's talking about is where he writes to Sonja and he says: "Damn, you look good. You have, how can I say, blossomed. Send me some biker shorts pictures."
>
> Are you satisfied that this has mitigating value? Satisfied! Are you satisfied? Are you satisfied that it has mitigating value that the defendant can continue to have relationships

> which provide him, he says, with guidance and positive support when he has destroyed forever those very same things for another family? You can find it, you have the power, but you know the truth.

The prosecutor's statement suggesting the existence of further letters not made available to the jury is borne out by the questioning by the defendant of Lonnie Gerard Smith. At the conclusion of the direct examination of Lonnie Smith, the following exchange occurred:

> Q. So when you were in prison for this other break-in, you and he [the defendant] exchanged letters?
>
> A. (Witness nods head affirmatively).
>
> Q. And in the letters that he wrote you, did he express his remorse or sorrow for having done this?
>
> A. Yeah.
>
> Q. Did you happen to save any of those letters while you were in prison?
>
> A. I have plenty of them.
>
> Q. Do you still have them?
>
> A. Yeah.
>
> Q. Are they at home?
>
> A. Yeah.
>
> Q. I might ask you to go get those later on today. I didn't know about those.

There is no further reference to these letters in the transcript.

Reading the whole argument made by the prosecutor and in light of the evidence elicited by the defendant as to the existence and availability of letters not introduced by the defendant, we find no error in this argument. The testimony of Lonnie Smith indicates the contents of these letters could have been beneficial to the defendant's case. It is therefore a logical inference from the evidence of their existence and the apparent beneficial content that the defendant's decision not to introduce them could be due to contents which were detrimental to the defendant.

[17] The defendant lastly claims the prosecution's argument belittled the nonstatutory mitigating circumstance that the defendant pled guilty without any prior promises or concessions thus insuring the prompt and certain application of correctional measures to him. The challenged argument stated:

> Do you think we couldn't have proved it? Do you think if he had pled "not guilty" that Mr. Willoughby and I on behalf of the State could not have proved to a jury that he committed it? If they heard exactly the same evidence you heard, do you think a jury would have found him not guilty? If you want to, you can say because you are the voice of the community. If you want to, you can say if you go into a convenience store and you commit robbery and you commit murder but you come to court and plead guilty you will not receive the maximum penalty under the law because you pled guilty. You can say that. You have the power. But it wouldn't be right and it wouldn't be justice and you know that.

Ultimately, the jury did not find this mitigating circumstance. We agree with the State that in the face of overwhelming evidence, the plea of guilty would seem to have little mitigating value and the argument serves only to point out the evidence in an effort to focus the jury on the logical inference. We find no error in this argument.

C.

[18] The defendant cites to a short passage taken from one of the prosecutor's arguments in which the prosecutor made reference to the jury as being "the voice of the community." The defendant cites several cases in contending that this argument is grossly improper and merits a new sentencing hearing. *See State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985); *Prado v. State*, 626 S.W.2d 775, 776 (Tex. Cr. App. 1982); *See, e.g., Hutchins v. Commonwealth*, 220 Va. 17, 255 S.E.2d 459 (Va. 1979); *State v. Agner*, 30 Ohio App.2d 96, 283 N.E.2d 443 (1972).

We believe the defendant misreads *Scott*. In *Scott*, we cited cases from Texas and Louisiana in holding that the jury acts "as the voice and conscience of the community" and that the members of the jury are seated as "representatives of the community." *Scott*, 314 N.C. at 311, 333 S.E.2d at 297-98. We find no error in the use of the description of the jury as "the voice of the community."

D.

[19] The defendant suggests the argument by the prosecution lessened the responsibility of the jury in the decision-making process. The defendant cites to the following passage:

> When you go in to deliberate in a few minutes, you may go in with the idea that you've got to do something that you feel good about and it may be suggested to you that you ought to do what feels right, what feels good. But I suggest to you not to accept that guilt. Don't take someone else's guilt. Don't accept someone else's guilt for what they've done. Don't let anybody make you feel guilty for living up to your responsibility. You can't always have a good feeling about what you do. You don't get a warm glow inside from doing all your daily tasks. There are parts of your job and your family that are hard, that are difficult, some thing [sic] that wring you out emotionally, and this is one of those things.
>
> You're not going to go home with a warm glow and feel good about this case. Whatever your decision is, this case is going to change you. You've seen a different side of life. It makes you think about things differently. And you can't go home and feel good and put your feet up tonight, but you can go home and feel like you've done the right thing. You can go home and know you've followed the law and that you've done what your responsibility was, that you didn't shirk that responsibility. It's your decision today after looking at the facts and the circumstances. It's your decision to weigh the evidence.

Our reading of this portion of the argument indicates the prosecutor does not alter the burden on the jury, but instead emphasizes the responsibility and duty of each juror and of the jury as a whole. We find nothing in this argument which constitutes error.

E.

[20] The defendant's final contention regarding the prosecution's arguments centers on the jury's consideration of mercy or sympathy in reaching its decision. The defendant contends the prosecutor sought to discourage the jury from considering compassion for the difficulties the defendant had faced throughout his life. Such an argument violates the principles expressed in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), and

prevents the jury from fairly considering the evidence offered in mitigation.

The section of the argument to which the defendant objects states:

> The State is satisfied now that inside of each of you is a personal conviction that by this evidence and according to the law William Quentin Jones should be sentenced to death for the murder of Ed Peebles. You are to perform your duty as a juror in reaching this decision fairly and objectively and without bias or prejudice, passion or any other arbitrary factor. Mercy, pity, sympathy, these are emotions. You promised us you would make your decision on the facts according to the law and we believed you.
>
> Mr. Dodd said to some of you during jury selection you had wide latitude in allowing your feelings to play a part when you consider this case. I tell you that is wrong. It would be wrong for you to sentence the defendant to death if the State has not met its burden because you felt angry or because you felt sorry for the victim's family. And it would be wrong for you to sentence the defendant to life when the State has met its burden because you felt sorry for him or his family, or because you wanted to be merciful or sympathetic. It would be wrong for you to allow your emotions to overcome your reason and common sense. You must base your decision, as you told us you would, upon the facts, weighed in light of your common sense and according to the law to reach a recommendation about sentence in this case that speaks the truth.
>
> You may have those feelings but if you weep for the defendant, then weep for Ed Peebles. And if you weep for the defendant's mother, then weep for a little girl who will never know what it is to be held in her daddy's arms again. And if you weep for the defendant's brother, weep for Michelle Peebles, who when she sat in this courtroom and watched that same videotape, saw the last moments of her husband's life. And if you weep for the defendant's family, then weep for the parents of Ed Peebles who know what it is like to lay their son in the ground because he stopped for a cup of coffee at a convenience store.

> But when you have wept, when you are done weeping, then, ladies and gentlemen, base your decision not on sympathy, not on anger, not on mercy, not on vengeance, not on pity, not on retribution. Base your decision as you promised us you would on the facts. Thank you.

The defendant then points this Court to the concluding argument of the State which stated:

> And while they [defense counsel] are here, I want you to think about a few things. Think about what they are asking you to do. Are they asking you to make a decision fairly and objectively? Are you being asked to render justice? Give a person what is due? Are you being asked to make your decision without passion and bias and sympathy or pity? And are you being asked to follow the law and do what the law requires you to do. Now, you have the power to do whatever you choose. They are absolutely right. They may tell you that and you do, you have the power. You have the power to let William Quentin Jones escape justice for what he did. You've got the power to say that despite the weight of the evidence, William Quentin Jones should receive a life sentence. You have that power just like William Quentin Jones had the power to take Ed Peebles' life. You have the power. But what I ask you is to resist doing something just because you have the power. That's what William Quentin Jones did. Don't do it just because you have the power. Don't do it like William Quentin Jones. Thank you.

The defendant notes that many of the nonstatutory mitigating circumstances requested by the defendant asked the jury to consider the mitigating value of his background and character. In weighing those aspects of the defendant, the jurors are necessarily being asked to use their compassion and mercy. The defendant cites to *California v. Brown*, 479 U.S. 538, 548, 93 L. Ed. 2d 934, 944 (1987) (Brennan, J., dissenting), as the authority for this argument.

The majority in *Brown* held that singling out the word "sympathy" without considering the whole of the surrounding statement was not appropriate. *Brown*, 479 U.S. at 542-43, 93 L. Ed. 2d at 940-41. In *Brown*, the issue was an instruction which, like the argument cited above, listed numerous irrelevant factors which should not enter into the deliberation process. Extraneous, non-evidence based sympathy is one such factor. Hearing the argument of the

prosecution coupled with the court's instruction we do not believe a reasonable juror could understand the argument to call for the jury to disregard mitigating evidence simply because it appeals to a person's sympathies. The argument attempts to and serves to reinforce the responsibility of the jury to reach its decision based on the evidence and the law. We find no error.

[21] The defendant contends in his next assignment of error that the jury was erroneously charged as to how to consider nonstatutory mitigating circumstances. The court charged the jury that if it found one or more mitigating circumstances it must consider the aggravating circumstances in connection with any mitigating circumstances found by one or more of them. The court then charged, "[w]hen making this comparison, each juror may consider any mitigating circumstance or circumstances that juror determines to exist by a preponderance of the evidence."

The defendant says this charge, by the use of the word "may," told the jury that they need not consider mitigating circumstances and this was error. We do not read the instruction as does the defendant. The jury was instructed unequivocally that they must consider the aggravating circumstances in connection with the mitigating circumstances. The next sentence in which the word "may" is used, tells the jury which mitigating circumstances they may consider, which are those found by a preponderance of the evidence. We find no error in this instruction. *See State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994).

[22] The defendant next assigns error to the part of the charge that defined a mitigating circumstance. The defendant requested the following instruction:

> Members of the jury, I instruct you that mitigating factors are not limited to factors that mitigate the killing itself. That is, it is not necessary in order to find a factor to be mitigating that it extenuate the gravity of the offense. Rather, in addition to factors extenuating the gravity of the offense, you may also consider any aspect of the defendant's background or character as a mitigating factor if you deem it a reason supporting a sentence less than death.

The court declined the defendant's request and gave the following charge:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or make it less deserving of extreme punishment than other first degree murders.

The defendant says the charge given by the court failed to give him the full benefit of relevant mitigating evidence. He says that to have mitigating value evidence need not lessen the seriousness of the crime but may reduce the moral culpability of the defendant. If this is so, the charge was certainly not in error for the court charged specifically on this point. The defendant also says the evidence need not make a killing less deserving of extreme punishment than other first degree murders, but need only suggest some particular basis for a particular defendant to receive a sentence less than death. We can see very little difference between these two statements. It was not error for the court to charge as it did on this point. Finally, the defendant argues that mitigation need not extenuate or reduce the moral culpability of the crime but need only "lessen[ ] the seriousness of the murder[.]" *State v. McDougall*, 308 N.C. 1, 25, 301 S.E.2d 308, 323, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). This is not a correct statement of the law. A defendant may be less culpable than some other murderer but this does not make a murder any less serious. We find no error in this challenged part of the charge.

PRESERVATION ISSUES

The defendant brings forward five issues which have recently and/or consistently been decided contrary to his position and requests we re-examine our position.

[23] The first preservation issue involves the use of peremptory challenges by the State to remove prospective jurors who expressed reservations about the death penalty. This issue was decided contrary to the defendant's contention in *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *judgment reinstated*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 775 (1993); *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990). We find no error.

[24] The defendant asserts the trial court improperly instructed the jury that if they answered Issue Four "yes," it would be their duty to recommend the death sentence. This issue was heard and decided contrary to the defendant's position in *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308. *See also State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). We find no error.

[25] The defendant contends the trial court committed prejudicial error by failing to grant his motion for individual *voir dire* and sequestration of the jury. "Motions for individual voir dire and jury sequestration are directed to the discretion of the trial judge." *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 357. In light of the defendant's failure to cite any specific incident in the transcript which would indicate an abuse of discretion, we overrule this assignment of error.

[26] The defendant contends the North Carolina death penalty statute is unconstitutional, is imposed in a discriminatory manner, is vague and overbroad, and unconstitutionally involves subjective discretion. We have consistently upheld the constitutionality of the death penalty statute. *See State v. Roper*, 328 N.C. 337, 370, 402 S.E.2d 600, 619. We overrule this assignment of error.

[27] The defendant asserts the trial court committed reversible error in instructing the jury on the issue of sympathy and mercy. The defendant objects to the portion of the instruction which stated: "You are to perform this duty fairly and objectively and without bias, prejudice, passion, or any other arbitrary factor." The defendant did not object to this instruction at trial and the issue is therefore subject to "plain error" review. *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991). In order to require the State to demonstrate harmless error beyond a reasonable doubt, the defendant must show any error achieves constitutional status. *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991). The cited section of the instructions does not direct the jury not to consider sympathy or mercy, but rather reminds the jurors that irrelevant, outside, arbitrary factors should not enter into their deliberations. The jury was properly instructed on the definition of mitigating circumstances and on the application of those circumstances to the decision-making process. We find no error in the instruction as given.

PROPORTIONALITY REVIEW

[28] In reviewing the sentence, as we are required to do by N.C.G.S. § 15A-2000(d), *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); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), we hold that the aggravating circumstances were supported by the record and that the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Our final task is to determine whether the sentence was excessive or disproportionate to the penalty imposed in other first degree murder cases. We hold that the sentence was not excessive or disproportionate.

In determining proportionality, we are impressed with the cold blooded and deliberate way in which the murder was committed. The defendant entered the premises and opened fire without warning, killing one patron and wounding another. Apparently, he intended to so intimidate the people in the store that they would not interfere with his plan to rob the store.

The jury found as aggravating circumstances that the murder was committed for pecuniary gain and the murder was part of a course of conduct which included the commission of other crimes of violence against other persons.

The defendant cites several robbery murder cases in which the juries have recommended a sentence of life in prison. *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986); *State v. Miller*, 315 N.C. 773, 340 S.E.2d 290 (1986); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Bauguss*, 310 N.C. 259, 311 S.E.2d 248, *cert. denied*, 469 U.S. 838, 83 L. Ed. 2d 76 (1984); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983); *State v. Fox*, 305 N.C. 280, 287 S.E.2d 887 (1982); *State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980); *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979). He contends that the murder committed in this case is no more egregious than any of the murders committed in those cases. We believe all those cases are distinguishable. In *Massey*, *Wilson*, *Bauguss*, *Easterling*, *Avery*, and *Atkinson* the defendants were convicted of felony murder. This means the juries did not have

to find the defendants intentionally killed the victims. In this case, the defendant pled guilty to a charge of first degree murder which would include an intentional killing with premeditation and deliberation.

In *Miller*, the defendant was convicted of first degree murder when a person with whom he was acting in concert killed a man. In this case, the defendant did the killing. *Fox* and *Hunt* involved two brutal murders, but in neither case was the aggravating circumstance found, as it was in this case, that the defendant was engaged in a course of conduct which included the commission of crimes of violence against other persons. In *Whisenant*, the defendant was convicted of two murders which occurred after he had entered the home of an elderly man. The facts, as revealed in the opinion in that case, do not approach the deliberate and cold blooded murder that occurred in this case.

The defendant also relies on *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987) and *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), two cases in which the juries recommended death sentences which we found disproportionate. In *Stokes*, the defendant was convicted of felony murder which distinguishes it from this case. In *Young*, the aggravating circumstance was not found that the defendant's course of conduct included the crimes of violence against other persons. This Court in *Young* used the absence of this aggravating circumstance to distinguish that case from cases in which the death penalty was imposed. *Id.* at 691, 325 S.E.2d at 194.

There are cases similar to this case in which the death penalty has been imposed. In *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985), the defendant shot two people, killing one of them, when they surprised him after he had broken into a home. One of the aggravating circumstances found by the jury was that the murder was part of a course of conduct which involved a crime of violence against another person. We said in that case that of the fourteen cases then in the pool in which the death penalty had been affirmed, this aggravating circumstance had been found in seven of them. *Id.* at 648, 314 S.E.2d at 503. In *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), *cert. denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), we affirmed the imposition of a death sentence when a person was killed in a robbery and the jury found the course

of conduct aggravating circumstance. In *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985) and *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), death sentences were affirmed for killings during robberies.

We are confident that death penalties are being consistently imposed in this state for murders such as the one involved in this case. The defendant's sentence was not disproportionate.

NO ERROR.

Chief Justice EXUM concurring.

I concur with the result reached by the majority in this case, but I disagree with the majority's handling of defendant's first assignment of error.

When the second juror was excused for cause after stating that he would have difficulty following the court's instructions concerning the meaning of a life sentence, defense counsel conducted a voir dire of another juror. Following this voir dire, the defense had to decide which of six prospective jurors then remaining in the courtroom and earlier passed by the State it would accept. There was a discussion off the record between defense counsel and defendant. The following colloquy then occurred:

MR. MANNING: Your Honor, may we approach the bench?

THE COURT: All right.

MR. DODD: Judge, in view of the issues that were raised on parole that was raised in front to all the other jurors, we would request that you ask the remainder of the jurors if they have any problem following your instruction on parole, number one.

Number two, we would ask for the right to inquire of the remaining jurors whether they have—that's if you're not going to ask it. Only because it was raised and because everybody else who is sitting in here has heard it and we believe it may play a role consciously or subconsciously and we have to deal with it.

THE COURT: Well, I'm not going to ask them any questions. It's your voir dire and can ask the appropriate questions.

MR. WILLOUGHBY: I think their views on parole are an inappropriate subject to be questioned under the law.

THE COURT: You can't. He's the one that raised it. That's the only reason I gave them a charge, which is out of a Supreme Court case.

MR. DODD: I understand.

THE COURT: You can't ask them that.

MR. DODD: I need to understand if they can follow the instruction you just gave. Surely I have the right to ask that in view of the fact you just gave it and they all heard it.

THE COURT: I don't think you can.

MR. DODD: Okay.

THE COURT: No under our case law.

MR. DODD: Let me make sure I understand. You're saying that I can't ask anymore questions relating to parole or their ability to follow your instruction on parole.

THE COURT: Anything that deals with parole you cannot.

MS. HILL: But you're not saying he cannot ask the jurors will you be able to follow the law as the judge gives it to you. That's a standard question you can ask.

THE COURT: Yes.

MS. HILL: But not parole.

THE COURT: I'll give them that when I charge them.

MS. HILL: Any instructions on the law the judge gives you in general.

THE COURT: Well, that's the basic thing in picking a jury anyway is to follow the law. We spend a week picking a jury. Usually it takes five minutes to find out.

MS. HILL: You're not telling Mr. Dodd he can't ask that question but can't pick out one instruction and ask about it.

MR. DODD: Okay.

THE COURT: Anything else?

MR. MANNING: I think we're at the point where we need to make our decision and I was wondering if we could take about ten minutes to have our client back in the hallway to confer with him about it.

THE COURT: Well, I'll give you some time. I have 40 jurors upstairs ready to come down here. I have to talk to them a little bit. I will wait until after you make your challenges.

MR. DODD: Before we make that decision, I want to ask one general question of the whole panel. That is, can they follow the law they've been instructed on so far on everything they've heard.

THE COURT: That's an improper question you're going to get back into. That's improper for you to ask them. He already brought it up.

MR. DODD: You understand what my concern is.

THE COURT: I understand.

MR. DODD: I don't know any other way to do it except to ask them if they will follow all the instructions.

MS. HILL: Will you follow the judge's instructions and not single it out.

THE COURT: Ask if they know of any reason they have of their own why they could not.

MR. DODD: I'll do that.

MS. HILL: Before we call the next panel, do you know—can we be heard about the procedure of the second panel?

MR. DODD: Sure.

THE COURT: Okay.

(RECESS)

MR. DODD: Your Honor, thank you for your time. With the defendant's thanks, we would excuse Juror No. 1, Ms. Pope; Juror No. 6, Ms. Wetherington; and Juror No. 12, Mr. Albright.

THE COURT: The three of you may step down and come over to the clerk's desk and she'll tell you where to go from here.

The defendant is satisfied with jurors No. 2, 4 and 11?

MR. DODD: Yes, Your Honor, we are.

THE COURT: You may seat the new jurors, nine new jurors.

As I read the foregoing colloquy, the trial court declined to permit defense counsel to question the six jurors remaining in the courtroom regarding whether they could follow the court's instructions concerning the meaning of a life sentence apparently on the ground that none of these jurors had expressed concern on this point. The trial court did, however, after much discussion, rule that it would permit defense counsel to ask these jurors whether they knew of any reason they could not follow the trial court's instructions on the law. Apparently believing, as the majority surmises, that further questioning on the point would not produce revelations helpful to him, defendant declined to make this inquiry, electing instead to excuse peremptorily three of the six jurors and to accept three.

Having not pursued this line of inquiry even to the extent permitted by the court, I think defendant has waived any right to complain about the trial court's refusal to permit him to ask the more specific question relating to the trial court's earlier instruction on the meaning of a life sentence.

Neither do I believe the trial court's handling of this issue amounted to error. Defendant did not seek to inquire of the remaining prospective jurors concerning their ability to follow the trial court's instructions on the meaning of a life sentence immediately upon the excusal of the second juror for cause. Had he done so, the issue having been raised before these jurors and being fresh in their minds, I would agree with the majority that refusal on the part of the trial court to permit the inquiry would have been error. Defendant though, proceeded to question another prospective juror at some length concerning her general views and attitudes toward the death penalty. It was not until after this questioning occurred that defendant asked to reopen the parole eligibility issue with the remaining prospective jurors who had not indicated a problem with it. The trial court ruled that it would not permit reopening of the parole eligibility issue at that time but that it would permit defendant to ask generally whether the remaining jurors could follow the court's instructions on the law. Under these circumstances I think it was within the trial court's discretion

to handle the matter as it did, and the trial court did not abuse its discretion.

STATE OF NORTH CAROLINA v. MICHAEL JEROME WORSLEY

No. 413A92

(Filed 6 May 1994)

1. Rape and Allied Offenses § 82 (NCI4th)— first-degree rape—sufficiency of evidence

There was sufficient evidence to support submission of first-degree rape to the jury where the evidence tended to show that defendant entered the victim's apartment, stabbed her and dragged her outside to a grassy common area where he continued to stab her; a neighbor awakened by the victim's screams looked out a window and saw defendant straddling the victim and "almost laying on top of her"; police discovered that a rock twelve to fifteen inches long and twelve inches wide had been thrown through the back window of the victim's apartment; the officers followed a trail of blood from the grassy common area through the back door and into the living room, where the officers found patches of blood on the sofa; officers found more blood on the sofa than in any other part of the apartment; the trail led from the sofa to the victim's upstairs bedroom, where officers found another spattering of blood; an autopsy revealed that the victim died as a result of a number of stab wounds to her neck, but also suffered stab wounds to her face, chest and arms; and there were no injuries to her vaginal area, but vaginal and rectal smears revealed the presence of semen and semen was found on her underwear. The evidence, 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 engaged in vaginal intercourse with the victim by force and against her will while either employing a dangerous weapon or inflicting serious personal injury.

Am Jur 2d, Rape §§ 88 et seq.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

2. Rape and Allied Offenses § 120 (NCI4th)— attempted first-degree rape—evidence sufficient

There was sufficient evidence of attempted first-degree rape to warrant an instruction by the trial court where the evidence tended to show that defendant entered the victim's apartment in the early morning hours, stabbed her and dragged her outside to a grassy common area where he continued to stab her; a neighbor awakened by the victim's screams saw defendant straddling the victim and "almost laying on top of her"; police discovered that a large rock had been thrown through the back window of the apartment; the officers followed a trail of blood from the grassy common area through the back door of the apartment into the living room, where there were patches of blood on the sofa, then from the sofa to the victim's upstairs bedroom, where more blood was found; the victim's underwear was not torn, there was no transfer of pubic hairs, there was no injury to the victim's vaginal area, and the blood type of semen found on and in her body could not be conclusively determined. There was considerable evidence from which the jury could reasonably infer that defendant intended to commit first-degree rape and committed an act which exceeded mere preparation but which fell short of the actual commission of first-degree rape.

Am Jur 2d, Rape §§ 88 et seq.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse. 25 ALR4th 1213.

3. Burglary and Unlawful Breakings § 58 (NCI4th)— first-degree burglary—intent to rape—intent to murder—evidence sufficient

There was sufficient evidence to support submission of first-degree burglary to the jury where there was sufficient evidence to support the jury's finding that defendant attempted to rape the victim. Additionally, a rational trier of fact could conclude that defendant entered the victim's apartment with the intent to commit murder since the evidence tended to

show that defendant stabbed her to death following his entry into her home.

Am Jur 2d, Burglary §§ 44 et seq.

4. **Homicide §§ 281, 279 (NCI4th)— felony murder—evidence of burglary and rape sufficient—evidence of felony murder sufficient**

There was sufficient evidence to submit felony murder to the jury where the evidence of the underlying felonies, burglary and rape, was sufficient.

Am Jur 2d, Homicide § 442.

5. **Burglary and Unlawful Breakings § 43 (NCI4th)— first-degree burglary—indictment—felony defendant intended to commit—not specified—sufficient**

A first-degree burglary indictment was sufficient even though it did not specify the felony defendant intended to commit when he entered the victim's apartment. Although previous cases have held that a burglary indictment must specify the particular felony the defendant is alleged to have intended to commit, such cases were decided prior to the enactment of N.C.G.S. § 15A-924(a)(5). The indictment in the present case satisfies the requirements of the statute; if defendant was in need of further factual information, he need only have moved for a bill of particulars.

Am Jur 2d, Burglary § 36.

6. **Searches and Seizures § 28 (NCI4th)— burglary, rape, murder—warrantless entry into defendant's home—exigent circumstances**

The trial court did not err by denying defendant's motion to suppress physical evidence seized from his home and statements made following his arrest where officers arrived at the scene of the murder to find the victim's body lying in a grassy common area of the apartment complex; she had been the victim of a brutal stabbing; an eyewitness identified defendant as the killer and another witness informed officers that he had seen defendant running toward the defendant's apartment shortly after the murder; the officers went to defendant's nearby apartment and discovered fresh blood on the doorknob; they had no way of knowing whether defendant

was alone or might be harming someone else; they knocked loudly and announced themselves, but received no response; and they entered the apartment and found defendant. These uncontroverted facts constituted exigent circumstances sufficient to justify the officers' warrantless, nonconsensual entry into the defendant's home to effect his arrest.

Am Jur 2d, Searches and Seizures § 76.

7. **Searches and Seizures § 57 (NCI4th)— burglary, rape, murder—defendant's bloody bed sheet—officers lawfully present—admissible**

A bloody bed sheet was admissible in a prosecution for burglary, rape and murder where officers arriving at the scene found the victim in a common area; she had been brutally stabbed; a witness identified defendant and another indicated that defendant had run toward his apartment; officers found blood on the doorknob of defendant's apartment, knocked and announced themselves but received no answer; entered and found defendant lying in bed; and noticed blood on the sheet. The sheet was in plain view of the officers while they were lawfully on the premises.

Am Jur 2d, Searches and Seizures § 161.

8. **Searches and Seizures § 71 (NCI4th)— burglary, rape, murder—search of defendant's apartment—consent of wife**

Evidence obtained as a result of the consent of defendant's wife for a search of their apartment was admissible in a prosecution for burglary, rape, and murder. Although it has been held in the past that a wife has no authority to consent to a search of the home she shares with her husband, those cases have been effectively overruled by N.C.G.S. §§ 15A-221 and -222. Moreover, the prior cases were likely premised on the now untenable view that the husband was the master of the wife.

Am Jur 2d, Searches and Seizures § 100.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases. 1 ALR4th 673.

9. Evidence and Witnesses § 1219 (NCI4th)— burglary, rape, murder—statement by defendant—arrested without warrant—Miranda warnings

A confession by a defendant in a burglary, rape, and murder prosecution was admissible even though defendant had been arrested in his home without a warrant, even assuming that the arrest was illegal, where defendant was fully advised of his rights at the police station.

Am Jur 2d, Evidence §§ 545, 613.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Battle, J., on 5 June 1992, in the Superior Court, Chatham County, sentencing the defendant to life imprisonment for first-degree murder. Heard in the Supreme Court on 17 November 1993.

Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

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

MITCHELL, Justice.

On 9 July 1991, a Chatham County Grand Jury indicted the defendant, Michael Jerome Worsley, for first-degree murder and first-degree burglary. The Grand Jury indicted the defendant for first-degree rape on 28 January 1992. He was tried capitally at the 22 May 1992 Criminal Session of Superior Court, Chatham County. The jury returned verdicts finding the defendant guilty of first-degree murder under the felony murder rule, first-degree burglary and attempted first-degree rape.

At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. The trial court arrested judgment on the two underlying felonies and sentenced the defendant in accord with the jury's recommendation. 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. The defendant and Ms. Anita Nettles lived in the same apartment complex in Pittsboro, North Carolina. In the early morning hours of 8 June 1991, the defendant, by his own admission, entered the apartment where Ms. Nettles lived with her three children, stabbed her, dragged her outside and continued to stab her. A neighbor who was awakened by Ms. Nettles' screams looked out of her apartment window and saw the defendant straddling Ms. Nettles in a grassy common area of the apartment complex. Two of Ms. Nettles' children were nearby screaming, "Don't hurt my mommy." Ms. Nettles was also begging the defendant not to hurt her. Another neighbor eventually came upon Ms. Nettles' body in the common area and called the police.

When the police arrived, they found that a large rock had been thrown through the back window of Ms. Nettles' apartment. A trail of blood led from the back door of the apartment into the living room, where there were patches of blood on the sofa. The trail then led upstairs to Ms. Nettles' bedroom, where the police found another spattering of blood. There was no evidence that any of Ms. Nettles' personal property had been removed.

After looking through the apartment, the officers spoke with Ms. Nettles' four-year-old son, Marcus, who told them that "Jerry" had stabbed his mother. The police later learned that the defendant used the name "Jerry" when talking with women who lived in the apartment complex. Another resident of the apartment complex told the police that he had seen the defendant running toward the defendant's apartment shortly after Ms. Nettles' murder.

The officers went to the defendant's apartment and found fresh blood on the doorknob of the back door. They knocked loudly and announced themselves as police officers. Receiving no response, they entered the front door of the apartment, which was unlocked. They found the defendant lying in bed with his wife and noticed blood on the bedsheet. The officers took the defendant into custody and read him the *Miranda* warnings. The defendant's wife then consented to a search of the apartment. During the course of their search, the officers discovered a pair of the defendant's pants with grass stains on both knees and blood (from both the defendant and Ms. Nettles) on the legs. They then placed the defendant in the Chatham County Jail.

The defendant initially refused to answer any of the officers' questions. Around twenty hours after his arrest, a police officer went to the defendant's cell to serve him with a warrant for first-degree burglary. The defendant told the officer that he wanted to talk. After the officer again read him the *Miranda* warnings, the defendant admitted that after smoking crack cocaine, he had entered Ms. Nettles' apartment, stabbed her and then dragged her outside where he continued stabbing her.

An autopsy revealed that Ms. Nettles died from a number of stab wounds to her neck. She also suffered stab wounds to her face, chest and arms. There were no injuries to her vaginal area and there had been no transfer of pubic or head hairs between the defendant and Ms. Nettles. Vaginal and rectal smears taken from Ms. Nettles' body revealed the presence of semen, however. An SBI forensic serologist also found semen on Ms. Nettles' underwear. The serologist could not conclusively determine the blood type of the semen.

Other pertinent evidence is discussed at other points in this opinion where it is relevant.

[1] By his first assignment of error, the defendant argues that the evidence was insufficient to support submission of first-degree rape to the jury. We disagree.

We have stated in detail on numerous occasions 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, 236-37, 400 S.E.2d 57, 61 (1991); *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980); *State v. Powell*, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117-18 (1980). When measuring the sufficiency of the evidence to support submission of a charged offense, "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), *judgment vacated on other grounds*, --- U.S. ---, --- L. Ed. 2d --- (1994). 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.*

In order to prove first-degree rape, it is sufficient that the State demonstrate that the defendant engaged in vaginal intercourse with another person by force and against the will of the other person and either (1) employed or displayed a dangerous weapon or (2) inflicted serious personal injury upon the victim or another person. N.C.G.S. § 14-27.2(a)(2) (1993). 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 engaged in vaginal intercourse with Ms. Nettles by force and against her will while either employing a dangerous weapon or inflicting serious personal injury upon her.

The evidence tended to show that in the early morning hours of 8 June 1991, the defendant entered Ms. Nettles' apartment, stabbed her and dragged her outside to a grassy common area where he continued to stab her. A neighbor who had been awakened by Ms. Nettles' screams looked out of her apartment window and saw the defendant straddling Ms. Nettles and "almost laying on top of her." When the police arrived at the scene, they discovered that a rock twelve to fifteen inches long and twelve inches wide had been thrown through the back window of Ms. Nettles' apartment. The officers also followed a trail of blood that led from the grassy common area through the back door of Ms. Nettles' apartment and into her living room, where the officers found patches of blood on the sofa. Indeed, the officers found more blood on the sofa than in any other part of the apartment. The trail then led from the sofa to Ms. Nettles' upstairs bedroom, where the officers found another spattering of blood.

An autopsy revealed that Ms. Nettles died as a result of a number of stab wounds to her neck. She also suffered stab wounds to her face, chest and arms. While there were no injuries to Ms. Nettles' vaginal area, vaginal and rectal smears taken from her body revealed the presence of semen. Semen was also found on Ms. Nettles' underwear.

The foregoing evidence, when viewed in the light most favorable to the State, supports a reasonable inference that in the early morning hours of 8 June 1991, the defendant approached Ms. Nettles' apartment and tossed a rock through the back window. He then reached through the hole in the window and unlocked the back door. He entered the apartment and went upstairs to Ms. Nettles' bedroom where he found her asleep. An initial struggle occurred

in the bedroom as indicated by the spattering of blood found there. The defendant dragged Ms. Nettles out of her bedroom and down the stairs to the living room sofa. From the considerable amount of blood found on the sofa and the semen found inside Ms. Nettles' body and on her underwear, a rational trier of fact could reasonably conclude that the defendant and Ms. Nettles remained on the sofa for some time while he stabbed and raped her. He then dragged her outside to the grassy common area where he straddled her, continued to stab her and possibly continued to rape her.

The defendant emphasizes, *inter alia*, that Ms. Nettles' underwear was not torn, that there was no evidence of any transfer of pubic or head hairs between the defendant and Ms. Nettles, that there was no injury to her vaginal area and that the SBI serologist who examined the semen found inside and on Ms. Nettles' body could not conclusively determine the blood type of the semen. As explained above, however, any contradictions in the evidence must be resolved in the State's favor.

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 engaged in vaginal intercourse with Ms. Nettles by force and against her will while either employing a dangerous weapon or inflicting serious personal injury upon her. 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 rape. Accordingly, this assignment of error is without merit.

[2] The defendant contends by his second assignment of error that the evidence was insufficient to warrant the trial court's instruction on the lesser-included offense of attempted first-degree rape. Principles of due process "require[ ] that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982); *see also State v. Arnold*, 329 N.C. 128, 139, 404 S.E.2d 822, 829 (1991); *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984). Underlying this rule is the realization that instructing the jury on a lesser-included offense that is not supported by the evidence improperly "invite[s] a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole reason that some of the

jurors believe him guilty of the greater offense." *State v. Lampkins*, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L. Ed. 2d 1216 (1976). We conclude that there was sufficient evidence in the present case to warrant the trial court's instruction on the lesser-included offense of attempted first-degree rape.

In order to prove attempted first-degree rape, the State must demonstrate "that the defendant had the intent to commit the crime and committed an act which went beyond mere preparation, but fell short of actual commission of the first-degree rape." *State v. Montgomery*, 331 N.C. 559, 567, 417 S.E.2d 742, 746 (1992). As noted above, the evidence in the present case tended to show that in the early morning hours of 8 June 1991, the defendant entered Ms. Nettles' apartment, stabbed her and dragged her outside to a grassy common area where he continued to stab her. A neighbor who had been awakened by Ms. Nettles' screams looked out of her apartment window and saw the defendant straddling Ms. Nettles and "almost laying on top of her." When the police arrived at the scene, they discovered that a large rock had been thrown through the back window of Ms. Nettles' apartment. The officers followed a trail of blood that led from the grassy common area through the back door of Ms. Nettles' apartment and into her living room, where the officers found patches of blood on the sofa. The trail then led from the sofa to Ms. Nettles' upstairs bedroom, where the officers found another spattering of blood.

This evidence, when viewed in the light most favorable to the State, supports a reasonable inference that in the early morning hours of 8 June 1991, the defendant gained access to Ms. Nettles' home by throwing a large rock through her back window. Upon entry, he went upstairs to Ms. Nettles' bedroom, where he first attempted to rape her and an initial struggle ensued. The defendant then dragged Ms. Nettles out of her bedroom and down the stairs to the living room sofa, where they continued to struggle as he again attempted to rape her. The defendant subsequently dragged Ms. Nettles outside where he straddled her in a final attempt at rape. Thus, there is considerable evidence from which the jury could reasonably infer that the defendant intended to commit first-degree rape and committed an act which exceeded mere preparation.

The evidence also tended to show that Ms. Nettles' underwear was not torn, that there had been no transfer of pubic hairs between

the defendant and Ms. Nettles, that there was no injury to Ms. Nettles' vaginal area and that the SBI serologist who examined the semen found in and on Ms. Nettles' body could not conclusively determine the blood type of the semen. This evidence supports a reasonable inference that the defendant's actions, while exceeding mere preparation, fell short of the actual commission of first-degree rape.

We therefore conclude that the evidence in the present 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, as the jury found in this case, that the defendant intended to commit first-degree rape and committed an act which went beyond mere preparation, but fell short of the actual commission of first-degree rape. The trial court thus did not err by instructing the jury on the lesser-included offense of attempted first-degree rape. We therefore reject this assignment of error.

[3] By his third assignment of error, the defendant maintains that there was insufficient evidence to support submission of first-degree burglary to the jury. First-degree burglary is the breaking or entering of an occupied dwelling at night with the intent to commit a felony therein. *Id.* at 568, 417 S.E.2d at 747; *see also* N.C.G.S. § 14-51 (1993). The defendant's specific contention is that the evidence in the present case did not allow a reasonable inference that he intended to commit a felony when he broke into Ms. Nettles' apartment. We disagree.

Having concluded that there was sufficient evidence to support the jury's finding that the defendant attempted to rape Ms. Nettles, we also conclude that there was sufficient evidence from which a rational trier of fact could conclude that the defendant entered Ms. Nettles' apartment with the intent to commit rape. *See State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992) ("The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering the building."). Additionally, since the evidence tended to show that the defendant stabbed Ms. Nettles to death following his entry into her home, a rational trier of fact also could conclude that the defendant entered Ms. Nettles' apartment with the intent to commit murder. *Id.* Thus, the trial court did not err in denying the defendant's motions to dismiss the charge

of first-degree burglary. This assignment of error is therefore without merit.

[4] By his fourth assignment of error, the defendant insists that the evidence was insufficient to support submission of the charge of first-degree murder under the felony murder theory. Specifically, the defendant contends that since there was insufficient evidence to support the submission of the underlying felonies of burglary and attempted rape, the trial court erred in submitting first-degree murder under the felony murder rule. We have already determined that there was sufficient evidence in the case at bar of the underlying felonies of first-degree burglary and attempted first-degree rape. The evidence was therefore sufficient to support submission of first-degree murder under the felony murder rule. Accordingly, this assignment of error is without merit.

[5] The defendant contends by his fifth assignment of error that the indictment charging him with first-degree burglary was fatally defective in that it failed to specify the felony he intended to commit when he broke into Ms. Nettles' apartment. In support of his contention, the defendant notes that we have held in previous cases that an "indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony." *State v. Norwood*, 289 N.C. 424, 429, 222 S.E.2d 253, 257 (1976); *see also State v. Wells*, 290 N.C. 485, 493, 226 S.E.2d 325, 331 (1976); *State v. Cooper*, 288 N.C. 496, 499, 219 S.E.2d 45, 47 (1975); *State v. Tippett*, 270 N.C. 588, 593-94, 155 S.E.2d 269, 273 (1967); *State v. Allen*, 186 N.C. 302, 305, 119 S.E. 504, 505 (1923). Such cases were decided prior to the enactment of N.C.G.S. § 15A-924(a)(5), however, and are no longer controlling on this issue. That statute, which has supplanted prior law, provides that an indictment or other criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (1988 & Supp. 1993). We conclude that the first-degree burglary indictment in the present case satisfies the requirements of the statute.

In *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), this Court held that an indictment for first-degree kidnapping satisfied the requirements of N.C.G.S. § 15A-924(a)(5) even though it did not specify the felony the defendant intended to commit at the time of the kidnapping. *Freeman*, 314 N.C. at 435, 333 S.E.2d at 745. We observed that an essential element of kidnapping "is that the confinement, restraint or removal be for the purpose of facilitating the commission of *any* felony or facilitating escape following the commission of *a* felony." *Id.* We then concluded that the requirements of N.C.G.S. § 15A-924(a)(5) were met "by the allegation in the indictment that the confinement, restraint or removal was carried out for the purpose of facilitating 'a felony' or escape following 'a felony.' " *Freeman*, 314 N.C. at 435, 333 S.E.2d at 745. We acknowledged "that in burglary cases we have required that the indictment specify the particular felony which the defendant intended to commit." *Id.* at 436, 333 S.E.2d at 746. We noted, however, that this rule was "drawn from the ancient strict pleading requirements of the common law" while the pleading requirements of the Criminal Procedure Act are "more liberal." *Id.* Nevertheless, we found it unnecessary to decide whether the common law rule regarding specificity in burglary indictments survived the enactment of the Criminal Procedure Act. *Id.*

We now conclude that the indictment for first-degree burglary in the present case satisfies the requirements of N.C.G.S. § 15A-924(a)(5), even though it does not specify the felony the defendant intended to commit when he entered Ms. Nettles' apartment. The true bill of indictment for first-degree burglary returned against the defendant in the present case 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 did during the nightime [sic] between the hours of four and five o'clock . . . break and enter the dwelling house of [Ms. Nettles] . . . . At the time of the breaking and entering the dwelling house was actually occupied by [Ms. Nettles], Marcus Nettles, Hamilton Nettles and Asiah Nettles.

> The defendant broke and entered the dwelling house with the intent to commit a felony therein.

As in *Freeman*, "the indictment here charges the offense . . . in a plain, intelligible, and explicit manner and contains sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. The indictment "also informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense." *Id.* If the defendant in the case at bar was in fact "in need of further factual information," he need only have moved for a bill of particulars pursuant to N.C.G.S. § 15A-925. *Freeman*, 314 N.C. at 436-37, 333 S.E.2d at 746.

The indictment for first-degree burglary in the present case therefore satisfies the requirements of N.C.G.S. § 15A-924(a)(5), notwithstanding the fact that it does not specify the felony the defendant intended to commit when he entered Ms. Nettles' apartment. To the extent our earlier cases cited above would have required a different result, we expressly overrule them. We reject this assignment of error.

[6] By his sixth and final assignment of error, the defendant argues that the trial court erred in denying his motions to suppress physical evidence seized from his home and statements he made to the police following his arrest. The defendant insists that this evidence was obtained pursuant to an unconstitutional warrantless arrest of the defendant in his home in the absence of exigent circumstances and therefore was inadmissible. *See Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963). We disagree.

In the absence of exigent circumstances, a warrantless, nonconsensual entry into a suspect's home to effect a routine felony arrest violates the Fourth Amendment to the Constitution of the United States. *Payton v. New York*, 445 U.S. 573, 576, 63 L. Ed. 2d 639, 644 (1980). In the present case, the officers arrived at the scene of the murder to find Ms. Nettles' body lying in a grassy common area of the apartment complex. She had been the victim of a brutal stabbing. An eyewitness to the murder identified the defendant as the killer. Another witness informed the officers that he had seen the defendant running toward the defendant's apartment shortly after the murder. The officers went to the defendant's nearby apartment and discovered fresh blood on the doorknob of the back door. The officers had no way of knowing at this point

whether the defendant was alone or might be harming someone else inside his apartment. The officers knocked loudly on the defendant's door and announced themselves as police officers, but received no response. We conclude that these uncontroverted facts constituted exigent circumstances sufficient to justify the officers' warrantless, nonconsensual entry into the defendant's home to effect his arrest. *See State v. Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421 (1979) (enumerating seven factors informative on the existence of exigent circumstances, including: the gravity and nature of the offense, "the reasonableness of the belief the suspect is armed," "the degree of probable cause to believe the suspect committed the crime involved" and "whether reason to believe the suspect is in the premises entered existed"); *see also State v. Johnson*, 310 N.C. 581, 586, 313 S.E.2d 580, 583 (1984) (recognizing that the "[f]acts and circumstances sufficient to constitute 'exigent circumstances' in the context of [F]ourth [A]mendment searches vary widely"); *State v. Yananokwiak*, 65 N.C. App. 513, 517, 309 S.E.2d 560, 563 (1983) (employing a "totality of the circumstances" test for determining whether there were exigent circumstances sufficient to justify a warrantless entry to arrest).

[7] Once lawfully inside, the officers found the defendant lying in bed and noticed blood on the bedsheet. The bloody bedsheet therefore was admissible since it was within the plain view of the officers while they were lawfully on the premises. *See Allison*, 298 N.C. at 140, 257 S.E.2d at 420 ("The seizure of suspicious items in plain view inside a dwelling is lawful if the officer possesses legal authority to be on the premises."); *see also Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112 (1990); *Arizona v. Hicks*, 480 U.S. 321, 94 L. Ed. 2d 347 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971).

[8] The officers took the defendant into custody and the defendant's wife consented to a search of their apartment. The remaining items of evidence about which the defendant complains were seized in the course of this consent search. As the defendant does not challenge the voluntariness of his wife's consent, the evidence obtained pursuant to this search was admissible. *See* N.C.G.S. §§ 15A-221, -222 (1988); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973).

We recognize that in the past we have held that a wife has no authority to consent to a search of the home she shares with her husband. *See State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965) (wife did not have the authority to consent to a search of the home and therefore stolen property recovered during the search was inadmissible against the husband at trial); *see also State v. Woods*, 286 N.C. 612, 213 S.E.2d 214 (1975), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976) (recognizing the continuing validity of *State v. Hall*); *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L. Ed. 2d 74 (1971) (recognizing the continuing validity of *Hall*). These cases have been effectively overruled on this point, however, by the enactment of N.C.G.S. §§ 15A-221, -222. N.C.G.S. § 15A-221 provides that law enforcement officers "may conduct a search and make seizures, without a search warrant or other authorization, if consent to the search is given." N.C.G.S. § 15A-222 provides that the consent needed to justify a warrantless search and seizure may be given "[b]y a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises." The statute places no express restriction on the authority of a wife to consent to a search of the premises she shares with her husband. Nor can such a restriction fairly be read into the broad language of N.C.G.S. § 15A-222, since a wife clearly is "a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises" she shares with her husband.

Prior cases also likely were premised on the view, still prevailing in some quarters in those days, that the husband was the master of his wife. *See, e.g., Hall*, 264 N.C. at 563, 142 S.E.2d at 179 (a wife has no authority "to consent to a search of a *husband's* dwelling") (emphasis added). Today, any such notion is repugnant and untenable as well as being out of touch with reality. Thus, the better view, and the one we now expressly adopt, is that a wife may consent to a search of the premises she shares with her husband. To the extent that *Hall* and its progeny are in conflict with this principle, they are expressly overruled.

[9] We also reject the defendant's argument that his statements to the police at the Chatham County Jail following his arrest were inadmissible. The Supreme Court of the United States recently held that a voluntary confession given by a murder suspect who had been fully advised of his rights at the police station following

his arrest was admissible even though the officers had arrested the defendant in his home without a warrant in violation of *Payton. New York v. Harris*, 495 U.S. 14, 21, 109 L. Ed. 2d 13, 22 (1990). Thus, even assuming, *arguendo*, that the officers violated *Payton* in the case at bar, the trial court properly admitted the defendant's informed and voluntary confession.

The trial court did not err in admitting the physical evidence seized from the defendant's apartment and his subsequent confession to the police. Accordingly, we reject this assignment of error.

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

No error.

WILLIAM C. SCOTT, SR. v. JANE MAYO SCOTT

No. 306PA92

(Filed 6 May 1994)

1. **Divorce and Separation § 68 (NCI4th)— divorce—defendant's failure to show incurable insanity**

The trial court did not err by concluding that defendant failed to prove that she is incurably insane within the meaning of N.C.G.S. § 50-5.1 so as to require plaintiff to proceed under that statute in order to obtain an absolute divorce from defendant, although the evidence was undisputed that defendant suffers from an incurable mental illness, where (1) defendant failed to meet the procedural requirements set forth in N.C.G.S. § 50-5.1 because only one of her medical experts associated with a four-year medical school made any determination of defendant's condition three years prior to the institution of the divorce action, and (2) the evidence supported the trial court's finding that defendant's mental illness has been controllable with medication a majority of the time and she has been able to function in normal daily situations such as maintaining a household, paying bills and handling financial matters, hosting social functions, shopping, maintaining her driver's license, and operating a motor vehicle.

Am Jur 2d, Divorce and Separation §§ 88 et seq.

Requisites of proof of insanity as a ground for divorce. 15 ALR2d 1135.

Insanity as substantive ground of divorce or separation. 24 ALR2d 873.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation. 33 ALR2d 1230.

2. Divorce and Separation § 67 (NCI4th)— divorce—definition of incurable insanity

In order to bar an action for divorce based on one year's separation on the ground that defendant is incurably insane, prior cases will be followed which require that defendant's "mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act." The term "incurable insanity" in N.C.G.S. § 50-5.1 will not be redefined to equate it with severe and persistent mental illness as defined in N.C.G.S. § 122C-3(33a) of the Mental Health, Developmental Disorders, and Substance Abuse Act of 1985.

Am Jur 2d, Divorce and Separation §§ 88 et seq.

Insanity as substantive ground of divorce or separation. 24 ALR2d 873.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation. 33 ALR2d 1230.

3. Divorce and Separation § 68 (NCI4th)— divorce based on one year's separation—defense of incurable insanity—burden of proof

In order to bar an action for divorce based on one year's separation, defendant bears the burden of persuasion that he or she is incurably insane within the meaning and purpose of N.C.G.S. § 50-5.1.

Am Jur 2d, Divorce and Separation §§ 88 et seq.

Insanity as substantive ground of divorce or separation. 24 ALR2d 873.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation. 33 ALR2d 1230.

Justice MITCHELL concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 106 N.C. App. 606, 417 S.E.2d 818 (1992), affirming judgment of divorce entered 16 October 1990 by Washburn, J., in the District Court, Alamance County. Heard in the Supreme Court 17 March 1993.

Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Carole S. Gailor, Susan D. Crooks, and Susan S. McFarlane, for defendant-appellant.

PARKER, Justice.

In this action for divorce, defendant contends the Court of Appeals erred in affirming the trial court's entry of judgment of divorce based on one year's separation pursuant to N.C.G.S. § 50-6. We disagree and affirm the decision of the Court of Appeals.

Plaintiff filed this action for divorce from defendant based on one year's separation. In response, defendant counterclaimed for alimony and equitable distribution, moved to dismiss on the grounds that N.C.G.S. § 50-6 was inapplicable because she suffered from incurable mental illness, and asserted N.C.G.S. § 50-5.1 as an affirmative defense. Although she has broken her argument into numerous subparts, the crux of defendant's argument is that, under the evidence presented, plaintiff was not entitled to an absolute divorce pursuant to N.C.G.S. § 50-6 but was required to proceed under N.C.G.S. § 50-5.1.

Defendant contends *inter alia* that (i) N.C.G.S. § 50-5.1 provides the exclusive means by which one may divorce a spouse suffering from incurable mental illness; (ii) defendant's undisputed evidence complied with the requirements of N.C.G.S. § 50-5.1; (iii) the trial court's finding of fact, that defendant was able to function in normal daily situations, was not supported by the evidence and did not support the conclusion that defendant was not incurably insane within the meaning of N.C.G.S. § 50-5.1; and (iv) the Court of

Appeals applied an unduly restrictive definition of incurable insanity.

In North Carolina two statutes authorize the grant of an absolute divorce. One, applicable to sane spouses, permits divorce based on one year's separation. N.C.G.S. § 50-6 (1987). The other, applicable to divorce from an incurably insane spouse, requires three years' separation by reason of the incurable insanity of one spouse. N.C.G.S. § 50-5.1 (1987). As the Court of Appeals correctly held, N.C.G.S. § 50-5.1 provides the sole remedy for a plaintiff seeking divorce from an incurably insane spouse. *Scott v. Scott*, 106 N.C. App. 606, 609, 417 S.E.2d 818, 821 (1992). As stated in *Lawson v. Bennett*, 240 N.C. 52, 81 S.E.2d 162 (1954):

> In this connection, the General Assembly has seen fit to legislate specifically and specially in respect to the granting of absolute divorce in all cases where a husband and wife have lived separate and apart by reason of the incurable insanity of one of them, upon the petition of the sa[n]e spouse. G.S. 50-5, subsection 6, as amended [now N.C.G.S. § 50-5.1].
>
> Therefore, in keeping with well established principle the remedy provided is exclusive. . . . "The courts everywhere are in accord upon the proposition that if a valid statutory method of determining a disputed question has been established, such remedy so provided is exclusive and must be first resorted to and in the manner specified therein."

Id. at 58, 81 S.E.2d at 167 (quoting *Committee on Grievances of Bar Association v. Strickland*, 200 N.C. 630, 633, 158 S.E. 110, 112 (1931)).

In the present case defendant contends the evidence of her incurable mental illness brings her within the purview of N.C.G.S. § 50-5.1. The portion of N.C.G.S. § 50-5.1 relied upon by defendant in her brief is as follows:

> Provided further, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action . . . .
>
> . . . .
>
> In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the

> action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

N.C.G.S. § 50-5.1 (1987). The statute further provides that if the insane defendant spouse does not have sufficient income to provide for his or her own care and maintenance, the court shall require the sane spouse to provide for care and maintenance for the defendant's lifetime. *Id.*

Defendant presented three expert witnesses. Dr. Seymour Halleck, a physician licensed to practice psychiatry in North Carolina, who is a faculty member at the University of North Carolina School of Medicine, testified by affidavit. Dr. Ada Khoury, who is licensed to practice psychiatry in North Carolina and was in August 1990 a house staff officer at North Carolina Memorial Hospital and a resident at the University of North Carolina School of Medicine, testified in person. Dr. George Hamby, who is licensed to practice psychiatry in North Carolina and is engaged in private practice and has treated defendant continuously since 1968, also testified in person.

Dr. Halleck treated defendant for mental illness in 1975 and 1979 and diagnosed defendant as suffering from paranoid schizophrenia. When Dr. Halleck discharged defendant, she was instructed to continue taking Trilafon and Cogentin. The record does not indicate that Dr. Halleck saw defendant after 1979.

Dr. Khoury testified that she examined and treated defendant for mental illness in July and August 1990 and diagnosed her as suffering from schizo-affective disorder. Dr. Khoury had not seen defendant prior to July 1990 and had no independent knowledge aside from that gleaned from Dr. Hamby's records concerning defendant's ability to perform the normal functions of daily life.

Dr. Hamby testified that he had diagnosed defendant as suffering from paranoid schizophrenia, manic depression (bipolar disorder), and schizo-affective disorder, which recognizes that defendant suffers from a combination of manic depression and paranoid schizophrenia. Both Dr. Khoury and Dr. Hamby were of the opinion that defendant's use of alcohol complicated her mental illness and made it worse. Dr. Hamby testified that at the time of the hearing the three main things defendant needed to do were to keep her appointments with him, take her medication properly, and avoid drinking alcohol while taking the medication. Dr. Hamby testified that when defendant reached the point that she could handle these three tasks without assistance he would tell her to release the aids who were attending her at home. Dr. Hamby further testified that the usual reason for hospitalizing defendant was to adjust or alter her medication. Defendant has never been involuntarily committed though from time to time Dr. Hamby did tell defendant that if she would not enter the hospital voluntarily, he would have to have her committed. Defendant always agreed to the hospitalization. While Dr. Hamby expressed some concern about defendant's ability to handle large sums of money, he was not concerned about her ability to control a household account.

Plaintiff testified that the parties separated on 17 December 1988 after thirty-two years of marriage, and since the separation defendant had lived by herself in the marital home. According to plaintiff's testimony, defendant cared for the children while they were being raised; handled the finances and kept a joint checking account; maintained her driver's license and drove a car except when the doctor advised her not to drive on account of the medication level; entertained at home, frequently having people as guests

for dinner and from time to time orchestrating larger parties with fifty to a hundred people; handled maintenance on the home including contracting with and paying plumbers, painters, and yardmen; and had familiarity with the assets in her trust account and kept up with the dividends. Plaintiff further testified that the couple had always had communication problems even in good times and that defendant was given to mood changes and outbursts of anger. Defendant had been under medication for the last twenty-three years and, except for the periods of hospitalization, was able to function as a housewife and person within the family unit.

[1] In light of the evidence in the record, we conclude the Court of Appeals did not err in affirming the trial court's denial of defendant's motion to dismiss for the following reasons. First, defendant's expert testimony does not satisfy the requirements of the statute. The statute requires the evidence to show both examination of the insane spouse by two or more medical doctors who are members of the staff of one of North Carolina's accredited four-year medical schools at least three years preceding the institution of the action for divorce and a determination at that time by the staff members that the spouse is suffering from incurable insanity. The two members of the staff of the University of North Carolina School of Medicine who testified either in person or by affidavit were Dr. Khoury and Dr. Halleck. Dr. Khoury did not examine defendant until July 1990, some three months after the divorce action was commenced on 10 April 1990. Hence, only one of defendant's medical experts associated with a four-year medical school made any determination of defendant's condition three years prior to the institution of the action for divorce, and defendant has thus not met the procedural requirements set forth in N.C.G.S. § 50-5.1.

Second, the evidence supports the following finding of fact made by the trial court in ruling on defendant's motion to dismiss:

> Over the last twenty-two years, the defendant has been voluntarily hospitalized for short periods of time on numerous occasions at Alamance Memorial Hospital and North Carolina Memorial Hospital for treatment of mental illness. The defendant has continually suffered from incurable mental illness but a majority of the time, her mental illness has been controllable with medication and the defendant has been able to function in normal daily situations such as maintaining a household, paying bills and handling financial matters, hosting social func-

> tions, shopping, maintaining her driver's license and operating a motor vehicle. The defendant has never been involuntarily committed nor adjudicated incompetent or incurably insane.

Notwithstanding defendant's assertions that the evidence relevant to her incurable insanity is undisputed, the record discloses substantial conflicting evidence to support the trial court's finding. Admittedly, the evidence that defendant suffers from an incurable mental illness is undisputed, but the evidence that the condition is treatable and controllable with medication is also undisputed. In making its findings, the trial court was entitled to consider both expert and nonexpert testimony. Uncontradicted expert testimony is not binding on the trier of fact. Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts. *Correll v. Allen*, 94 N.C. App. 464, 470, 380 S.E.2d 580, 584 (1989). Although plaintiff offered no expert testimony to contradict defendant's expert evidence concerning the diagnosis of defendant's condition, plaintiff's own testimony showed defendant's ability to perform usual daily tasks when her illness was controlled with medication. Moreover, the testimony of Dr. Hamby, defendant's treating psychiatrist and the person most familiar with her condition over an extended period of time, corroborated certain of plaintiff's evidence. The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991). Conclusions of law are, however, entirely reviewable on appeal.

[2] Finally, the Court of Appeals did not err by applying an overly restrictive definition of incurable insanity. The statute itself does not define "incurable insanity." Interpreting N.C.G.S. § 50-5.1 (formerly N.C.G.S. § 50-5(6)), this Court has stated:

> Separation occasioned by insanity is cause for divorce in North Carolina only in cases of incurable insanity. And in these cases the requirements of G.S. 50-5(6) must be met. In all other instances of separation arising by reason of mental incompetency, such separation is not a ground for divorce. But to bar an action for divorce based on two years separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act.

Moody v. Moody, 253 N.C. 752, 756, 117 S.E.2d 724, 727 (1961) (citing *Lawson v. Bennett*, 240 N.C. 52, 81 S.E.2d 162 (1954)).

Defendant urges this Court to adopt a more expansive meaning of the term, "incurable insanity," by superimposing on N.C.G.S. § 50-5.1 the definition of severe and persistent mental illness found in the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 as amended in the 1990 Regular Session of the General Assembly. N.C.G.S. § 122C (1993). That statute defines severe and persistent mental illness in an adult as

> a mental disorder suffered by persons of 18 years of age or older that leads these persons to exhibit emotional or behavioral functioning that is so impaired as to interfere substantially with their capacity to remain in the community without supportive treatment or services of a long term or indefinite duration. This disorder is a severe and persistent mental disability, resulting in a long-term limitation of functional capacities for the primary activities of daily living, such as interpersonal relations, homemaking, self-care, employment, and recreation.

N.C.G.S. § 122C-3(33a) (1993). Recognizing that this definition is more specific and assuming arguendo that defendant's illness is within the scope of this definition, we decline to adopt this definition as a substitute for "incurable insanity" in N.C.G.S. § 50-5.1.

Under accepted canons of statutory construction, an interpretation

> consistently given to the statute is as much a part of the statute as if expressly written in it. We have no right to change or ignore it. If it is to be changed, it must be done by the Legislature, the law-making power. If, in its wisdom, a change is desirable, it can readily do so.

Hyler v. GTE Products Co., 333 N.C. 258, 266, 425 S.E.2d 698, 703 (1993) (quoting *Hensley v. Cooperative*, 246 N.C. 274, 281, 98 S.E.2d 289, 294 (1957)). The purpose of the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 is different from that of the divorce statute. Furthermore, N.C.G.S. § 50-5.1 and other sections of Chapter 50 have been amended numerous times since this Court's decision in *Moody*. As recently as the 1991 session, the General Assembly enacted N.C.G.S. § 50-22 to permit a claim for equitable distribution by an incompetent spouse's guardian without a decree of divorce after the parties

have lived separate and apart for one year. N.C.G.S. § 50-22 (1991). The statute then specifically preserves the right of the competent spouse to obtain a divorce. *Id.*

If the legislature had wished to redefine "incurable insanity" in N.C.G.S. § 50-5.1 to equate the term with severe and persistent mental illness as defined in the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985 as amended, it could have done so. Defendant's expert, Dr. Khoury, testified that approximately eight percent or twenty million people in the United States suffer from bipolar disorder or manic depression. The medical experts also testified that this mental illness is treatable and controllable by medication. Given the legislature's failure to amend N.C.G.S. § 50-5.1, we cannot presume that the legislature intended to limit one spouse's right to divorce based on one year's separation where the other spouse's condition does not rise to the level of incurable insanity as previously defined by this Court.

As stated in *Mabry v. Mabry*, 243 N.C. 126, 129, 90 S.E.2d 221, 223 (1955): "The State is interested in the marital status of its citizens, and it guards with care the marital rights as well as the property rights of its insane." The purpose of N.C.G.S. § 50-5.1 is twofold, namely, (i) to allow a sane spouse to divorce an incurably insane spouse who is unable by reason of his or her mental condition to fulfill the obligations of a husband or wife and (ii) to provide for the support of that person. For the foregoing reasons, we hold that to bar an action for divorce based on one year's separation the "mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act." *Moody*, 253 N.C. at 756, 117 S.E.2d at 727. Applying this standard, the trial court, based on its finding of fact, did not err in concluding as a matter of law that "defendant has failed to prove by the greater weight of the evidence that she is incurably insane within the meaning and purpose of North Carolina G.S. 50-5.1."

[3] The second issue raised in this appeal is whether the trial court erred in placing the burden of proof on the defendant to show incurable insanity. The defendant contends that a plaintiff seeking a divorce based on one year's separation pursuant to N.C.G.S. § 50-6 should be required to plead and prove that the defendant is sane. We disagree. All persons are presumed to be of sound mind until the contrary is shown. *Davis v. Davis*, 223 N.C. 36,

38, 25 S.E.2d 181, 183 (1943). Insanity is an affirmative defense. Accordingly, we hold that to bar an action for divorce based on one year's separation, the defendant bears the burden of persuasion that he or she is incurably insane within the meaning and purpose of N.C.G.S. § 50-5.1.

AFFIRMED.

Justice MITCHELL concurring.

I completely concur in the scholarly opinion of the Court in this case. I must point out, however, that this opinion demonstrates the error of the bare majority of this Court which implied in a prior case that legislative inaction after a judicial interpretation of a statute was a weak reed upon which to lean and that the legislature's failure to modify a statute after such a judicial interpretation was as likely to be the product of political cowardice as to be the product of the legislature's approval of this Court's interpretation. *DiDonato v. Wortman*, 320 N.C. 423, 425, 358 S.E.2d 489, 490 (1987). I believe that Justice Webb was correct when he stated in his dissent in *DiDonato* that the rule of statutory construction treating legislative silence as approval of our prior judicial construction of a statute should not be denigrated. *Id.* at 437, 358 S.E.2d at 497 (Webb, J., dissenting). As Justice Webb quite accurately stated: "It cannot add to the strength of this Court to use this canon of construction when we want to reach a certain result, *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), and ignore it when it suits our convenience." *DiDonato*, 320 N.C. at 437, 358 S.E.2d at 497. I am pleased to see this Court return in the present case to the undiluted application of the doctrine of statutory construction inferring legislative approval of the decisions of this Court from legislative silence in the face of those decisions. It is my sincere hope that the Court will now follow this canon of statutory construction consistently and not ignore it when it suits our purpose to do so.

ARTIS K. KAPP, MICHAEL W. ROWE, MELISSA A. ROWE, RUTH S. ROBERTSON, E. DANIEL SPEAS, JANE S. HUTCHENS, JENNY LYNN, JOYCE PREACHER, SPEAS JOYCE, JOHN H. KAPP, KENNETH G. SPEAS, WILLIAM EUGENE SPEAS, AND LAVERN E. SPEAS v. WILLIAM H. KAPP, AND M. KEITH KAPP, INDIVIDUALLY AND AS CO-EXECUTORS OF THE ESTATE OF JOSEPHINE P. KAPP, AND BETTY M. KAPP

No. 273PA93

(Filed 6 May 1994)

1. **Trusts § 1.1 (NCI3d)— trust not created by will language—conveyance to executor—Uniform Trusts Act inapplicable**

A provision in a will that the residuary estate shall be "administered and distributed" in stated percentages to plaintiffs did not direct the executors to hold the estate for plaintiffs and thus did not create an express trust. Therefore, where the testatrix gave one of the executors of her estate an option to purchase a tract of land for $500 per acre during her lifetime and for six months after her death and directed in her will that her executors comply with this option, provisions of the Uniform Trusts Act set forth in N.C.G.S. §§ 36A-66 and 36A-78 did not apply to prohibit the executors from conveying the land to the optionee-executor.

Am Jur 2d, Wills §§ 1481, 1543.

Option created by will to purchase real estate. 44 ALR2d 1214.

2. **Executors and Administrators § 35 (NCI4th)— option to purchase given to executor—exercise of option—no breach of fiduciary duty**

Where a will gave one of the executors the option to purchase a tract of land owned by the testatrix, the executor could exercise the option to purchase without violating his fiduciary duty as executor.

Am Jur 2d, Executors and Administrators §§ 828 et seq.

3. **Fraud, Deceit, and Misrepresentation § 37 (NCI4th)— absence of fiduciary relationship—no presumption of fraud**

There was no presumption of fraud in the testatrix's execution of a document giving an executor of her estate the option to purchase a tract of land for $500 per acre during her lifetime and for six months after her death where there

was evidence that, although testatrix relied on the executor in some of her business transactions, she did not rely on the executor with regard to the option, and the jury found that there was no fiduciary relationship between the executor and testatrix at the time the option was executed.

Am Jur 2d, Fraud and Deceit §§ 437 et seq.

4. **Fiduciaries § 2 (NCI4th) — existence of fiduciary relationship — executor's exercise of option — evidence inadmissible**

Where testatrix gave one of her executors an option to purchase a tract of land within six months after her death and directed in her will that her executors comply with this option, and plaintiffs alleged that the executors violated their fiduciary duty by conveying the land to the optionee-executor, evidence that the executors did not make the option part of the estate file, undervalued the land on the 90-day inventory, did not inform the beneficiaries of the will of the option until it was exercised, did not disclose to the beneficiaries that adjoining land was being purchased by a commercial developer, and backdated the deed conveying the land was not relevant to show a fiduciary relationship between the optionee-executor and testatrix at the time the option was executed, to show that the exercise of the option was not an open, fair and honest transaction, or to prove any issue in the case and was properly excluded by the trial court. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Fraud and Deceit §§ 16, 442.

5. **Quasi Contracts and Restitution § 31 (NCI4th) — executor's exercise of option — unjust enrichment — insufficient evidence**

The trial court did not err by failing to submit an issue of unjust enrichment to the jury where the evidence showed that defendant executor exercised an option given to him by the testatrix to purchase a tract of land for $500 per acre for a total price of $35,705; the executor later sold the land for $1,423,000; the executor was not acting in a fiduciary capacity at the time the option was executed and did not suggest the price of the land; and testatrix was a competent person, could determine the price, and did so of her own free will.

Am Jur 2d, Restitution and Implied Contracts § 88.

6. Fiduciaries § 1 (NCI4th)— fiduciary relationship—instruction on undue influence—jury not misled

Although the trial court had dismissed a claim based on undue influence and only a claim based on breach of fiduciary duty remained in the case, the trial court's correct charge on undue influence could not have misled the jury to believe that it would have to find undue influence in order to find a fiduciary relationship.

Am Jur 2d, Fraud and Deceit §§ 16, 442.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, remanding the case for further proceedings upon a judgment entered by DeRamus, J., at the 4 March 1991 Civil Session of Superior Court, Forsyth County. Heard in the Supreme Court 31 January 1994.

The plaintiffs and defendants have appealed from a decision of the Court of Appeals which remanded this case for further proceedings. The plaintiffs alleged in this action that the defendants William H. Kapp and M. Keith Kapp violated their duties, as executors of the estate of Josephine P. Kapp, by conveying to William H. Kapp a seventy-one acre tract of real property which was owned by Josephine at the time of her death. The case was tried by a jury.

The evidence showed that Josephine was the aunt of William and the great aunt of Keith, who is William's son. William lived approximately one and a half miles from Josephine and cultivated the tract of land in question. He also advised her in regard to business matters, such as whether to take a penalty on certificates of deposit in order to reinvest at higher rates and whether to purchase additional shares of stock when offered by the issuer.

In late July or early August of 1980, Josephine talked to Keith, who is an attorney, in regard to making a will. Keith told her how to make a holographic will and gave her the names of three attorneys with whom she could consult. One of them was Robert Vaughn whom Keith knew only by reputation. Josephine made a holographic will on 13 August 1980 in which she stated, "William H. Kapp and Michael Keith Kapp to buy the land at a reasonable price and to pay it to my estate."

On 11 September 1980, William carried Josephine to Mr. Vaughn's office. Josephine conferred with Mr. Vaughn, during which

conference William was not present. Mr. Vaughn's memorandum of that conference showed Josephine wanted William and Keith to be able to purchase the land after an appraisal by an independent appraiser, notwithstanding that they may be acting in a fiduciary capacity.

On 7 October 1980, William carried Josephine to Mr. Vaughn's office. Mr. Vaughn's notes were headed "10/7/80 conf. Bill K. and Miss K." William testified that after he had greeted Mr. Vaughn, he left Mr. Vaughn in his office with Josephine. It was at that meeting that an option to William only was discussed. Mr. Vaughn's notes show that for the purposes of the option they should have the property appraised.

On 28 October 1980, William again carried Josephine to Mr. Vaughn's office. Mr. Vaughn testified that William was in the room for part of the time he talked to Josephine, but he discussed all the terms of the option with her when William was not in the room. Mr. Vaughn testified that he did not advise Josephine what price should be placed on the land, but that she told him to use the tax value, which was $500 per acre. William agreed to pay $360 or one percent of the sales price for the option.

On 21 January 1981, Josephine executed three documents which had been prepared for her by Mr. Vaughn. One document was a power of attorney under which she designated William as her attorney in fact with Keith as an alternate. She also executed an option to William to purchase the seventy-one acre tract at a price of $500 per acre or a total of $35,705 during Josephine's lifetime and for six months after her death. She also executed a will which contained the following provision:

> Section C. At the time of the execution of my Will, I own certain real estate being approximately seventy (70) acres of land in Forsyth County. It is my wish and desire that my nephew, WILLIAM H. KAPP, be able to acquire such real estate, and, consequently, I have granted an option to him to purchase such real estate. I wish to call my Executors' attention to the fact that I have granted such option and I direct my Executors to comply with the terms of any such option or contract that may be in effect at the time of my death. I understand that my nephew, WILLIAM H. KAPP, may be acting in several capacities and notwithstanding the fact that he is acting in a fiduciary capacity, I still direct that he be able to acquire

such property pursuant to the terms of the option or any other contract applicable to such real estate.

Josephine died on 11 March 1986. Within six months of Josephine's death, William exercised the option and bought the real property for $35,705. In January 1988, William sold the land for $1,423,000.

The court submitted the following issues to the jury, all of which were answered favorably to the defendants:

1. At or before the time Josephine Kapp executed the option of January 21, 1981, did a fiduciary relationship exist between her and the defendant William H. Kapp as to any aspect of that transaction?

2. Did Josephine Kapp execute the option relying and acting upon independent advice of her attorney, Robert Vaughn?

3. Was the execution of the option an open, fair and honest transaction?

In its judgment, the court, after reciting the issues answered by the jury, said the Uniform Trusts Act applied to this case but that it excused the defendants pursuant to N.C.G.S. § 36A-80 for any violation of the Uniform Trusts Act, N.C.G.S. § 36A-60 *et seq.* The court entered judgment for the defendants.

The Court of Appeals reversed the superior court and held that the Uniform Trusts Act does not apply to this case. It then said that this misapplication of the law was prejudicial to a proper determination of the case. The Court of Appeals then set aside the judgment of the superior court and remanded the case for further proceedings consistent with its opinion.

We granted petitions for discretionary review filed by both sides.

Clark, Wharton & Berry, by David M. Clark, Frederick L. Berry and Virginia S. Schabacker, for plaintiffs-appellants and appellees.

Bell, Davis & Pitt, P.A., by William Kearns Davis and J. Dennis Bailey, for defendants-appellants and appellees.

WEBB, Justice.

[1] The first question posed by this appeal is whether the Uniform Trusts Act, N.C.G.S. § 36A-60 *et seq.*, applies to this case and

if so whether, as contended by the plaintiffs, N.C.G.S. § 36A-78 and N.C.G.S. § 36A-66 forbid the executors from conveying the real property to William. We affirm the Court of Appeals and hold that the Act does not apply. N.C.G.S. § 36A-60 says:

> As used in this Article unless the context or subject matter otherwise requires:
>
> . . . .
>
> (4) "Trust" means an express trust only.

N.C.G.S. § 36A-60 (1984).

Nothing in the language of Josephine's will expressly creates a trust. We do not agree with plaintiffs that the language of the will, that the residuary estate shall be "administered and distributed" in stated percentages to the plaintiffs, directs the executors to hold the estate for plaintiffs and thus creates an express trust.

The cases upon which the plaintiffs rely are not helpful to them. *Davis v. Jenkins*, 236 N.C. 283, 72 S.E.2d 673 (1952) and *Pearson v. Pearson*, 227 N.C. 31, 40 S.E.2d 477 (1946), deal with the purchase of estate assets by the administrators of the estates. They recognize an administrator is a fiduciary but do not deal with the creation of express trusts. There may be cases in which an express trust may be created without expressly saying so, but this is not such a case.

We do not agree with the Court of Appeals that the case should be remanded for further proceedings. We are able to determine the case on the basis of the issues decided by the jury.

[2] The plaintiffs correctly say that although the Uniform Trusts Act may not apply, the executors are nevertheless under a fiduciary duty to the plaintiffs. *Erickson v. Starling*, 233 N.C. 539, 64 S.E.2d 832 (1951); *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949). They argue that it diminished the estate for William to exercise the option and he was under a fiduciary duty to the plaintiffs not to exercise it unless he resigned as executor. William's duty to the plaintiffs as executor was to administer the estate in accordance with the will. The will provided for him to purchase the tract of land. He could do so without violating his duty as executor.

[3] All the parties agree that this case does not comprise an attack on the will. It is conceded that there was no undue influence

and that Josephine was of sound mind when the option and the will were executed. The plaintiffs contend that William was a fiduciary for Josephine before and at the time the option was exercised and there is a presumption of fraud in the execution of the option. *Curl v. Key*, 311 N.C. 259, 316 S.E.2d 272 (1984). We have held that a fiduciary relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971); *Abbitt v. Gregory*, 201 N.C. 577, 160 S.E. 896 (1931); *Brisson v. Williams*, 82 N.C. App. 53, 345 S.E.2d 432 (1986), *cert. denied*, 318 N.C. 691, 350 S.E.2d 857 (1986); *Stilwell v. Walden*, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

In this case, there is evidence that Josephine relied on William in her business transactions. There is other evidence, particularly in regard to the transaction regarding the granting of the option, that she did not rely on William. The question of the fiduciary relationship was submitted to the jury, and we believe properly so. The issue was resolved favorably to the defendants. There was no fiduciary relationship between Josephine and William when the option was executed and there is not a presumption of fraud.

[4] The plaintiffs also contend the court committed error in excluding evidence of certain actions taken by the defendants after Josephine's death. The plaintiffs offered evidence which was excluded that the defendants did not make the option a part of the estate file, listed the land value on the 90 day inventory at $30,000 when the tax value was $95,000, did not inform the beneficiaries of the will of the existence or terms of the option until it was exercised, did not disclose to the beneficiaries that adjoining land was being purchased by a major commercial developer, and the exercise of the option and the deed conveying the property were backdated to 1 August 1986. The plaintiffs say all this was evidence of William's intent. This evidence would not have had a tendency to make the relations of William and Keith to Josephine more likely to be fiduciary relations. Nor would it have made it more or less likely that Josephine relied on the advice of Robert Vaughn in exercising the option. It would also not make it more or less likely that the exercise of the option was an open, fair and honest transaction. N.C.G.S. § 8C-1, Rule 401 (1992). This evidence was

not relevant to any issue in this case and it was not error to exclude it. N.C.G.S. § 8C-1, Rule 402 (1992).

[5] The plaintiffs next contend that a claim for unjust enrichment should have been submitted to the jury. Relying on *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984), the plaintiffs say that unjust enrichment "will usually lie whenever one man has been enriched or his estate enhanced at another's expense under circumstances that, in equity and good conscience, call for an accounting by the wrongdoer." *Id.* at 646, 312 S.E.2d at 218 (quoting *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 252, 85 S.E.2d 140, 143 (1954)). The plaintiffs say that equity and good conscience require a recovery for unjust enrichment in this case because of the small consideration paid by William for a valuable tract of land. They say that there is no evidence "that Josephine intended for William to buy her property for a song." They say further that William remained silent when Josephine told Mr. Vaughn to use the tax value to determine the price to be paid for the land.

We have held that William was not acting in a fiduciary capacity in the drawing of the option. There is no evidence that he suggested the price to be paid for the land. Josephine was a competent person and could determine the price. The evidence shows she did so of her own free will. It was not error not to submit unjust enrichment to the jury.

The plaintiffs next contend there was error in the charge. The plaintiffs first say the court told the jury to limit its consideration as to whether there was a fiduciary relation "as to any aspect of that [January 21, 1981 option] transaction[.]" The plaintiffs say this implied that any previous ongoing fiduciary relation could be ignored. We do not agree with the plaintiffs as to this interpretation of the charge, but we believe any doubts should have been resolved by the following portion of the court's charge.

> Finally, members of the jury, as to this first issue, I charge if the defendants have proved by the greater weight of the evidence that at or before the execution of the January 21, 1981, option no fiduciary relationship exist[ed] between Josephine Kapp and Bill Kapp as to any aspect of that transaction or as to any relevant transaction leading up to that transaction, then it would be your duty to answer this first issue no, in favor of the defendants.

[6] The plaintiffs also contend there was error in the charge in that the court charged on something that was not at issue. Although the court had dismissed a claim based on undue influence, the court in its charge on a fiduciary relation explained to the jury the law as to undue influence. This part of the charge had no relevance to the issue of a fiduciary relation in this case. The plaintiffs contend that by charging as it did, the court led the jury to believe that it would have to find undue influence in order to find a fiduciary relation.

The charge on undue influence was correct as to that facet of the law as was the charge on a fiduciary relation. Although irrelevant to the issue of the fiduciary relation, we cannot hold a correct statement of the law as to undue influence would have led the jury to believe it would have to find undue influence before it could find a fiduciary relation.

Finally, the plaintiffs contend that it was error for the court to instruct the jury that if it answered either of the first two issues favorably to the defendants, it would answer the third issue in favor of the defendants. The answer to the first issue was sufficient to determine the case in favor of the defendants. If there was error in determining the third issue, it was harmless error.

For the reasons stated in this opinion, we affirm the Court of Appeals in part, reverse the Court of Appeals in part and remand the case to the Court of Appeals for remand to Superior Court, Forsyth County, for an order reinstating the judgment heretofore entered.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

WILLIAM DWIGHT BOESCHE, PLAINTIFF v. RALEIGH-DURHAM AIRPORT AUTHORITY; BERT COLLINS, IN HIS OFFICIAL CAPACITY AS AIRPORT AUTHORITY CHAIRMAN; JOHN C. BRANTLEY, IN HIS OFFICIAL CAPACITY AS AIRPORT DIRECTOR; JOHN C. BRANTLEY, IN HIS INDIVIDUAL CAPACITY; NEDRA FARRAR-LUTEN, IN HER OFFICIAL CAPACITY AS AIRPORT PERSONNEL MANAGER; NEDRA FARRAR-LUTEN, IN HER INDIVIDUAL CAPACITY; ANDREW T. OWENS, IN HIS OFFICIAL CAPACITY AS AIRPORT MAINTENANCE MANAGER; ANDREW T. OWENS, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. 353PA93

(Filed 6 May 1994)

On plaintiff's appeal pursuant to N.C.G.S. § 7A-30(1) and petition for discretionary review pursuant to N.C.G.S. § 7A-31 from a decision of the Court of Appeals, 111 N.C. App. 149, 432 S.E.2d 137 (1993), affirming an order entered by Judge Hobgood at the 24 October 1991 Session of Superior Court, Orange County, allowing defendants' Rule 12(b)6) motion to dismiss for failure to state a claim. Heard in the Supreme Court 17 March 1994.

Loftin & Loftin, by John D. Loftin; and Walter H. Bennett, Jr., for plaintiff-appellant.

Newsom, Graham, Hedrick, Kennon & Cheek, P.A., by Lewis A. Cheek,, Joel M. Craig, and John R. Long, for defendant-appellees.

PER CURIAM.

After considering the record and new briefs and hearing oral argument, the Court concludes that plaintiff's petition for discretionary review was improvidently allowed. The Court further concludes that it should reconsider its earlier order denying defendants' motion to dismiss the appeal. Upon reconsideration, the Court determines that defendants' motion to dismiss plaintiff's appeal should be allowed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S APPEAL ALLOWED.

CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, D/B/A CAROLINAS MEDICAL CENTER; CHARLOTTE INSTITUTE OF REHABILITATION AND UNIVERSITY HOSPITAL; CAROLINA MEDICORP, INC.; FORSYTH MEMORIAL HOSPITAL, INC.; MEDICAL PARK HOSPITAL, INC.; DUKE MEDICAL CENTER; HIGH POINT REGIONAL HOSPITAL; MEMORIAL MISSION HOSPITAL, INC.; MOSES H. CONE MEMORIAL HOSPITAL; AND NORTH CAROLINA BAPTIST HOSPITALS, INC. v. NORTH CAROLINA INDUSTRIAL COMMISSION AND JAMES J. BOOKER, J. HAROLD DAVIS AND J. RANDOLPH WARD, IN THEIR OFFICIAL CAPACITIES AS ITS CHAIRMAN AND MEMBERS

No. 119PA93

(Filed 6 May 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of summary judgment for plaintiffs entered by Bailey, J., at the 11 December 1992 Session of Superior Court, Wake County. Heard in the Supreme Court 13 September 1993.

Turner Enochs & Lloyd, P.A., by Wendell H. Ott and Laurie S. Truesdell; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., Anthony H. Brett, and Dale E. Nimmo, for plaintiff-appellees.

Michael F. Easley, Attorney General, by Isham B. Hudson, Jr., Senior Deputy Attorney General, for defendant-appellants.

PER CURIAM.

Pursuant to *Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.*, 336 N.C. 200, 443 S.E.2d 716, (1994) this case is dismissed as moot.

DISMISSED.

ADA T. SMITH; ADA KELLY SMITH HINES AND HUSBAND, LOVIT HINES, ET AL v. SAM B. UNDERWOOD, JR.; SANDRA LEE HONEYCUTT (DIVORCED); ET AL

No. 4A94

(Filed 6 May 1994)

Appeal by respondent Sam B. Underwood, Jr., pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, 113 N.C. App. 45, 437 S.E.2d 512 (1993), which reversed an order entered on 27 January 1992, *nunc pro tunc* 17 January 1992, by Herring, J., in the Superior Court, Pitt County, in which the trial court in its discretion denied petitioners' petition to remove the respondent, Sam B. Underwood, Jr., as co-trustee of the Ada T. Smith and W. H. Smith Trust. Heard in the Supreme Court 14 April 1994.

Bass, Bryant & Moore, by John Walter Bryant and William E. Moore, Jr., for petitioner-appellees.

Ward and Smith, P.A., by Ryal W. Tayloe and A. Charles Ellis, for respondent-appellant Sam B. Underwood, Jr.

PER CURIAM.

For the reasons stated in the dissenting opinion for the Court of Appeals by John, J., the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Pitt County, for reinstatement of the trial court's order denying, in its discretion, the petition to remove the respondent-appellant as a co-trustee of the Ada T. Smith and W. H. Smith Trust.

REVERSED AND REMANDED.

CORNERSTONE CONDOMINIUM ASSOCIATION, INC. v. PATRICK O'BRIEN AND WIFE, PATRICIA O'BRIEN

No. 512A93

(Filed 6 May 1994)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 112 N.C. App. 527, 435 S.E.2d 818 (1993), reversing the trial court's judgment for plaintiff entered by Horton, J., at the 8 July 1992 Civil Session of District Court, Cabarrus County, and remanding for entry of judgment in favor of defendants. Heard in the Supreme Court 13 April 1994.

Ferguson and Scarbrough, P.A., by James E. Scarbrough, for plaintiff-appellant.

Johnson, Roberts & Hastings, by James C. Johnson, Jr., for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissent below, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the District Court, Cabarrus County, for reinstatement of the trial court's order allowing judgment for plaintiff.

REVERSED AND REMANDED.

ELIAS ROGERS AND ALTON DUDLEY v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION, INC.

No. 440PA93

(Filed 6 May 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 112 N.C. App. 365, 435 S.E.2d 582 (1993), reversing and remanding the judgment and order entered by Thompson, J., on 31 January 1992 in Superior Court, Robeson County. Heard in the Supreme Court 13 April 1994.

Barry Nakell for plaintiff-appellees.

Smith, Ruff and Schroeder, by Thomas E. Schroeder and W. Britton Smith, Jr.; and Locklear, Jacobs & Sutton, by Arlie Jacobs, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MARIE A. THRIFT v. FOOD LION, INC., AND TRIANGLE ICE CO., INC.

No. 394A93

(Filed 6 May 1994)

Appeals by plaintiff and defendant Food Lion, Inc. pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 111 N.C. App. 758, 433 S.E.2d 481 (1993), affirming a judgment entered 13 March 1992 by McHugh, J., in Superior Court, Forsyth County. Heard in the Supreme Court 12 April 1994.

Metcalf, Vrsecky & Beal, by Anthony J. Vrsecky, for plaintiff-appellant.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and Lawrence Pierce Egerton, for defendant-appellant Food Lion, Inc.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellee Triangle Ice Company, Inc.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion in the Court of Appeals. The case is remanded to the Court of Appeals for further remand to Superior Court, Forsyth County, for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

JOANN H. DAVIS v. SENCO PRODUCTS, INC.

No. 289PA93

(Filed 6 May 1994)

On discretionary review of the unpublished decision of the North Carolina Court of Appeals, 109 N.C. App. 700, 429 S.E.2d 789 (1993), dismissing the plaintiff's appeal from the judgment of Fullwood, J., entered 4 October 1991 in the Superior Court, Dare County. Heard in the Supreme Court on 11 April 1994.

Twiford, Morrison, O'Neal & Vincent, by Edward A. O'Neal, for the plaintiff-appellant.

Rodman, Holscher, Francisco & Peck, P.A., by Edward N. Rodman, for the defendant-appellee.

PER CURIAM.

Discretionary Review Improvidently Allowed.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JAMES EDWARD JAYNES	)	

No. 194A92

(Filed 11 May 1994)

Pursuant to N.C.G.S. § 15A-1418, Defendant's Motion for Appropriate Relief filed in this Court on 2 March 1994 is allowed for the purpose of entering the following order:

Defendant's Motion for Appropriate Relief is hereby remanded to the Superior Court, Polk County.

It is further ordered than an evidentiary hearing be held on the aforesaid motion at the earliest time practicable and that the resulting order containing the findings of fact and conclusions of law of the Superior Court Judge determining the motion be transmitted to this Court so that it may proceed with the pending appeal in this case or enter an order terminating the appeal.

By order of the Court in Conference, this 11th day of May, 1994.

s/PARKER, J.
For the Court

DAVID LAWSON, PHILLIP J. DONAHUE, AND JAMES ARNOLD, PETITIONERS	)	
v.	)	ORDER
GARY DIXON, WARDEN, CENTRAL PRISON, A DIVISION OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION AND FRANKLIN FREEMAN, SECRETARY, DEPARTMENT OF CORRECTION, RESPONDENTS	)	

No. 198P94-2

(Filed 17 May 1994)

Upon consideration of the Petition for Writ of Certiorari and Motion to Bypass Court of Appeals, filed in this action by defendants, Gary Dixon, Warden of Central Prison, and Franklin Freeman, Secretary of the North Carolina Department of Correction, it appearing to the Court that defendants did not file a notice of appeal or petition for writ of certiorari in the North Carolina Court of Appeals, and it further appearing to the Court that in the interest of justice and to expedite decision in the public interest, defendants' Petition for Writ of Certiorari and Motion to Bypass Court of Appeals should be allowed, the Court, pursuant to Rule 2 of the Rules of Appellate Procedure, suspends the requirements of the Rules of Appellate Procedure and in the exercise of its supervisory powers pursuant to Article IV, Section 12(1) of the North Carolina Constitution hereby allows defendants' Motion to Bypass Court of Appeals and issues its Writ of Certiorari to review the request in plaintiffs' complaint for a writ of mandamus and an injunction permitting the videotaping of plaintiff Lawson's execution and the orders of the Superior Court heretofore entered on 9 and 10 May 1994;

And the Court, having reviewed the request in plaintiffs' complaint and the orders, concludes that only a question of law is raised by plaintiffs' complaint; that plaintiffs David Lawson, Phillip J. Donahue, and James Arnold do not have a right under either the First or Fourteenth Amendments to the United States Constitution or under Article 1, Section 14 of the North Carolina Constitution to audiotape or videotape plaintiff Lawson's scheduled execu-

tion, see *Houchins v. KQED, Inc.*, 438 U.S. 1, 57 L. Ed. 2d 553 (1978); *Pell v. Procunier*, 417 U.S. 817, 41 L. Ed. 2d 495 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 41 L. Ed. 2d 514 (1974); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977); that under N.C.G.S. § 15-190 the execution is under the supervision and control of Warden Dixon; and that, as a matter of law, neither Secretary Freeman nor Warden Dixon can be mandamused to permit the requested audiotaping or videotaping;

NOW, THEREFORE, IT IS ORDERED that all orders issued in this action by the Superior Court, Wake County, in furtherance of plaintiffs' petition for writ of mandamus and an injunction, be and they are hereby vacated.

IT IS FURTHER ORDERED that plaintiffs' action be and it is hereby dismissed.

So ordered by the Court in Conference, this 17 day of May, 1994.

s/PARKER, J.
For the Court

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

ABLE OUTDOOR, INC. v. HARRELSON

No. 115PA94

Case below: 113 N.C.App. 483

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1994.

BEATY v. FREIGHTLINER CORP.

No. 48P94

Case below: 113 N.C.App. 422

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

BELL ATLANTIC TRICON LEASING CORP. v. JOHNNIES'S GARBAGE SERV.

No. 118P94

Case below: 113 N.C.App. 476

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

BILTMORE SQUARE ASSOC. v. CITY OF ASHEVILLE

No. 143P94

Case below: 113 N.C.App. 459

Petition by several plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

BRIGHT v. MODERN GLOBE, INC.

No. 106P94

Case below: 113 N.C.App. 652

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

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

COX v. DEAN

No. 144P94

Case below: 113 N.C.App. 424

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

CROWELL CONSTRUCTORS, INC. v. STATE EX REL. COBEY

No. 178PA94

Case below: 114 N.C.App. 75

Motion by defendant for temporary stay allowed 21 April 1994 pending determination of defendant's petition for discretionary review. Petition by defendant for writ of supersedeas allowed 5 May 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1994.

EDWARDS v. HARDIN

No. 113PA94

Case below: 113 N.C.App. 613

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 5 May 1994. Petition by plaintiff for discretionary review pursuant G.S. 7A-31 allowed 5 May 1994.

FAIR v. ST. JOSEPH'S HOSPITAL, INC.

No. 37P94

Case below: 113 N.C.App. 159

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

FINEBERG v. STATE FARM FIRE AND CASUALTY CO.

No. 101P94

Case below: 113 N.C.App. 545

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

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

KING v. DURHAM COUNTY MENTAL HEALTH AUTHORITY

No. 134P94

Case below: 113 N.C.App. 341

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

KING v. SOUTHERN RAILWAY CO.

No. 135A94

Case below: 113 N.C.App. 424

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 May 1994.

N.C. STATE BAR v. BURTON

No. 27P94

Case below: 112 N.C.App. 852

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

ROGERS v. HELM

No. 20P94

Case below: 112 N.C.App. 853

Petition by plaintiff for reconsideration of petition for discretionary review dismissed 5 May 1994.

SAVE OUR RIVERS, INC. v. TOWN OF HIGHLANDS

No. 166P94

Case below: 113 N.C.App. 716

Motion by defendant for temporary stay allowed 5 May 1994 pending determination of defendant's petition for discretionary review.

SHARP v. TEAGUE

No. 155P94

Case below: 113 N.C.App. 589

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1994.

STATE v. BURNS

No. 568P93

Case below: 113 N.C.App. 202

Motion by plaintiff for temporary stay allowed 16 May 1994.

STATE v. DAVIS

No. 13P94

Case below: 113 N.C.App. 203

Motion for stay pursuant to Rule 23 denied 2 May 1994.

STATE v. GARNER

No. 122P94

Case below: 113 N.C.App. 653

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 May 1994.

STATE v. LONG

No. 62P94

Case below: 113 N.C.App. 765

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 5 May 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

STATE v. LONG

No. 62P94-2

Case below: 113 N.C.App. 765

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

STATE v. NELSON

No. 199A94

Case below: 114 N.C.App. 341

Motion by Attorney General for temporary stay allowed 10 May 1994 pending determination of the State's petition for discretionary review.

STATE v. NORRIS

No. 191P94

Case below: 114 N.C.App. 270

Motion by defendant for temporary stay allowed 26 April 1994 pending receipt of a timely filed petition for discretionary review.

STATE v. PENN

No. 100P94

Case below: 113 N.C.App. 423

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 May 1994.

STATE v. RAYNOR

No. 196P94

Case below: 114 N.C.App. 505

Petition by Attorney General for writ of supersedeas and motion for temporary stay denied 5 May 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

STATE v. STATEN

No. 102P94

Case below: 113 N.C.App. 426

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 5 May 1994.

STATE v. WATSON

No. 153P94

Case below: 113 N.C.App. 656

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

STEFFEY v. MAZZA CONSTRUCTION GROUP

No. 117PA94

Case below: 113 N.C.App. 538

Petition by defendant (City of Burlington) for discretionary review pursuant to G.S. 7A-31 allowed 5 May 1994.

TAYLOR v. NEWRENT, INC.

No. 99P94

Case below: 113 N.C.App. 426

Petition by defendant and third party plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

TORAIN v. MCCULLOCK

No. 123P94

Case below: 113 N.C.App. 657

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

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

TSENG FU LIN v. CITY OF GOLDSBORO

No. 116P94

Case below: 113 N.C.App. 654

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 May 1994.

STATE OF NORTH CAROLINA v. MICHAEL EARL SEXTON

No. 499A91

(Filed 17 June 1994)

1. **Jury § 260 (NCI4th)— peremptory challenge of blacks—race-neutral reasons—no disproportionate exclusion of blacks**

The trial court did not err by concluding that there was no purposeful racial discrimination in the prosecutor's peremptory challenges of four black jurors where the prosecutor offered the following race-neutral reasons for challenging the jurors: (1) one juror changed her view of the death penalty several times during voir dire; (2) the second juror made no eye contact with the prosecutor during voir dire, stated on her questionnaire that her brother was in prison, and knew a defense witness; (3) the third juror wore an earring, was 22 years old, and was unemployed; and (4) the fourth juror's husband worked for a hospital as did defendant prior to his arrest, and a member of her family was arrested for child support. Furthermore, the prosecutor's stated basis for these peremptory challenges did not result in a disproportionate exclusion of blacks where the venire consisted of seventy-nine whites and six blacks; at the time of defendant's challenge, the prosecutor had exercised a peremptory challenge against a white juror and four against black jurors; the prosecutor did not excuse all four blacks for the same reason; and one seated member and an alternate member of the jury were members of the black race.

Am Jur 2d, Jury § 235.

Proof as to exclusion of or discrimination against eligibile class or race in respect to jury in criminal case. 1 ALR2d 1291.

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

2. **Jury § 141 (NCI4th)— capital trial—parole eligibility—jury voir dire—mitigating circumstances**

The trial court did not err by refusing to permit the defendant in a capital trial to examine prospective jurors about parole eligibility or by refusing to submit to the jury mitigating circumstances relating to parole.

Am Jur 2d, Jury § 197.

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

3. Jury § 223 (NCI4th)— capital punishment beliefs—excusal for cause

The trial court in a capital trial did not err by allowing the State's challenges for cause of two prospective jurors whose voir dire answers revealed that they were opposed to the death penalty and that their personal convictions would substantially impair the performance of their duties as jurors.

Am Jur 2d, Jury § 290.

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

4. Jury § 215 (NCI4th)— predisposition to impose death penalty—ability to consider life imprisonment—denial of challenge for cause

The trial court in a capital trial did not err by denying defendant's challenge for cause of a prospective juror who first expressed a predisposition to impose the death penalty but then indicated that he could put aside his leaning toward the death penalty and consider life imprisonment as a punishment.

Am Jur 2d, Jury § 290.

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

5. Jury § 111 (NCI4th)— capital trial—jurors who recalled media coverage—individual voir dire denied

The trial judge in a capital trial did not abuse his discretion in the denial of defendant's request for individual voir dire when a panel of jurors indicated that they recalled media coverage of the crimes where the trial judge stated that he thought the situation could be handled by proper questions but that "if it gets too bad, we will have to send them out and just take them one at a time," and at no other time

during jury selection did defense counsel specifically request individual voir dire.

Am Jur 2d, Jury § 197.

6. Evidence and Witnesses § 666 (NCI4th)— admission of defendant's pretrial statement—failure to object at trial—tactical decision—waiver of right to assign as error

In a prosecution for the capital crime of first-degree murder and the noncapital crimes of first-degree kidnapping, first-degree rape, first-degree sexual offense and common law robbery, defendant's failure to object at trial to the admission of his pretrial statement to a detective waived any right to assign admission of that statement as error on appeal where defendant made a tactical decision to let the statement come in without objection because the statement tended to bolster defendant's defense of consent to the kidnapping, rape and sexual offense charges, defendant's testimony showing the lack of specific intent to kill formed after premeditation and deliberation, and defendant's credibility when giving consistent testimony at trial.

Am Jur 2d, Appeal and Error § 601-603; Trial §§ 162, 166, 173.

7. Evidence and Witnesses § 1693 (NCI4th)— enlarged photograph of victim's body—admissibility for illustrative purposes

An enlarged photograph of the victim's naked body taken at the crime scene was properly admitted in this murder, kidnapping, rape and sexual offense prosecution to illustrate one officer's testimony about the location of defendant's hairs recovered from the victim's body and to illustrate a second officer's testimony about body areas from which he took swabs and the wetness of the victim's hair. The photograph, though enlarged, was not used excessively.

Am Jur 2d, Homicide §§ 417 et seq.

Admissibility in evidence of enlarged photographs or photostatic copies. 72 ALR2d 308.

8. Evidence and Witnesses §§ 334, 3015 (NCI4th)— prior conviction—cross-examination about details—admissibility to show intent

In a first-degree murder prosecution in which defendant admitted that he had previously been convicted of assaulting

his girlfriend, the prosecutor's cross-examination of defendant as to whether he had choked his girlfriend was admissible under Rule 404(b) to show intent and was not precluded under Rule 609 where the murder was committed by choking the victim; the prior assault by choking had occurred less than a year before the murder and was thus not remote in time; defendant's defense to the murder charge was lack of a specific intent to kill; defendant testified that he could not recall choking either the assault or the murder victim; and evidence that defendant had recently choked another victim was relevant to show his intent.

Am Jur 2d, Evidence § 324; Homicide § 310; Witnesses §§ 581 et seq.

Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime. 39 ALR Fed. 570.

Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed. 781.

9. Evidence and Witnesses § 2889 (NCI4th)— cross-examination of defendant—relevancy to show normal intelligence and clearheadedness

The prosecutor's cross-examination of the defendant in a murder, kidnapping, rape and sexual offense prosecution as to whether he had a driver's license, graduated from high school, or had consumed drugs at the time of the murder was relevant to show that defendant was a person of normal intelligence who was clearheaded at the time of the crimes.

Am Jur 2d, Witnesses §§ 484 et seq.

10. Evidence and Witnesses § 123 (NCI4th)— deceased rape victim—rape shield statute—victim's sexual behavior—testimony by defendant—rebuttal evidence admissible

Where a rape victim is deceased and the defendant's own testimony brings into question the victim's sexual behavior, the rape shield statute is not violated by the prosecution's presentation of rebuttal evidence relating to the victim's prior sexual conduct to challenge the credibility of defendant's

testimony. Therefore, where a defendant on trial for murder, kidnapping, rape and sexual offense testified that the victim stated that she wanted to cheat on her husband and was the instigator of consensual sexual acts, including oral sex, rebuttal testimony by the victim's co-workers that the victim was not flirtatious and had a reputation for marital fidelity and by her husband that to his knowledge the victim had never cheated on him and had an aversion to oral sex did not violate the rape shield statute. N.C.G.S. § 8C-1, Rule 412.

Am Jur 2d, Rape §§ 55 et seq.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences. 1 ALR4th 283.

11. Evidence and Witnesses § 264 (NCI4th)— rape and sexual offense—attack on victim's character for marital fidelity—rebuttal character evidence

Where the defendant in a murder, kidnapping, rape and sexual offense trial testified not only that the victim was the instigator of consensual sexual acts but also that the victim stated that she wanted to cheat on her husband, defendant's attack on the victim's character for marital fidelity went beyond what was necessary for his consent defense and opened the door to the admission of the State's rebuttal evidence about the victim's general good moral character, devotion to family, and reputation for marital fidelity. N.C.G.S. § 8C-1, Rule 404(a).

Am Jur 2d, Evidence §§ 336 et seq.

12. Kidnapping and Felonious Restraint § 16 (NCI4th)— sufficient evidence of forcible removal

The State's evidence was sufficient to support an inference that defendant forcibly removed a rape and murder victim across a parking lot to her van and then to the murder scene by threats and intimidation and was thus sufficient to support defendant's conviction of first-degree kidnapping where it tended to show that the victim was carrying her handbag, a portfolio containing books, and her open umbrella as she left work and walked across a parking lot toward her van; her umbrella, open, upside down, and containing water, was later observed in the parking lot; when defendant first saw the victim, he was holding a screwdriver he habitually used to start the car he was driving; the victim's shoe tops bore striate scratches,

and the knee areas of her panty hose had striate holes; her body had scrapes on both knees and near the right elbow; she had a deep bruise, consistent with a defensive wound, on her forearm and scrapes on her right cheek and under her nose; and she had no scrapes or bruises in her mouth area at the time she left work.

Am Jur 2d, Abduction and Kidnapping § 32.

13. Criminal Law § 445 (NCI4th)— prosecutor's closing argument—victim's consent against human nature—no impropriety

The prosecutor did not impermissibly personalize the victim's ordeal by arguing to the jury in a murder, kidnapping, rape and sexual offense case that "it would defy human nature for [the victim] to have volunteered to assist defendant and put herself in a position to have a consensual conversation with him" where the record discloses that the prosecutor tied this assertion with evidence that it was raining heavily, the victim had called her husband to tell him she was leaving work, and her umbrella was abandoned in the parking lot where her van was parked.

Am Jur 2d, Trial §§ 305, 306.

14. Criminal Law §§ 438, 466 (NCI4th)— prosecutor's closing argument—characterization of defendant as liar—absence of prejudice—remark about slander not improper

It was improper for the prosecutor in a murder, kidnapping, rape and sexual offense trial to argue to the jury that defendant was a liar and that he had lied to his girlfriend and to the jury, but defendant failed to show that this error was prejudicial considering the overwhelming evidence against him. Furthermore, the prosecutor did not improperly suggest that defense counsel had orchestrated a slander where his mention of slander in his jury argument clearly referred to defendant's consent defense as a defense and not to the actions of defense counsel.

Am Jur 2d, Trial §§ 218 et seq.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

15. Criminal Law § 465 (NCI4th)— prosecutor's closing argument—premeditation and deliberation—no impropriety

The prosecutor's closing argument in a first-degree murder case about the irrelevancy of any anger or emotion by defendant was not a misstatement of the law of premeditation and deliberation since the prosecutor was entitled, on the evidence presented by the State, to urge the jury not to return a verdict of guilty of second-degree murder. Furthermore, the prosecutor did not incorrectly state that the judge would instruct "that [defendant] acted with deliberation" where he used the conditional "if" throughout his remarks about premeditation and deliberation.

Am Jur 2d, Trial § 640.

Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury. 62 ALR2d 245.

16. Kidnapping and Felonious Restraint § 28 (NCI4th)— consent by fraud—evidence justifying instruction

The evidence in a kidnapping case was sufficient to show trickery employed to accomplish removal so as to justify the trial court's instruction that consent obtained by fraud is not consent where defendant stated in his confession that he first asked the victim for a ride to a hospital security office but then told the victim to drive down a nearby road because he pretended that his cousin's car was there, and defendant stated that he thought the victim agreed to give him a ride because she saw his hospital employee identification tag and thought it would be "O.K." to give him a ride.

Am Jur 2d, Abduction and Kidnapping § 32.

Kidnapping by fraud or false pretenses. 95 ALR2d 450.

17. Criminal Law § 447 (NCI4th)— capital sentencing—jury argument—rights of victim and family—intervention not required

Any error in the prosecutor's reference to the rights of the victim and her family in his jury argument in a capital sentencing proceeding was *de minimis*, and the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

Am Jur 2d, Trial §§ 296 et seq.

18. Criminal Law § 1309 (NCI4th)— capital sentencing—evidence of victim's character—no constitutional violation

Defendant's constitutional rights were not violated in a capital sentencing proceeding for the first-degree murder of a kidnapping and rape victim by the admission of evidence of the victim's character for marital fidelity when all of the evidence in the guilt-innocence phase was resubmitted to the jury since this evidence was properly admitted during the guilt-innocence phase; all evidence presented during the guilt-innocence phase of a capital case is competent for the jury's consideration in passing on punishment pursuant to N.C.G.S. § 15A-2000(a)(3); the Eighth Amendment does not prohibit either the admission of evidence or prosecutorial argument concerning a murder victim's personal characteristics; evidence of the victim's character was narrowly focused on rebutting defendant's testimony at trial that the victim indicated she wanted to be unfaithful to her husband; and the prosecutor did not make any argument based on this evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

Admissibility in rape case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior. 65 ALR Fed. 519.

19. Criminal Law § 1343 (NCI4th)— capital sentencing—especially heinous, atrocious, or cruel aggravating circumstance—constitutionality

The "especially heinous, atrocious, or cruel" aggravating circumstance for the capital crime of first-degree murder set forth in N.C.G.S. § 15A-2000(e)(9) is constitutional on its face and as applied in this case where the N.C. Supreme Court has applied a limiting construction to the language of this circumstance, and this limiting construction was embodied in the instructions given to the jury in this case.

Am Jur 2d, Criminal Law §§ 598, 599.

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

20. Criminal Law § 1344 (NCI4th) — capital sentencing — especially heinous, atrocious, or cruel aggravating circumstance — sufficiency of evidence

The trial court did not err by submitting the especially heinous, atrocious, or cruel aggravating circumstance to the jury in a capital sentencing hearing because the evidence supported a finding that the murder was physically agonizing to the victim and involved psychological terror not normally present in a first-degree murder where it tended to show that the victim was kidnapped, sexually assaulted, and killed by ligature strangulation; a death by ligature strangulation would have taken three to four minutes at a minumum and the victim would have known what was happening for at least ten seconds before losing consciousness; the amount of time for unconsciousness and death varies depending upon how tightly and rapidly the ligature was applied, and the only internal injury to the victim's neck was some slight bruising of the tissues over her windpipe; and defendant was in front of or beside the victim when he strangled her, and she was aware of defendant's presence and murderous purpose.

Am Jur 2d, Criminal Law §§ 598, 599.

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

21. Criminal Law § 1355 (NCI4th) — capital sentencing — mitigating circumstance — no significant criminal history — evidence insuffient

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding the mitigating circumstance that defendant had "no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1), where the evidence of defendant's prior criminal activity was a conviction for forgery and uttering on 1 May 1989 and conviction for two counts of assault on a female on 22 October 1989; one of these counts was assault by choking which occurred less than one year before the strangulation of the victim in this case; and defendant testified that he did not remember choking the former victim and did not remember the details of the strangulation of the present victim. Given the nature and recency of defend-

ant's record of assault, the trial court did not err in determining that no reasonable juror could have concluded that defendant's criminal history was insignificant.

Am Jur 2d, Criminal Law §§ 598, 599.

22. Criminal Law § 1302 (NCI4th)— capital trial—guilty verdicts—alternative motions to withdraw and select new jury for sentencing

The trial court in a capital trial did not err in denying defense counsel's motion to withdraw from representation, or in the alternative to select a new jury after the guilty verdicts, on the ground that the jurors' rejection of the defense theory and counsel's role in presenting it would have precluded their rational consideration of evidence submitted in mitigation.

Am Jur 2d, Criminal Law § 600.

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

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where defendant brutally strangled the random victim in the course of a kidnapping, rape, and sexual offense; defendant was convicted upon theories of both premeditation and deliberation and felony murder; the jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, was committed to avoid or prevent a lawful arrest, and was committed while defendant was engaged in the commission of first-degree kidnapping, first-degree rape, first-degree sexual offense, and robbery; the jury declined to find the existence of any of the five statutory mitigating circumstances submitted for their consideration and found the existence of eighteen of the twenty-seven nonstatutory mitigating circumstances submitted; defendant insisted, even in the face of clear evidence to the contrary, that the victim consented to the sexual acts; defendant insisted, notwithstanding clear evidence to the contrary, that he left the victim alive; and defendant stole the victim's personal effects, including her ATM card, and withdrew money from her bank account.

Am Jur 2d, Criminal Law § 628.

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.

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.

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.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Farmer, J., at the 9 September 1991 Criminal Session of Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for first-degree kidnapping, first-degree rape, first-degree sexual offense, and common-law robbery was granted 19 October 1992. Heard in the Supreme Court 13 April 1993.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Henderson Hill, Director, Death Penalty Resource Center, for defendant-appellant.

PARKER, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Kimberly Crews (herein "victim"). The jury returned a verdict finding defendant guilty of first-degree murder upon the theories of (i) premeditation and deliberation and (ii) felony murder. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. Execution was stayed 12 November 1991 pend-

ing defendant's appeal. The jury also found defendant guilty of first-degree kidnapping, first-degree rape, first-degree sexual offense, and common-law robbery; and the trial court sentenced defendant to forty years for the kidnapping, life for the rape, life for the sexual offense, and ten years for the robbery, each sentence to run consecutively. For the reasons discussed herein, we conclude the jury selection, guilt-innocence phase, and sentencing proceeding were free from prejudicial error and the death sentence is not disproportionate.

State's evidence tended to show that the victim was a child sexual abuse counselor whose office was located in the Wake Area Health Education Center at Wake Medical Center in Raleigh, North Carolina. Alan Crews, the victim's husband, testified that she usually left her office around 3:30 p.m. each day to pick up their daughter; but on Wednesdays she worked later in order to accommodate clients. Shortly before 6:00 p.m. on Wednesday, 8 August 1990, the victim telephoned her husband, who was at home with their daughter, to ask if the family needed anything from the store. The victim habitually telephoned to let her husband know she was leaving work, and the trip home took from twenty to thirty minutes. By 7:00 p.m., she had not arrived at home; and although her husband was concerned, he thought her delay might be related to the stormy weather that evening. By 8:00 p.m. the victim had not come home, and her husband was worried. It was not her habit to be late when she said she was coming home, nor was it her habit to be away from home at night without telling her husband where she would be. Not wanting to alarm his daughter, Alan Crews put her to bed and waited for her to fall asleep before attempting to locate his wife. Thinking he might have forgotten or been unaware of his wife's plans, he first telephoned a friend with whom his wife often exercised. The friend said she and the victim had in fact planned to exercise but changed their plans on account of the stormy weather. Crews next telephoned 911 and was advised to call area hospitals. He telephoned three hospitals, but none had admitted his wife. He again telephoned 911 and asked that an officer come to his home.

The officer arrived, took a brief statement, and asked some questions. He was called away to a robbery but soon returned. The officer asked about possible routes used by the victim in driving home from work and then left to begin checking the routes. Later the officer returned and reported the victim had not been

found. Sometime after 1:00 a.m. on 9 August, other officers came to the Crews' residence and told Alan Crews they had found his wife dead in her grey 1986 Plymouth Voyager van.

Raleigh Police Detective Ronnie Holloway testified that shortly after midnight he and another officer searched for the victim around Wake Medical Center. It was raining heavily. They searched the employee and public parking lots, and as they drove towards the rear parking deck, Holloway saw a vehicle with its lights on. The vehicle was on Galahad Street and about 200 yards away from and facing a medical center parking deck. The officers approached the vehicle, confirmed that it was the Voyager van they were seeking, and saw a body in the backseat. Holloway testified that at first he thought the body was a mannequin, "but it was a white female with black hair, nude. She was lying on her back side and her arms were down[,] the left hanging toward to [sic] the floor of the van and the right one was laying [sic] across her body and the legs were spreaded [sic] open." The officers did not touch anything in the van; they sealed off the area and summoned other investigators.

W.E. Hensley, crime scene specialist for the City-County Bureau of Identification ("CCBI"), videotaped the scene. The tape was shown to the jury. Leonard Colvin, identification technician for the CCBI, made still photographs of the scene and gathered trace evidence. At trial he identified evidence including the victim's panties and panty hose, a rape suspect kit from Alan Crews, a similar kit from the defendant, and various items of personal property belonging to the victim. Colvin testified that the victim's keys, employee parking lot entry card, health club membership card, and other personal items were recovered from a water filled ditch on Old Bunch Road. The victim's pocketbook, grey portfolio containing books, and panty hose were found beside the same road. Her black and tan umbrella was found nearby, as well as her checkbook, which was propped up against a tree. Her dress was recovered from the side of Hodge Road. Defendant cooperated with and assisted the officers in recovering many of these items. Colvin also identified defendant's Wake Medical Center employee identification badge and clothing worn by defendant at the time of the murder. Defendant gave these to officers at his home in Plummer's Trailer Park.

Johnny Leonard, latent examiner for the CCBI, identified the victim's shoes. The left shoe was found near the front passenger

seat; the right shoe was underneath the brake pedal. No prints from these shoes were found in the van, and both shoes had striate scars on the toes and toe tops. Further, Leonard examined the shoes worn by defendant and determined that muddy footprints in the van were made by them. One of defendant's footprints was lifted from the victim's shoe recovered near the front passenger seat. Leonard also testified on direct and redirect examination that the front floor mat was upside down. On recall he testified that the backseat floor mat was upside down. Further, although defendant's left shoe made two separate impressions on a floor mat near the sliding door of the van, only one print showed traces of mud.

Scott Worsham, forensic chemist for the State Bureau of Investigation ("SBI"), was accepted by the court as an expert in hair examination and identification. He identified exhibits consisting of tapings made from the victim's body and her van. He testified that head hair consistent with defendant's was found on (i) the carpet around the driver's and passenger's front seats, (ii) the driver's seat cushion and seat back, (iii) the van's middle seat, (iv) the van headlining above the backseat and over the victim's head, and (v) the victim's chest or shoulder. Pubic hair consistent with defendant's was found on the rear seat underneath the victim's body, in combings from the victim's pubic area, and on the victim's back and buttocks. Defendant's pubic hairs found on the victim's body bore follicular tags, indicating removal under force.

Worsham also noted that the victim's brassiere and slip were on the van floor near her left foot, and both garments were saturated and clean. Further, the victim's hair was wet. It was soaked through, rather than damp in areas which would be consistent with exertion. Her body was damp, cool, and clean; and there were bruises on the insides of her elbows, on her kneecaps, and on her lip. In addition, the legs of her panty hose had been stretched, and there were striate holes in the knee areas.

SBI Agent John Wayne Bendure was accepted by the court as an expert in fiber identification and comparison. He testified that fibers from defendant's shirt and shorts were found on the victim's dress, and in Worsham's tapings from the victim's (i) back and buttocks, (ii) legs, abdomen, chest, and arms, and (iii) chest and shoulders. In addition, fibers from the seat covers in the van were found on defendant's clothes. Bendure also noted abrasions, holes, and runs in the knees of the victim's panty hose.

SBI Agent David J. Spittle was accepted by the court as an expert in serology. He testified that defendant's blood type was B and he was a secretor. The victim's blood type was O, her husband's was A, and no type A fluids were found on the victim's body. By contrast, swabs taken from the victim's mouth showed the presence of spermatozoa consistent with defendant's blood type. Fluid on the victim's upper arm was semen, but the quantity was insufficient for complete analysis. In addition, vaginal swabs from the victim showed the presence of defendant's spermatozoa, which was also found on the seat under her buttocks. Fingernail scrapings from the victim did not contain any blood. Spittle also observed that the victim's hair was very wet.

Robert McCoy testified that he supervised the Wake Medical Center laundry, where defendant was employed. On 8 August 1990 defendant was already at work when McCoy arrived around 2:00 p.m. Sometime around 3:30 p.m., when the laundry room shift changed, defendant was missing. Another employee came in, and McCoy told him to begin operating the machinery since defendant was not there. The next time McCoy saw defendant was after "everybody had punched out." Defendant came running in through the back ramp, and he was soaking wet. Defendant said, "I got to go. I got to go. I was out there fixing my young lady's car and that was the only thing I was out there doing." McCoy said he would discuss the matter with defendant the next day because defendant "said he was in this big rush to leave." Defendant's time card showed he left at 6:30 p.m. that day.

Diane Simpson, Communications Department Supervisor for IBM Coastal Credit Union, testified that the victim had an account with the credit union. Records showed that on 8 August 1990 at 6:50 p.m., someone withdrew $100.00 from the victim's checking account by use of an automatic teller machine at Centura Shopping Center on Poole Road in Raleigh. At 7:30 p.m. on the same day, there was also a withdrawal request for $200.00 from the victim's savings account. This request, made from an automatic teller machine at the Triangle East Shopping Center in Zebulon, was denied because it exceeded a daily withdrawal limit.

Leon Turner testified that around 6:40 p.m. on 8 August 1990, he used the automatic teller machine at the Poole Road site, which is about two miles from Wake Medical Center. It had been raining that day and was still drizzling. A man was using the machine,

so Turner stood to one side. The man kept turning to look at Turner, who turned away. The man looked again and went back to his car, which was running. As Turner used the machine, the noise of the car's engine continued, and the car did not leave. When Turner was through and driving away, he looked back and saw the same man approach the machine again. Turner identified the man as defendant.

Angela Perry testified that in August of 1990 she and her daughter lived in Plummer's Trailer Park near Old Bunch Road in Zebulon, North Carolina. Defendant lived with them. Angela owned a 1986 Chevrolet Cavalier automobile which was difficult to start; defendant did not own an automobile. Defendant kept a screwdriver under the seat of Angela's car and used it under the hood when starting the car. The screwdriver was longer and bigger than a pencil. Angela usually drove defendant to Wake Medical Center before reporting to work. Ordinarily, defendant drove Angela's car to work only on alternate Thursdays. His paycheck was mailed to Angela's residence, and he used the car to drive home and get his check. Wednesday, 8 August 1990, was the day before defendant's payday. On that morning Angela did not go to work because she was sick, and defendant drove her car to work. About 7:45 p.m. on that evening, defendant telephoned Angela and said her "car wouldn't go over 20 or 30 miles and that he would be home." He returned home around 8:00 p.m., and Angela was angry because he was late. He remained at home for about fifteen minutes, left with a friend to go to the store, and returned with a pack of cigarettes. Except for arriving home late, he behaved as he normally did. However, he ordinarily had no money on the day before payday, and most of his paycheck was used in paying bills.

The next morning Angela had an appointment with her doctor, and defendant said he would drive her there but needed to stop by Wake Medical Center to explain why he could not work. He used the screwdriver to start Angela's car. After Angela's appointment, the two returned home to pick up defendant's paycheck and went out to pay bills. Again, defendant's behavior seemed normal. On the next day, Friday, Angela remained at home, but defendant returned to work as usual and again came home late. Angela left to visit her neighbor across the street. When she returned home, defendant was leaving with police officers. The next time Angela talked to defendant was Saturday morning around 4:30 a.m. at the Raleigh Police Department. Angela and defendant's

sister, Dianne Sexton, asked defendant if he had committed the crime; and defendant, who was crying, admitted he strangled the victim. Later defendant told Angela he did not know the victim was dead until Thursday morning, when he went to Wake Medical Center to explain why he could not work.

Kaye Johnson testified that she was employed by Wake Medical Center and was at work on 8 August 1990. She telephoned her husband about 5:45 p.m. and told him she needed to work for about one more hour. However, when she realized it was raining heavily, she decided to leave and take her work home. As she left the building a little before 6:00 p.m., it was pouring down rain. She walked through the parking lots to Parking Lot 4, and as she approached her car, she noticed an open umbrella in good condition in front of the car. Johnson testified she particularly noticed the umbrella because in such heavy rain, it would be unusual for anyone to set down an umbrella before getting into a vehicle. On Thursday or Friday, she heard her co-workers discussing the victim's death and remembered the umbrella. Later her supervisor saw officers investigating in Lots 3 and 4 and suggested that Johnson report what she had seen. Johnson did so; and in court she testified that an umbrella, previously identified as the victim's, looked like the one she saw. On cross-examination, Johnson testified that she did not recall ever having seen a grey Voyager van parked near her car and to the best of her knowledge, the victim's umbrella looked like the one she had seen, which was lying upside down with water in it.

Chief Medical Examiner Dr. John D. Butts, who performed an autopsy on the victim's body, was accepted by the court as an expert in pathology. He testified that he observed facial injuries consisting of a scraping of her right cheek and of her upper lip and a bruise associated with the latter injury. In association with the upper lip injury, there was a small cut on the victim's inner lip, over one of her front incisors. Around the front of the victim's neck were two burn-like ligature marks. On the right back of her neck, one course of the ligature burn went upward towards her right ear. Another course ended just at the base of her shoulder [neck]. At the back of her neck, the ligature courses merged. Other injuries to the victim's body included two bruises on the back of her left hand, a location consistent with their being defensive wounds. Another defensive wound, a deep bruise, was on the vic-

tim's forearm. There were also scrapes on both her knees and some scraping on the back of her right elbow.

Dr. Butts opined that the victim died as a result of ligature strangulation which obstructed the flow of blood to her brain. The ligature burns were "consistent with a single strand of some material looped twice around the neck and pulled backwards and to the [victim's] right." In Dr. Butts' opinion, the length of time required for someone to die of ligature strangulation would vary depending on how tightly and rapidly the ligature was applied. If the blood supply to the carotid arteries is cut off "almost instantaneously by extreme rapid application of sufficient pressure, a person will loose [sic] consciousness within about six to ten seconds and then if the ligature is kept applied for several minutes, fatal brain injury will occur and the person will invariably die." However, if the blood supply were not cut off immediately, it would take longer for unconsciousness to occur. Further, the only internal injury to the victim's neck was some slight bruising of the tissues over her windpipe.

On cross-examination Dr. Butts testified that the abrasions on the victim's knees and elbows occurred about the time of her death. He could not state that the ligature was applied only one time and with sufficient force to cause the victim to lose consciousness and die shortly thereafter. Although he did not observe a significant number of petechiae, or hemorrhages, on the victim's eyelids, petechiae more commonly results from manual strangulation. Moreover, when consciousness is lost during strangulation, the heart and lungs continue to operate; and if the ligature is released, the person will eventually regain consciousness. The range of time of application required to produce death is from three to four minutes.

On redirect examination, Dr. Butts testified that the six to ten seconds preceding loss of consciousness would be unpleasant and uncomfortable for a victim. During this time, the victim would be aware of what was happening.

Dr. David L. Ingram, the victim's supervisor, saw her around 4:00 p.m. on 8 August 1990. He testified that she did not have any scrapes or bruises about her mouth and her clothes were not in disarray.

Raleigh Police Detective John Howard testified that on 11 [10] August 1990 he questioned defendant at home, on the way

to the police department, and at the department. At the department Howard made a recording of his conversation with defendant, and this recording was later transcribed. The jurors listened to the recording; copies of a sixty-page transcript were also provided for them. Through the first thirty-one pages of questioning, defendant repeatedly denied any involvement in the murder. Later, however, he admitted that the victim saw what he was doing and asked if he was having trouble. She said she would give him a ride to the security office at the front of the medical center. He got in the passenger side of the van, rode towards the front, and then told the victim to turn around. He complimented the victim on her appearance, she smiled, and he tried to get close to her. He said that she did not move, and he asked her to get in the back of the van. She got up and went to the back without saying anything. He asked her to take off her clothes, and she did so; but "then she, all of a sudden she like changed her mind and I like got upset. I was like, why you don't want to do it now, you done came this far? She was like, well, I don't want to do it." After that defendant did not know what happened, because "it just happened so quick. It's like I just grabbed her and the next thing I know she was out." Defendant denied having driven the van and stated further that he told the victim to drive to Galahad Street because his cousin's car was there and defendant could use the cousin's booster cables. Nevertheless, he also said he saw cables in the victim's van when he and the victim were in the back. In addition, he did not have sex with the victim because she changed her mind. He wrapped her panty hose around her neck two or three times and tightened them because she was trying to get out and kept trying to scream. He said, "[S]he just all of a sudden changed." When he left, he thought she had passed out but would probably wake up. He said, "I knew I probably if she woke up I knew I won't going to get away 'cause she knew who I was. She saw my face or whatever and she could just point me out." When he let her go she was still breathing, and he "just got up everything, hurry up and got out of there." Defendant's statements describing his actions at the teller machines corroborated the testimony of earlier witnesses as related above. The transcript also showed that defendant went with officers and assisted them in recovering evidence, as described above. Detective Howard also identified the screwdriver defendant used to start Angela's car.

At the close of State's evidence defendant moved to dismiss all the charges against him. The trial court denied the motions.

Defendant's evidence included his own testimony. He stated that on 8 August, on account of the rain, he left the laundry room to move Angela's car closer to his work area. The car would not start, and he attempted to use the screwdriver under the hood. Consistent with his recorded statement, he testified that the victim walked by and offered to take him to the security office. Defendant testified that he threw the screwdriver into the car, walked with the victim to her van, and got in on the passenger's side. The victim was carrying a handbag, her pocketbook, and an umbrella. Her van was less than 100 feet from defendant's car. Inside the van, the two introduced themselves, and the victim complimented defendant on his appearance. Defendant noticed she had a scratch on her lip and commented on it; the victim said it had just happened. The victim asked "if she could touch me or rub my chest" and defendant said, "[Y]es, that is up to you." He thought "[t]hat she was coming onto me." He testified, "I asked her was she married. She said yeah. So I said, what do you think about cheating and she said well, you have to cheat sometimes. So now I am thinking that maybe she just wanted to mess around or whatever." This conversation took place in the parking lot. He testified further, "So I asked well, do you feel like cheating now and she had said yes, or agreed her head like yes." Defendant tried to think of a good place to go and get acquainted with her. The victim put the van in gear and drove towards the front of the medical center. At Galahad Street, defendant said,

> [W]hy don't you turn right here. There should be a good place down in there and when she turned there we went all the way around and she made a U-turn and turned around and I noticed a car that looked kindly like my cousin's car. I said, that looks like my cousin's car, he might have some jumper cables or something. I said, park here. She parked there. And that is when I asked her was she ready. She said, yeah, and she got up and walked to the back of the van.

The victim was not wearing her shoes. Defendant testified further that he asked the victim "was she going to take off all of her clothes or whatever." The victim removed all her clothing, defendant removed his clothing, and the victim began to fellate him; but he did not ejaculate in her mouth. He testified that "[a]fter that, she like laid down on the seat and I got on top of her. We had sex." Afterwards defendant said he needed to get up, but the victim was trying to hold him down. She told him he could

not leave and that if he did, she would tell security that he forced her there and raped her. He said, "[Y]ou shouldn't do that because you know I didn't do that. You came here on your own will. So she kept hollering well, you leave and that is what I am going to do." The victim continued to scream, cursed at defendant, spit in his face, kneed him in the groin, and tried to run. He grabbed her and threw her on the seat. She continued to scream and curse and defendant kept telling her to be quiet. Defendant testified:

> And then when I realized I had the stocking around her neck, she like went faint and I thought I had knocked her out, whatever. So I got up and I ran out the van. I think I got maybe a hundred or so feet in front of the van and I turned around and went back because I was thinking she [would] probably wake up and follow me. That is when I took all of her clothes and dress and stuff and pocketbook and I ran, ran back to my car and I got, I got it started and that is when I ran back to my job site and I ran inside and I saw my boss, Robert.

Defendant did not remember how long he had the panty hose around the victim's neck before he let go. He thought she was unconscious. He ran back to take her clothing and personal property to keep her from following him. He glanced quickly at the victim, and thought her eyes were open. He did not realize she was dead until the next morning, when he went to the medical center. Defendant also described going to the shopping center on Poole Road, using the teller machine, driving home, and throwing the victim's personal effects out the car window. He remembered that the victim set her umbrella down beside her seat and said he picked it up when he returned to the van.

Defendant testified further that he denied having sex with the victim because he was scared and thought he would get in more trouble. He repeated that the victim "just did everything that we did and all of a sudden changed her mind."

On cross-examination, defendant indicated that the victim's car was parked in the last or furthest parking lot away from the medical center. He admitted that while he was with the victim he was wearing his medical center identification tag, which bore his name and photograph. He insisted that on Wednesday night, Angela's car was pulling or jerking "like it wanted to [stall]" but admitted he did not observe this problem on Thursday. He testified

that his criminal record included a forgery and uttering charge and two assault charges. One of the assaults was on Angela. Defendant admitted that Angela said he had choked her, but defendant said he did not remember doing so.

Defendant admitted that he was clearheaded on the day of the murder and knew the area around Galahad Street well. He stated that when he first saw the victim, he had the screwdriver in his hand. Further, as the two walked towards her van, they were both under her umbrella. In addition, he removed his shirt while he was sitting in the van with the victim in the parking lot. This occasion was not the first time that someone had been overcome by his good looks. Although he had no relationship with the victim before that evening, he had previously had similar relationships with several other girls. At first he could not explain why semen was found in the victim's mouth, but later he said that while she was trying to hold him in the van, she was rubbing him and playing with his penis, which she put back in her mouth again. In addition, after returning to the van, he went immediately to the back and picked up the victim's dress and later used it to rub the driver's door and wipe off his fingerprints. Although he testified the victim's eyes were open, he denied that they were wide open, as shown in one of the crime scene photographs. He admitted that he did not know if the victim was still breathing and she could have been dead. He also admitted that after she went limp, he never saw her move again. He denied seeing the skinned places on her knees or any bruises on her arm and stated that she had not fallen in his presence. He also insisted that he did not intend to hide any evidence but "just throwed them away."

The State presented rebuttal evidence tending to show that the victim was not a flirtatious person or one who had a reputation for infidelity and that she cared deeply for her family. Alan Crews testified that he and the victim began to date each other exclusively before their seventeenth birthdays, and this continued until their marriage in 1982, just after they graduated from college. To his knowledge, his wife had always been faithful to him, and she had an aversion to oral sex.

At the close of all the evidence defendant renewed his motion to dismiss the charges against him, and the court denied the motion. The jury found defendant guilty on all counts as charged. Evidence

relative to the sentencing proceeding will be discussed later in this opinion.

JURY SELECTION ISSUES

[1] Defendant first contends that the trial court committed reversible error by permitting the prosecutor to exercise peremptory challenges on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). Defendant argues that in evaluating his *Batson* claim, the trial court applied the wrong legal standard and improperly placed on defendant the burden to show that jurors were excluded solely because of their race. Defendant argues further that the trial court failed to make findings of fact. We do not find these arguments persuasive.

The Equal Protection Clause of the United States Constitution prohibits a prosecutor from challenging prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 83; *accord State v. Glenn*, 333 N.C. 296, 301-02, 425 S.E.2d 688, 692 (1993).

In *Hernandez v. New York*, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), the Court summarized the *Batson* three-step process for evaluating such claims by a defendant:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Id. at 358-59, 114 L. Ed. 2d at 405 (citations omitted). Further, once a prosecutor has offered race-neutral explanations "and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Id.* at 359, 114 L. Ed. 2d at 405. An explanation based on something other than the race of the prospective juror constitutes a neutral explanation. *Id.* at 360, 114 L. Ed. 2d at 406. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* The reason offered by the prosecutor "need not

rise to the level of a challenge for cause." *Id.* at 362-63, 114 L. Ed. 2d at 407-08; *accord State v. Robinson*, 330 N.C. 1, 17, 409 S.E.2d 288, 297 (1991). "Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, '[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination.' " *Id.* at 363, 114 L. Ed. 2d at 408 (quoting *Batson*, 476 U.S. at 98, 90 L. Ed. 2d at 88-89). "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Id.* at 364, 114 L. Ed. 2d at 408-09. "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365, 114 L. Ed. 2d at 409. "[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' " *Id.* (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 83 L. Ed. 2d 841, 854 (1985)).

Applying these principles, we note first that the record includes a two-page order containing the trial court's findings of fact and conclusions of law on defendant's *Batson* claim. The trial court noted that it "did not determine that the defendant had made a prima facie case to raise an inference that the District Attorney used the challenges to exclude prospective jurors from the trial jury because of their race[,] but the District Attorney did explain the reasons for using a peremptory challenge as to each black juror excused." As to each such juror, the court's findings restate the prosecutor's reasons:

> (a) . . . Juror #9 [Badger]. She changed her view of the death penalty several times during voir dire
>
> (b) . . . Juror #5. She made no eye contact with the District Attorney during voir dire. On her questionnaire she listed that her brother was in prison. She also knew defendant's witness Myra Norwood.
>
> (c) . . . Juror #9 [Alston]. He wore an earring, was 22 years old and was not employed.
>
> (d) . . . Juror #1. Her husband works for a hospital as did the defendant prior to arrest. Some member of her family had been arrested for child support.

The court concluded that the challenges were for race-neutral reasons and there was no purposeful racial discrimination or violation of the Equal Protection Clause.

Under *Hernandez*, the trial court could also have considered whether the prosecutor's stated basis for a peremptory challenge would result in the disproportionate exclusion of members of a certain race. *Id.* at 363, 114 L. Ed. 2d at 408. We note that the venire consisted of seventy-nine whites and six blacks; and at the time of defendant's challenge, the prosecutor had exercised five peremptory challenges, the first against a white and the next four against blacks. The findings quoted above show that the prosecutor did not excuse all four blacks for the same reason and the reasons given were race-neutral. The trial court also found that (seated) Juror 12 and Alternate Juror 2 were members of the black race.

From the record, this Court cannot conclude there was disproportionate exclusion of members of the black race. Moreover, the trial court's conclusion that there was no purposeful racial discrimination by the prosecutor rests upon the court's evaluation of the prosecutor's demeanor and credibility. Therefore, we hold the trial court did not err in overruling defendant's objections.

[2] Defendant also contends the trial court erred by denying him the opportunity to examine prospective jurors on parole eligibility and refusing to submit to the jury mitigating circumstances relating to parole. We disagree.

In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987), this Court said:

> Defendant correctly observes that this Court has consistently held that a criminal defendant's status under the parole laws is irrelevant to a sentencing determination, and, as such, cannot be considered by the jury during sentencing, whether in a capital sentencing procedure under N.C.G.S. § 15A-2000 or in an ordinary case. *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979).

Id. at 518, 356 S.E.2d at 310.

In the instant case, defendant makes essentially the same arguments as those in *Robbins*. Defendant also relies on *California v. Ramos*, 463 U.S. 992, 77 L. Ed. 2d 1171 (1983), wherein the

Court found no constitutional defect in a California law requiring the trial court to inform a capital sentencing jury that the governor possessed power to commute a sentence of life imprisonment without possibility of parole. However, in *Robbins* this Court explicitly rejected the argument that such an instruction is constitutionally required. 319 N.C. at 519, 356 S.E.2d at 311. More recently, in *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994), this Court addressed the issue as follows:

> 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.*
>
> 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 909. The trial court did not abuse its discretion by refusing to allow the defendant to question jurors regarding these subjects.

Id. at 268, 439 S.E.2d at 559. Following *Robbins* and *Lee*, we hold the trial court did not err in refusing to permit defense counsel to raise these issues during jury selection or in refusing to submit mitigating circumstances based thereon.

[3] Defendant next contends the trial court erred in granting the State's challenges for cause of prospective jurors Jones and Hayes based on their feelings about the death penalty. 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). In addition, "[j]urors 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))." *State v. Gibbs*, 335 N.C. 1, 29, 436 S.E.2d 321, 337 (1993).

In the instant case, the record shows that when questioned by the prosecutor, Jones said he strongly opposed the death penalty. Asked twice if his feeling would substantially impair his ability to recommend death, Jones twice replied, "Yes." After a lengthy explanation by defense counsel, the court asked Jones if his personal convictions about the death penalty would prevent or substantially impair the performance of his duty in accordance with the court's instructions and Jones' oath. Jones answered, "I believe, it would hinder me from, because I have definite doubts about the death penalty."

When questioned by the prosecutor, prospective juror Hayes stated that she did not approve of the death penalty. Asked if she thought the appropriate punishment in all first-degree murder cases should be life, rather than death, she answered, "Yes, life rather than death." She heard defense counsel's lengthy explanation to Jones; and when questioned by the trial court, she answered twice that her personal convictions about the death penalty would substantially impair the performance of her duty.

> 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.

Id. at 29, 436 S.E.2d at 337.

Applying the foregoing principles, we conclude the trial court did not err in granting the prosecutor's challenges for cause of prospective jurors Jones and Hayes.

[4] Defendant also contends the trial court erred in denying his challenge for cause of prospective juror Iler, who, defendant argues, expressed a predisposition to impose the death penalty and thus

was unable to follow his oath to consider both life and death. Iler was passed by the State, and when questioned by the defense, at first seemed to indicate he could not consider a life sentence. However, when questioned further, Iler indicated he had not understood the bifurcation procedure. He next said he could consider life imprisonment but later said he could not. However, the trial court asked, "[C]an you fairly consider both and make a decision or is your view that you cannot consider life imprisonment?" Iler responded, "I could do that, yes." Then he added, "I said, no, but I could do that if certain evidence is presented to go along." Questioned again by defense counsel, Iler stated four times that he could compromise his feelings in order to arrive at the point where he could consider life imprisonment as a punishment. Without again challenging Iler for cause, defense counsel exercised a peremptory challenge to remove him.

In *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), the defendant made a similar contention. Defendant Quesinberry argued that the trial court erred in refusing to remove for cause a prospective juror who "expressed his belief that every murderer should receive the death sentence; but upon assuring the trial court that he could and would follow the court's instructions and remain open-minded regarding the appropriate sentence, he was seated as a juror." *Id.* at 235, 354 S.E.2d at 450. The Court concluded that since the prospective juror said he could put aside his prejudice concerning the death penalty, "[u]nder the *Adams-Witt* standard, [he] was properly not excused for cause." *Id.* at 235, 354 S.E.2d at 451.

In the instant case, Iler indicated he could put aside his leaning towards the death penalty. Following *Quesinberry*, we conclude the trial court did not err in refusing to remove Iler upon defendant's challenge for cause.

Defendant next contends the trial court abused its discretion in the conduct of jury selection. Defendant first argues that in four instances the trial court erred in permitting questions and statements by the prosecutor which misrepresented the law or a juror's duty. In two instances defendant objected, the trial court instructed the prosecutor to rephrase his questions, and the prosecutor did so. In two other instances defendant contends the court should have intervened *ex mero motu*. After a careful review of the record, we find the prosecutor did not misrepresent the law. Since there was no gross impropriety, we conclude the trial court

did not err in failing to intervene. *See State v. Gibbs*, 335 N.C. at 39, 436 S.E.2d at 342 (stating that where defendant fails to object to prosecutor's statements or comments during jury selection, gross impropriety is the standard of review).

[5] In addition defendant argues that the trial court improperly denied his request for individual *voir dire* of jurors who recalled media reports of the crimes. We are not persuaded by defendant's argument.

The Criminal Procedure Act provides that in capital cases the trial court "may direct that jurors be selected one at a time." N.C.G.S. § 15A-1214(j) (1988). "This statute gives neither party an absolute right to such a procedure." *State v. Murphy*, 321 N.C. 738, 740, 365 S.E.2d 615, 617 (1988). Instead, whether to grant individual *voir dire* is within the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent a showing of abuse of discretion. *Id.*

The jury selection process in defendant's case was lengthy and consumes over 900 pages of the transcript. Early in the process, the prosecutor asked a panel of twelve jurors to raise their hands if they recalled media coverage of the case. The prosecutor noted, "That's almost everybody on the jury," and suggested to the court that individual questioning might be appropriate. Court was recessed for lunch, and immediately after it reconvened, defense counsel expressed concern "that somebody might have a strong opinion about" the case on account of publicity "and might poison those in the box and out in the audience, too." The court said as follows:

> Well, unless somebody asks them what they have read, which you are not suppose[d] to do, I think you can handle it by proper questions. If it gets too bad, then I will find some way to move everybody out[,] but I think with the right kind of questions[,] you can hold that down. Let's just see. If it gets too bad, we will have to send them out and just take them one at a time. We may have to.

At no other time during jury selection did defense counsel specifically request individual *voir dire*. Defendant has failed to show abuse of discretion, and finding none, we conclude the trial court did not err.

GUILT-INNOCENCE PHASE ISSUES

[6] Defendant's first contention is that the trial court committed plain error when it allowed the State to introduce into evidence

defendant's statement to Detective Howard summarized above. Defendant concedes that he neither moved to suppress nor objected to admission of the statement. We find defendant has waived his right to object to its admission.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), this Court addressed a similar contention. We held that defendant's failure to object at trial to the admission of his statement waived any right to raise the issue on appeal. *Id.* at 14, 352 S.E.2d at 660. The statement provided

> the only evidentiary basis for defendant's principal defense against imposition of the death penalty. Under these circumstances it is imperative that defendant decide at trial whether he wants the statement admitted or not. It is a tactical decision that can only be made by defendant, not the court. A defendant may not, for tactical reasons, fail to object at trial to evidence he hopes will help him and later on appeal assign admission of that evidence as error when in light of the jury's verdict the evidence was not helpful, or was even hurtful, to defendant. The waiver rule was designed precisely to prevent this kind of second-guessing of the probable impact of evidence on the jury by parties who lose at the trial level. Defendant made his tactical decision to let the evidence come in at trial without objection. He may not now be heard to complain.

Id. at 15, 352 S.E.2d at 661.

In the instant case, defendant's defense to the charges of kidnapping, rape, and sexual offense was consent. The statement to Detective Howard, if believed, tended to bolster defendant's trial testimony that the victim found him attractive, consented to accompany and have sex with him, and later changed her mind. The defense of consent tended further to defeat a conviction of murder on the basis of felony murder.

In addition, defendant's defense to the charge of first-degree murder was lack of specific intent to kill formed after premeditation and deliberation. The statement to Detective Howard tended to bolster defendant's trial testimony that after the victim changed her mind, everything happened very fast; he thought the victim was alive when he left her; and on the next day he was shocked to find out she was dead. At trial defendant explained that after

he learned of the victim's death, he knew he was in trouble. Fearing he would get into more trouble, he did not tell Howard about having consensual sex with her.

Defendant's credibility was an essential element of his defenses. Evidence that prior to trial he made a statement consistent with the defenses raised at trial tended to bolster his credibility, and, consequently, his defenses. Defendant also gained advantage from having his explanation of the events put before the jury during State's case in chief. Defendant's case differs slightly from *Stokes* in that his testimony provided a partial evidentiary basis for his principal defenses against the death penalty. The record shows, however, that defendant made a tactical decision to let the prior statement come in at trial without objection. Hence, he may not now be heard to complain. Following *Stokes*, we conclude defendant waived the right to argue error, if any, on appeal.

[7] Defendant next contends the trial court erred in admitting over his objection State's Exhibit 43, an enlarged color photograph of the victim's naked body taken at the crime scene. Defendant argues use of the photograph was intended solely to and had the sole effect of inflaming the jury's passion and prejudice against him. We do not find these arguments persuasive.

" 'Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.' " *State v. Robinson*, 327 N.C. 346, 356, 395 S.E.2d 402, 408 (1990) (quoting *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988)). In *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988), this Court considered whether a single color photograph of the victim's remains was improperly admitted. We reiterated that "in a homicide case, photographs showing the condition of the body and its location when found are competent in spite of their portrayal of a gruesome spectacle." *Id.* at 127, 371 S.E.2d at 698. Whether photographic evidence is more probative than prejudicial lies within the trial court's discretion. " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Robinson*, 327 N.C. at 357, 395 S.E.2d at 408 (quoting *Hennis*, 323 N.C. at 285, 372 S.E.2d at 526-27).

In the instant case, the challenged photograph was used by Agent Worsham, who observed the body at the crime scene, to illustrate his testimony about the location of defendant's hairs recovered from the victim's body. In addition, Agent Spittle, who also observed the body at the scene, used the photograph to illustrate his testimony about body areas from which he took swabs and to show that the victim's hair was soaking wet. The photograph was not passed to the jury.

"Because the [S]tate introduced only one photograph of the victim's body, no issue of inflammatory repetition arises." *Harris*, 323 N.C. at 127, 371 S.E.2d at 698. In *Robinson*, this Court stated that in only a few cases have we held the use of photographic evidence to be unfairly prejudicial. 327 N.C. at 357, 395 S.E.2d at 409 (citing *Hennis* and *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969), *overruled on other grounds by State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975)).

Applying the foregoing principles, we cannot say that in the instant case, the trial court's decision to admit the photograph was manifestly unsupported by reason. The photograph, although enlarged, was used for illustrative purposes but not to excess. *Cf. Hennis*, 323 N.C. at 286, 372 S.E.2d at 528 (finding excessive use where evidence included thirty-five photographs passed to the jury and slides thereof were projected onto a screen whose dimensions were three feet and ten inches by five feet and six inches). We conclude, therefore, that the trial court did not err in admitting the photograph.

Defendant next contends the trial court committed plain error in permitting the prosecutor to cross-examine defendant regarding other crimes, bad acts, and character issues in order to suggest defendant had a violent and criminal predisposition. Again, we disagree.

[8] Defendant first argues that the trial court erred in permitting the prosecutor to inquire into specific details of his assault on Angela. Defendant concedes that during cross-examination, the prosecutor properly questioned defendant about his past convictions. Defendant argues that the prosecutor should not have been allowed to ask if defendant choked Angela.

Recently in *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993), this Court reaffirmed the rule "prohibiting the State from eliciting

details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial." 334 N.C. at 410, 432 S.E.2d at 353. However, we also discussed certain exceptions to this exclusionary rule and reiterated that Rule 404(b) operates as a general rule of inclusion for evidence of other crimes, wrongs, or acts if offered for a proper purpose, *e.g.*, proof of intent. Rule 404(b) excludes only evidence probative solely of a defendant's character or propensity to commit crimes. "The admissibility of evidence under this rule is guided by two further constraints—similarity and temporal proximity." *Id.* at 412, 432 S.E.2d at 354. On the facts then before us, we could not

> discern any logical relationship between the details of the prior crimes brought out on cross-examination and the crimes charged. That the defendant had used various weapons in other crimes had no bearing on any element of the offenses for which he was being tried, and the 1985 assault incidents involving Shirley Sutton and Wesley Hall were not only remote in time but were factually dissimilar from the present case.

Id.

The instant case differs from *Lynch* in that there is a logical relationship between the details of the prior crime and the murder charge, since both were committed by means of choking. Defendant testified he was not sure he choked Angela; and similarly, he could not recall details of his choking Kimberly Crews. As discussed above, defendant's defense to the murder charge was lack of specific intent to kill. That he had recently choked another victim was relevant to show intent. Finally, the prior assault by choking was not remote in time, having occurred in October 1989, less than a year before the occurrence of the murder with which defendant was charged. For all these reasons, the evidence was admissible under Rule 404(b) and was not precluded under Rule 609. Therefore, the trial court did not err in admitting it; and we conclude there was no plain error. *See State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 468 (stating that error at trial is prerequisite to an appellate finding of plain error), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

[9] Defendant also argues that the trial court permitted the prosecutor to engage in other irrelevant and prejudicial cross-examination, including questions about whether defendant possessed a driver's

license, graduated from high school, or had consumed drugs at the time of the murder. Defendant contends that since defendant did not raise the defenses of intoxication, insanity, or diminished capacity, the inquiries show the prosecutor's improper attempt to convert the trial from a determination of what happened on 8 August 1990 to a referendum on defendant's character. However, State responds, and we agree, that these questions were relevant to show generally that defendant was a person of normal intelligence who was clearheaded at the time of the crimes. We note also that the statutory mitigating circumstance of diminished capacity was submitted at sentencing. Again, we conclude there was no error and thus no plain error.

Defendant's next two contentions relate to the State's rebuttal evidence. Defendant testified on his own behalf that the victim approached him in the parking lot, asked him if he was having car trouble, and offered him a ride to the security station. According to defendant, the victim let him into her van, and after they had exchanged names, the victim told him that he was a nice looking person and that she liked the way he looked. Defendant interpreted this as a come-on. Defendant further testified that the victim then asked him if she could touch him or rub his chest. Defendant asked her what she thought about cheating, and the victim replied that one had to cheat sometimes. The victim then agreed that she felt like cheating that evening. According to defendant's testimony the two then drove to Galahad Street and parked. Defendant asked the victim if she was ready, and the victim responded, "Yes." Then with no further conversation, the victim walked to the back of the van and began to take her clothes off. Defendant stood in front of the victim, and the victim began to rub his chest and penis. According to defendant the victim then put defendant's penis in her mouth. After this the victim lay down on the seat, and again with no conversation, she and defendant had sexual intercourse.

In rebuttal, the State presented the testimony of Dr. David Ingram, Dr. Vivian Everett, Ms. Pauline Lyna, Ms. Nancy Mabry, all of whom worked with the victim, and Mr. Alan Crews, the victim's husband. The prosecutor asked Ingram, Everett, Lyna, and Mabry whether the victim was flirtatious or had a reputation for being flirtatious and also about the victim's reputation as a family person. These witnesses' testimony was consistent that the victim was not flirtatious and was a strong family person. Addi-

tionally, Everett and Lyna were asked whether the victim ever discussed going out with other men or cheating on her husband. Both witnesses answered these questions negatively. The victim's husband testified that to his knowledge the victim had never cheated on him and that the victim had an aversion to oral sex.

[10] Defendant first contends that the evidence about the victim's past sexual behavior and reputation for marital fidelity was introduced in violation of the rape shield statute.[1] Defendant argues

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1. The statute provides as follows:

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

that the evidence was prohibited by the policies set forth in *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980), and was not within the scope of *State v. Stanton*, 319 N.C. 180, 353 S.E.2d 385 (1987).

Initially we note that while defendant objected when questions about the victim's flirtatiousness and attitude towards family were asked of certain witnesses, defendant failed to object when the same or similar questions were asked of another witness. Consequently, the same evidence or evidence of similar import was admitted without objection. "When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, as here, the benefit of the objection is lost." *State v. Morgan*, 315 N.C. 626, 641, 340 S.E.2d 84, 94 (1986). Defendant also did not object when Everett, Lyna, and Crews were asked about the victim's marital fidelity or when Crews was asked about the victim's attitude concerning oral sex. Hence, in order to obtain any relief, defendant must show that error, if any, constituted plain error. *See State v. Syriani*, 333 N.C. 350, 376, 428 S.E.2d 118, 132 (1993).

> Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.
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> (e) The record of the in camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court.
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> N.C.G.S. § 8C-1, Rule 412 (1992).

We find that the policies articulated in *Fortney* do not support defendant's contention. *Fortney* was decided under the former rape shield statute, N.C.G.S. § 8-58.6 (1981). The defendant argued that because the statute prevented him from automatically questioning the prosecuting witness about her prior sexual experience, his right to confront the witness against him was compromised. *Fortney*, 301 N.C. at 35, 269 S.E.2d at 112. Discussing the policy reasons supporting the statute, this Court characterized it as a special rule of relevancy designed to (i) protect a rape victim from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate her, *id.* at 36, 269 S.E.2d at 113; (ii) reject "[t]he idea that *any* previous sexual behavior of a rape victim is *per se* relevant to a rape proceeding," *id.* at 38, 269 S.E.2d at 113-14; (iii) eliminate "the much more probable result of prejudice to the State's case when such evidence is admitted," *id.* at 38, 269 S.E.2d at 114; (iv) prevent diversion of the jury's attention to collateral issues, *id.* at 39, 269 S.E.2d at 114; and (v) eliminate victims' reluctance to report and prosecute sexual assaults, since such reluctance "stems from their feeling that the legal system harasses and humiliates them," *id.* at 42, 269 S.E.2d at 116. *See also* 2 David W. Louisell, *Federal Evidence* § 196 (rev. ed. 1985) [hereinafter 2 Louisell, *Federal Evidence*] (stating that debate over federal Rule 412 showed congressional concern over embarrassment and humiliation suffered by rape complainants and concern to insure that privacy of the complainant was protected).

Stanton was decided under the current rape shield statute. Defendant argued

> that the trial judge committed reversible error by permitting the victim to testify, over objection, that she became pregnant and had an abortion subsequent to the rape [and] it was plain error for the trial judge to permit the victim to testify, even in the absence of any objection, that she was not having sexual intercourse with anyone else during that time.

Stanton, 319 N.C. at 183, 353 S.E.2d at 387-88. Rejecting defendant's second contention, we said:

> Defendant contends that the admission of this evidence somehow violates Rule 412. With certain exceptions not pertinent here, Rule 412 is the embodiment of its predecessor, N.C.G.S. § 8-58.6 (repealed by 1983 N.C. Sess. Laws (Regular Sess. 1984) ch. 1037, § 2 (effective 1 July 1984)), a part of

> what was commonly referred to as the Rape Shield Law. Defendant's failure to object at trial aside, we find no error in the admission of this evidence. Defendant cites no authority contrary to either Rule 412 or its predecessor statute, N.C.G.S. § 8-58.6, to prohibit a victim from willingly testifying as to the lack of sexual involvement for purposes of corroboration, and we decline to so construe it. It would strain credulity for this Court to hold that, while a victim may testify to the details of her rape and corroborate that testimony with further testimony concerning her pregnancy and subsequent abortion, she may not testify as to the lack of sexual involvement with anyone except the defendant and thereby fail to fix responsibility for the pregnancy on the defendant.

Id. at 187, 353 S.E.2d at 389-90. Although concurring in the Court's ultimate decision, Justice Frye, joined by Chief Justice Exum and Justice Mitchell, agreed only that admission of the evidence did not constitute plain error, since Rule 412 made "this type of evidence irrelevant to any issue in this case and its admission improper if properly objected to." *Id.* at 191, 353 S.E.2d at 392. Even though the evidence related to a lack of sexual activity, rather than sexual activity,

> one purpose of the rule is to remove from the prosecution of sex offense cases the question of the prosecutrix's sexual activity or lack thereof with persons other than the defendant. Once the complaining witness is permitted to testify, as here, that she was neither dating anyone on a regular basis nor having sexual intercourse with anyone during that time, the door is open for defendant to make an issue of her sexual behavior. This, in my opinion, is what Rule 412 attempts to prevent.

Id. at 192, 353 S.E.2d at 392.

One patent and significant difference between *Fortney* and *Stanton* and the instant case is that the sexual assault victim herein, Kimberly Crews, was dead and could neither rebut the defense of consent nor risk subjecting herself to possible cross-examination about her previous sexual behavior. Therefore, the policies designed to protect rape victims personally and which support a conclusion that previous sexual behavior must in every instance be deemed irrelevant to prosecution of sexual assaults are of less importance. In addition, the instant case differs further from *Stanton* in that

the State did not attempt in its case in chief to introduce evidence of Kimberly Crews' previous sexual behavior. Therefore, permitting this rebuttal evidence does not conflict with the underlying statutory policy of eliminating prejudice to the State's case caused by introducing evidence of the victim's unfavorable personal characteristics or the policy that the issue of the victim's character is a collateral one. As the policy discussion in *Fortney* makes clear, the statute was intended as a shield for the victims of sexual assault and not as a sword for defendants. Therefore, we hold that in the limited circumstance where the rape victim is deceased and the defendant's own testimony brings into question the victim's sexual behavior, the prosecution may present rebuttal evidence relating to the victim's prior sexual conduct to challenge the credibility of defendant's testimony. In sum, we conclude that on the peculiar facts of the instant case, there was no error, hence there could be *no plain error.*

[11] Defendant also contends the trial court erred in permitting the rebuttal testimony about the victim's general good moral character, devotion to family, and reputation for marital fidelity. Defendant argues that the general rule is that evidence of a victim's character cannot be introduced to prove that she acted in accord therewith, but acknowledges that an exception exists for character evidence introduced to rebut defense evidence which puts it at issue. Defendant contends, however, that he did not introduce any evidence which permitted rebuttal evidence of the victim's good character; therefore, the evidence was erroneously admitted to defendant's prejudice. We do not find defendant's arguments persuasive.

Rule 404 prohibits the admission of evidence of a person's character offered for the purpose of proving conduct in conformity therewith. N.C.G.S. § 8C-1, Rule 404(a) (1992). An exception exists for evidence of a pertinent trait of character of the victim if offered by the accused "or by the prosecution to rebut the same." N.C.G.S. § 8C-1, Rule 404(a)(2). "Pertinent" means " 'relevant in the context of the crime charged.' " *State v. Bogle*, 324 N.C. 190, 198, 376 S.E.2d 745, 749 (1989) (quoting *State v. Squire*, 321 N.C. 541, 548, 364 S.E.2d 354, 358 (1988), and construing Rule 404(a)(1), which applies to the accused). "In criminal cases, in order to be admissible as a 'pertinent' trait of character, the trait must *bear a special relationship to* or *be involved in* the crime charged." *Id.* at 201, 376 S.E.2d at 751. For example, if one were charged with a crime

of violence, character for peaceableness would be pertinent; and if charged with embezzlement, honesty would be pertinent. "Rule 404(a), as a general rule, excludes character evidence. Therefore, the language of its exception permitting the accused to offer evidence of a 'pertinent' trait should be restrictively construed." *Id.* Following these principles, to be pertinent, a character trait of the victim must bear a relationship to the crime with which the defendant is charged. For example, if the defendant's defense to murder is self-defense, character of the victim for violence is pertinent. *E.g., State v. Shoemaker*, 80 N.C. App. 95, 341 S.E.2d 603, *disc. rev. denied*, 317 N.C. 340, 346 S.E.2d 145 (1986).

In the instant case, defendant's testimony was that the victim was the instigator of the consensual sexual acts. His defense to the rape and sexual assault charges went beyond consent, however, when he testified that the victim stated positively that she wanted to cheat on her husband. Ordinarily, the exception created by Rule 404(a)(2) "applies to all kinds of prosecutions, except those for 'rape' or 'assault with intent to commit' rape, where the question of admitting evidence of the character of the complaining witness is governed by Rule 412." 2 Louisell, *Federal Evidence* § 139. Notwithstanding, by attacking the victim's character for marital fidelity, defendant went beyond what was necessary for his defense and opened the door to the rebuttal evidence. Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially. *State v. Rose*, 335 N.C. 301, 337, 439 S.E.2d 518, 538 (1994). Therefore, we hold the trial court did not err in admitting the evidence.

[12] Defendant next contends the trial court erred in denying his motion, made at the close of all the evidence, to dismiss the charge of kidnapping. Defendant argues there was no evidence of forcible removal of the victim; the only viable theory was that defendant induced the victim to drive him from the parking lot to the scene of the murder; and the indictment limited the prosecution to a removal theory of kidnapping. We do not find these arguments persuasive.

The applicable statute provides in pertinent part:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
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> . . . .
>
> Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; . . .

N.C.G.S. § 14-39(a)(2) (1986). " 'The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping.' " *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 491 (1971) (quoting *State v. Bruce*, 268 N.C. 174, 182, 150 S.E.2d 216, 223 (1966)). Threats and intimidation are equivalent to the use of actual force or violence. *State v. Sturdivant*, 304 N.C. 293, 304, 283 S.E.2d 719, 729 (1981).

In ruling on a motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the offense charged and of defendant's being the perpetrator of the crime. *State v. Earnhardt*, 307 N.C. 62, 65, 296 S.E.2d 649, 651 (1982). Whether the evidence presented constitutes substantial evidence is a question of law for the trial court. *Id.* at 66, 296 S.E.2d at 652. "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). The trial court's function is to determine whether the evidence permits a reasonable inference that the defendant is guilty of the crime charged. *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652. In addition, "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).

In the instant case, there was ample evidence to show defendant forcibly removed the victim from the parking lot. The victim was carrying her handbag, a portfolio containing books, and her open umbrella. Her umbrella, open, upside down, and containing

water, was observed shortly before 6:00 p.m. in the parking lot. In addition, evidence showed the victim's shoe tops bore striate scratches, and the knee areas of her panty hose had striate holes. Her body had scrapes on both knees and near the right elbow. She also had a deep bruise, consistent with a defensive wound, on her forearm and scrapes on her right cheek and under her nose. She had no scrapes or bruises in her mouth area at 4:30 p.m. on that afternoon. Viewed in the light most favorable to the State, this evidence was more than sufficient to raise an inference that the victim was forcibly removed across the parking lot to the van and then to Galahad Street. In addition, defendant testified that when he first saw the victim, he was holding the screwdriver he habitually used to start Angela's car. This evidence, viewed most favorably for the State, would support an inference that defendant removed the victim from the parking lot by threats and intimidation, the equivalent of force. Therefore, we conclude the trial court did not err in denying defendant's motion to dismiss.

Defendant next contends that the trial court erred in failing to intervene *ex mero motu* during the prosecutor's closing argument. We disagree.

> "Prosecutors are granted wide latitude in the scope of their argument." *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). "An attorney may, . . . 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). "A prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *State v. Zuniga*, 320 N.C. at 253, 357 S.E.2d at 911 . . . .
>
> . . . Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments " 'stray so far from the bounds of propriety as to impede the defendant's right to a fair trial.' " *State v. Harris*, 308 N.C. 159, 169, 301 S.E.2d 91, 98 (1983) (quoting *State v. Davis*, 305 N.C. 400, 421, 290 S.E.2d 574, 587 (1982)).

State v. Small, 328 N.C. 175, 184-85, 400 S.E.2d 413, 418 (1991).

Defendant first argues that the prosecutor deliberately attempted to incite passion by telling the jurors not to be angry at defendant and by interweaving "concepts tinged with racial content" into the argument. Defendant admits, however, that race

was not explicitly mentioned. We have carefully reviewed the prosecutor's statements cited by defendant and find nothing racial in nature therein. Moreover, the prosecutor told the jurors to base their decision on the evidence, not on anger.

[13] Defendant also argues that the prosecutor impermissibly personalized the victim's ordeal by arguing "that it would defy human nature for [the victim] to have volunteered to assist defendant and put herself in a position to have a consensual conversation with him." However, the record discloses that the prosecutor tied this assertion to the evidence that it was raining heavily, the victim had called her husband to tell him she was leaving, and her umbrella was abandoned.

[14] Defendant also argues that the prosecutor inserted his opinion of defendant's credibility and sought to undermine the credibility of counsel by suggesting that they had orchestrated a slander. Among others, the prosecutor made the following statements to the jury: "Michael Sexton is a liar"; further, "[H]e's lied to you"; and finally, "He lied to Angela. He's lied to everybody. He's lied to you." These statements were not permissible. "It is improper for the district attorney, and defense counsel as well, to assert in his argument that a witness is lying. 'He can argue to the jury that they should not believe a witness, but he should not call him a liar.' " *State v. McKenna*, 289 N.C. 668, 686, 224 S.E.2d 537, 550 (1976) (quoting *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967)). While the statements constituted error, defendant has the burden of showing that the error was prejudicial. N.C.G.S. § 15A-1443(a) (1988). Defendant failed to object, and considering all the facts and circumstances revealed in the record which showed overwhelming evidence against defendant, defendant has failed to show that the error was prejudicial. Further, the prosecutor's mention of slander clearly referred to defendant's consent defense as a defense, not to the actions of defense counsel. Moreover, defendant again made no objection to the remark.

Defendant also contends that with respect to the kidnapping charge, the prosecutor argued critical facts not in evidence in a manner which deprived defendant of a fair trial. In support of this contention, defendant argues that the evidence failed to show removal by force. However, as we have previously concluded, ample evidence existed to support an inference that the victim was attacked outside her van.

[15] Defendant's final argument is that the prosecutor misstated the law on premeditation and deliberation. Defendant contends "[t]he prosecutor failed to tell the jury that defendant's anger, emotion and fear is irrelevant only if they the jury finds [sic] that 'the intent to kill was formed with a fixed purpose not under the influence of some suddenly aroused passion.' " On the evidence presented by the State, however, the prosecutor was entitled to urge the jury not to return a verdict of guilty of second-degree murder. Defendant also argues the prosecutor incorrectly stated that the judge would instruct "that [defendant] acted with deliberation." Although the prosecutor did not read the pattern instruction on premeditation and deliberation, he did use the conditional "if" throughout his remarks about premeditation and deliberation. Furthermore, the trial court gave the pattern instruction on premeditation and deliberation.

For all the foregoing reasons, we conclude defendant has failed to show that the prosecutor's argument was grossly improper. Therefore, we hold the trial court did not err in failing to intervene *ex mero motu*.

[16] Defendant's next contention is that after he objected, the trial court erred by refusing to modify its instruction on the charge of kidnapping. Defendant argues that on the facts of his case, the court erred in instructing that consent obtained by fraud is not consent. Defendant concedes that removal of a victim from one place to another may be accomplished by means of fraud or fear but argues that the purpose of the fraud theory of kidnapping was to protect the young and feeble-minded against machinations of adults with criminal intentions. Defendant argues further that there were no fraudulent misrepresentations as contemplated by case law. We do not find these arguments persuasive.

"[T]he offense of kidnapping, as it is defined in G.S. 14-39, includes an unlawful restraint whereby one person's freedom of movement is restricted due to another's fraud or trickery." *State v. Sturdivant*, 304 N.C. 293, 307, 283 S.E.2d 719, 729 (1981). In *Sturdivant*, the Court found fraud where the defendant used the pretext of wanting a ride to a friend's home in order to enter the car of the victim, a married woman driving with her son. In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the Court reaffirmed that false and fraudulent representations may constitute a substitute for force in kidnapping, but there was "no evidence

allowing more than mere conjecture that defendant used his misrepresentations to confine, restrain, or remove [the victim] against his will." *Id.* at 41, 305 S.E.2d at 714.

By contrast, in the instant case defendant stated in his confession that he first asked for a ride to the security office but then told the victim to drive down a road nearby because his cousin's car was there. Defendant admitted that he pretended his cousin's car was there. Defendant also said he thought the victim agreed to give him a ride because she saw his employee identification tag and thought it would be "O.K." to give him a ride. Considered altogether, defendant's evidence, if believed, sufficed to show trickery employed to accomplish removal as in *Sturdivant*. Therefore, we conclude the trial court did not err in instructing the jury as to kidnapping that consent obtained or induced by fraud or by fear is not consent.

SENTENCING PROCEEDING ISSUES

In the sentencing proceeding the State resubmitted all evidence offered during the guilt-innocence phase and offered evidence consisting of the testimony of Probation-Parole Officer Stamer. Stamer testified that in May 1989 defendant was convicted of forgery and uttering; and in October 1989 he was convicted of two counts of assault on a female.

Defendant's evidence included testimony from several social workers and physicians. Myra Norwood, social worker with the Wake County Department of Social Services ("DSS"), testified that in July 1980 defendant and his younger brother and sister were placed in the custody of DSS because their alcoholic mother neglected them and permitted her alcoholic live-in boyfriend to beat them. The three children were found wandering the streets at night, and defendant and his brother were delinquent. When the case was assigned to Norwood, the mother had left the community, and she did not reappear until June 1982. Defendant was sent to a training school; no other treatment program or foster home could be found for him. Based on his aggression, Norwood recommended that he be included in the Willie M class, but he was not accepted "because he was not violent enough." From the training school defendant was sent to the Central Orphanage (now Central Children's Home); and Norwood continued to monitor his progress by consulting with Laverne Wortham, a social worker at the orphanage. Norwood testified that after a short period of good

behavior, defendant began to express anger and frustration and get into fights. Defendant also ran away from the orphanage. She recommended that defendant be encouraged to seek treatment at the Vance-Granville County Mental Health Center. Ordinarily, defendant was very reluctant to discuss his feelings. In June 1982, Norwood arranged for defendant's mother to see all three children at the orphanage, where defendant and his brother were staying. During the visit, which lasted about two hours, defendant would not look at or speak to his mother. Norwood testified that "he finally was able to tell her at the end that he was glad that she had come and that he was sometime[s] angry with her for just disappearing."

When defendant was discharged from the orphanage, he went to live with a foster family in Raleigh, and Norwood continued to monitor his progress. Defendant was about seventeen years old, was going to school, and seemed to be getting along well. Norwood's responsibility for defendant ended around the time he graduated from high school. In general, Norwood did not think defendant received the help he needed to resolve his behavioral problems. She thought more effective treatment was provided for his brother and sister.

Laverne Wortham, Program Administrator for the Central Children's Home, testified that she met defendant in 1981, when she was a social worker for the orphanage. According to a psychological evaluation prepared in July 1980, when defendant was thirteen years old, defendant's full scale IQ was 87. His overall intellectual ability was in the upper half of the dull normal range; he functioned cognitively as well or better than nineteen percent of the normal population for his age group. A discrepancy between his verbal and performance IQ levels showed that some process was disturbing his intellectual function. He appeared insecure, angry, and action oriented and had poor interpersonal problem-solving skills. Defendant stayed at the orphanage from March 1981 through November 1983. A summary report for 1981 showed that his initial behavior was good, but in October 1981 he was temporarily suspended for fighting. In November he left the orphanage but was picked up by the police and agreed to return. Defendant had a hard time expressing his feelings verbally, kept things inside him, and expressed his feelings by doing annoying things. He was referred to the local mental health clinic in January 1982. At that time he was experiencing some behavior problems at school, was repeating

ninth grade because of his low academic average, and was not putting much effort into his studies. Defendant's 1982 summary report indicated he had shown improvement "in areas of stealing, fighting, and walking off campus without permission." His school behavior also improved, but he continued to have difficulty expressing his feelings verbally. Defendant was "getting more difficult to work with because of this." His houseparent stated he was sneaky; she had to watch him constantly; and she was not comfortable around him because of the way he looked at her. Defendant "discontinued going to mental health in May, 1982, and again in October, '82. This was due to his not wanting to go and his refusal to attend the session." In September 1982 he allegedly stole another student's earphones and was arrested. Eventually he was charged with communicating threats to a houseparent and spent five days in jail. Later he was permitted to return to the orphanage. In 1983 he became hostile to staff and did not follow instructions or do what was asked of him. In January 1983 he and some other students killed some baby pigs they had been assigned to feed. In September he threatened to hit a housemother who asked him to turn down the volume of his radio. He continued to refuse to go to the mental health clinic. The staff questioned whether the orphanage could best meet his needs, as he needed constant support and review.

After defendant left the orphanage, he went to live with foster parents Myrtle and David Shephard. When the Sexton children were originally taken into protective custody, the Shephards took defendant's sister into their home. While defendant was at the orphanage, he was also permitted some visits to the Shephards' home. Myrtle Shephard testified that while defendant lived with them he caused no problems and obeyed house rules. He was helpful around the house and treated the Shephards as if they were his parents; during this time he attended Sanderson High School. After defendant was arrested Myrtle Shephard visited him in prison; and he expressed remorse for the crimes he committed. In addition he wrote to her and expressed similar remorse. He also wrote that he had been given DSS records to look through and discovered for the first time that the reason he was encouraged to seek mental health treatment was that the staff of the orphanage thought he needed help expressing his feelings, was dangerous, or might kill someone.

Dr. Thomas W. Brown was accepted by the court as an expert in psychiatry. He examined defendant in August 1991, reviewed DSS records, and reviewed earlier psychiatric and psychological assessments made of defendant. He opined that defendant suffered from borderline personality disorder, which "describes people who because of early bad circumstances in a family end up in adult hood [sic] with a real inner emotional lack." Such people have few and poor coping skills, and as adults they deal very poorly with stress, relationships, and anger. Lacking emotional resources, they are vulnerable to being impulsive, volatile, and unable to cope well and to leading unpredictable, chaotic lives. They are much more likely "to get actually physically violent rather than just shake [a] fist and walk away." Dr. Brown also testified that defendant's IQ was "not in the range that officially warrants a diagnosis of mental retardation." Nevertheless, defendant had a severe degree of personality impairment and was suffering from this condition at the time of the crimes. Dr. Brown also testified defendant would be able to adapt and function in the structured environment of prison.

On cross-examination Dr. Brown testified that impulsiveness is part of borderline personality disorder and that defendant was impulsive. Defendant's records indicated he had been diagnosed in the past as having antisocial personality disorder, a hallmark of which "is lack of or relatively little conscience." The guidance from the orphanage and from the Shephards simply came too late to permit defendant to make a permanent improvement in his life. Dr. Brown opined that defendant would do better in the prison environment than anywhere else but also stated that he was a potentially dangerous person.

Dr. Brad Fisher was accepted by the court as an expert in psychology. He interviewed the defendant in November 1990 and twice in September 1991. Dr. Fisher also reviewed other psychological and psychiatric diagnoses, DSS records, and information from the orphanage and the training school. He testified that defendant had a severe personality disorder and had been diagnosed in the past as having antisocial personality disorder, narcissistic personality disorder, and oppositional character. These diagnoses overlap and generally describe a person with poor coping skills and a tendency towards misconduct in stressful situations. Asked whether defendant could conform his actions to the requirements of law, Dr. Fisher stated that because of defendant's relatively normal level of intelligence, he would stop at a stop sign. "He would do the normal

things[,] but in situations that to him are stressful[,] where we might have some deterioration in the ability to make normal judgments, good judgments, his plummets[;] and that ability is not there or is there only minimally." Dr. Fisher corroborated Dr. Brown's testimony that defendant's family background was chaotic. Further, defendant's condition was chronic. Asked if defendant could be expected to function well in prison, Dr. Fisher said, "They will be aware of his record and will setup [sic] a structure sufficient so that they are comfortable with security." Dr. Fisher agreed that defendant would be able to function in prison. On cross-examination Dr. Fisher agreed with Dr. Brown that defendant had little conscience, was impulsive, and was dangerous. Based on defendant's conduct in prison, Dr. Fisher did not agree that he was likely to kill someone; but he admitted that defendant told him he had been involved in a fight in prison.

Four aggravating circumstances were submitted to the jury: First, the murder was committed for the purpose of avoiding or preventing a lawful arrest. N.C.G.S. § 15A-2000(e)(4) (1988). Next, the murder was committed while the defendant was engaged in the commission of a robbery, rape, first-degree sexual offense, or kidnapping. N.C.G.S. § 15A-2000(e)(5). Third, the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6). Last, the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9). The jury found the existence of only three of these circumstances, declining to find circumstance (e)(6).

Thirty-two mitigating circumstances were submitted to the jury. Statutory circumstances included defendant's mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); his incapacity to appreciate the criminality of his conduct or to conform it to the requirements of law, N.C.G.S. § 15A-2000(f)(6); his chronological age, N.C.G.S. § 15A-2000(f)(7); his emotional age, N.C.G.S. § 15A-2000(f)(7); and any other circumstance or circumstances arising from the evidence, N.C.G.S. § 15A-2000(f)(9). The jury declined to find the existence of any of these circumstances.

Nonstatutory circumstances submitted and found included that (i) while in prison defendant maintained meaningful relationships with those close to him; (ii) the meaningful relationships provided defendant with guidance and positive support; (iii) while in prison defendant sought to help and advise others; (iv) during defendant's formative years his mother suffered from alcoholism; (v) defendant's

mother was of limited intelligence and mentally unable to provide for and relate to him in a normal mother-child relationship and abandoned him and his siblings at a young age; (vi) because of her problems and limitations, defendant's mother was unable to provide normal or adequate guidance to defendant as a child; (vii) after she was found to be unfit to care for her children, defendant's mother abandoned him and his siblings; (viii) as a young child and adolescent, defendant was deprived of the family nurturing necessary and essential for proper and normal development and growth; (ix) defendant is an adult child of a parent who abused alcohol; (x) since defendant's father died in an automobile accident when defendant was five years old, defendant was unable to have a parental relationship with or receive significant guidance from him; (xi) during his formative years defendant and his siblings were subjected to physical and emotional abuse by his mother and others who occasionally befriended her; (xii) during his formative years defendant was subjected to physical abuse by his surrogate father; (xiii) defendant's mental and emotional disturbances were caused in part by the emotional instability of his family members during his early developmental stages; (xiv) after DSS had to intervene to protect him and his siblings, defendant lived in a series of residences, including an orphanage and a foster home; (xv) from age thirteen defendant was separated periodically from his brother and sister, on account of their status as DSS wards, and this caused defendant much concern and upset; (xvi) during his formative years, defendant's mental and emotional disturbances were caused in whole or in part by the instability of his family; (xvii) defendant's life has great value to him, his family, and friends; and (xviii) defendant could adjust well to the structured environment of life in prison. The jury declined to find eight additional nonstatutory mitigating circumstances.

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

Defendant first contends the trial court erred in permitting the State to introduce victim character evidence at the penalty phase and to argue victim impact evidence in support of the death

penalty. Defendant argues that in resubmitting all the evidence presented during the guilt-innocence phase, the State also resubmitted evidence of the victim's character for marital fidelity. Defendant argues further that the evidence functioned as an aggravating circumstance in violation of the rule that aggravating circumstances are limited to those set forth in the capital sentencing statute. We disagree with defendant's contentions.

[17] We turn first to the prosecutor's argument, in which he stated, without objection by defense counsel,

> that Kim Crews was a live, living, breathing person.
>
> She had rights just like Michael Sexton has rights. She had a right to live. She had a right to breathe. She had a right to raise her daughter. She had a right to love her husband and those people have rights, too.
>
> . . . .
>
> It is interesting to me and you'll find mitigating [circumstance] number 25, the defendant's life has great value to him, his family and his friends. And I submit that's true to his family and his friends.
>
> Did Kimberly Crews' life have any great value to those people? Yes, it did. They care about life. She cared about life. You heard on cross-examination from Mr. McMillan about Kimberly Crews. The very kind of people she was trying to save . . . end[ed] her life.

This Court has said, "It is true that the 'rights of the victim' and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime." *State v. Price*, 326 N.C. 56, 86, 388 S.E.2d 84, 101 (1990), *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), *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated*, --- U.S. ---, 129 L. Ed. 2d 888 (1994); *cf. State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991) (finding no gross impropriety in similar de minimis references during State's argument at the guilt-innocence phase); *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989) (finding no constitutional error in mere identification of family members present in the courtroom at the opening of the proceedings), *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 648 (1991). Nevertheless, where such issues are "the subject of mere allusion by the prosecutor," the error is de minimis, and whether to intervene and recognize the error *ex mero motu* is within the discretion of the trial court. *Price*, 326 N.C. at 86, 388 S.E.2d at 101. In the instant case, the prosecutor's statements quoted above are indistinguishable from those in *Price*. Therefore, we conclude the trial court did not err in not intervening *ex mero motu*.

[18] We have held herein that on the narrow facts of defendant's case, the trial court did not err by permitting the State to introduce in the guilt-innocence phase rebuttal evidence of the victim's character for marital fidelity. All evidence presented during the guilt-determination phase of a capital case is also "competent for the jury's consideration in passing on punishment." N.C.G.S. § 15A-2000(a)(3) (1988). Moreover, the Eighth Amendment does not prohibit either the admission of evidence or prosecutorial argument concerning a murder victim's personal characteristics. *State v. Jennings*, 333 N.C. 579, 625, 430 S.E.2d 188, 212 (1993) (citing *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991)). In the instant case, evidence of the victim's character was narrowly focused on rebutting defendant's testimony at trial that the victim indicated she wanted to be unfaithful to her husband. Nevertheless, the prosecutor did not make any argument based on the admissible evidence. Under all the circumstances, we conclude there was no violation of defendant's constitutional rights in admitting the evidence at sentencing.

[19] Defendant next contends the trial court erred in submitting to the jury the aggravating circumstance that the murder "was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). Defendant argues that (i) the circumstance is unconstitutionally vague on its face and was insufficiently defined in the instruction given and (ii) the evidence did not support submitting it to the jury. Again, we disagree.

As required by the United States Supreme Court, this Court has applied a limiting construction to the language of the (e)(9) circumstance. *E.g.*, *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L. Ed. 2d 655 (1981). Our construction narrows the class of capital felonies in which juries can find this aggravating

circumstance and thus prevents arbitrary or capricious imposition of the death penalty. *State v. Fullwood*, 323 N.C. 371, 399-400, 373 S.E.2d 518, 535 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). The limiting construction was embodied in the instruction given the jury in the instant case, and thus we conclude it was constitutional on its face and as applied.

[20] Propriety of submitting this aggravating circumstance "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*, 103 S.Ct. 474 (1982)." *State v. Stanley*, 310 N.C. 332, 335, 312 S.E.2d 393, 395 (1984). This Court has

> 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.

State v. Gibbs, 335 N.C. 1, 61-62, 436 S.E.2d 321, 356 (1993); *accord State v. Syriani*, 333 N.C. 350, 390-91, 428 S.E.2d 118, 140, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993). In addition, "[i]n 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)." *Gibbs*, 335 N.C. at 61, 436 S.E.2d at 356.

Applying these principles, the evidence supports a finding that the murder of Kimberly Crews was physically agonizing and involved psychological terror not normally present in murder. The medical evidence permitted the inference that at a minimum death by ligature strangulation would have taken three to four minutes and the victim would have known what was happening for at least ten seconds before losing consciousness. But the amount of time for unconsciousness and death varies depending upon how tightly and

rapidly the ligature was applied, and the only internal injury to the victim's neck was some slight bruising of the tissues over her windpipe. Further, defendant testified that he was in front of or beside her when he strangled her. Hence, in her last moments, the victim, the mother of a young child, lay nude with soaking wet hair on the backseat of her van, as a stranger whom she could look in the eye wrapped her stockings around her neck. Whatever the time span, the minimum or longer, that it took for the victim to lose consciousness, the moments just before and during the strangulation would have been filled with overwhelming panic for the victim who, knowing that death was impending, was helpless to prevent it. To the victim, this ten seconds or longer was not a brief moment. A jury could reasonably infer that as the breath of life was choked out of the victim, she experienced extreme anguish and psychological terror.

In addition, we find defendant's case similar to two other cases of strangulation and sexual assault in which this Court said evidence supported the (e)(9) circumstance, *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), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). In *Artis*, the victim was dragged through the woods and strangled during an act of forcible intercourse; and expert testimony showed that during manual strangulation, a victim would not necessarily lose consciousness immediately and would suffer pain. 325 N.C. at 317-18, 384 S.E.2d at 492. In *Johnson*, submitting the circumstance was proper where evidence showed "that defendant first tried to strangle his victim to death with a fish stringer. Upon rendering her unconscious he sexually molested her. Then, realizing she was not dead, he stabbed her to death." 298 N.C. at 82, 257 S.E.2d at 621-22.

Finally, cases in which we have found the evidence insufficient to support submission of the circumstance are distinguishable. *State v. Hamlet*, 312 N.C. 162, 176, 321 S.E.2d 837, 846 (1984) (stating that the victim was unconscious and unable to feel any pain after being shot and was unaware of defendant's presence); *Stanley*, 310 N.C. at 340-41, 312 S.E.2d at 398 (stating no evidence showed victim suffered a prolonged or torturous death or that defendant heard any words she might have said). By contrast, it is highly unlikely that the victim in the instant case was unaware of defendant's presence and murderous purpose. For all the foregoing reasons,

we conclude the trial court did not err in submitting this aggravating circumstance for the jury's consideration.

[21] Defendant also contends the trial court erred in failing to submit the mitigating circumstance that he had "no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988). Again, we disagree.

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). Initially, "the trial court is required to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988). If the trial court concludes that the jury could so find from the evidence, then whether the evidence does in fact constitute a significant history of criminal activity is for the jury to decide. *Id.*

For the purposes of N.C.G.S. § 15A-2000(f)(1) " ' "[S]ignificant" means that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence.' " *State v. Artis*, 325 N.C. at 314, 384 S.E.2d at 490 (quoting Martin, J., concurring in *State v. Wilson*, 322 N.C. at 147, 367 S.E.2d at 609) (alteration in original). Further, "it is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists." *Id.*

In the instant case, defendant did not request that the (f)(1) circumstance be submitted to the jury. The evidence of defendant's prior criminal activity was a conviction for forgery and uttering on 1 May 1989 and conviction for two counts of assault on a female on 22 October 1989. One of these counts was assault by choking which occurred less than one year before the strangulation of Kimberly Crews. Defendant testified he did not remember choking his former victim, a circumstance strikingly similar to his professed lack of memory as to details of the strangulation of Kimberly Crews. Given the nature and recency of his record of assault, we cannot say that the trial court erred in determining that no reasonable juror could have concluded defendant's criminal history was in-

significant. Therefore, we conclude the trial court did not err by not submitting the (f)(1) circumstance for the jury's consideration.

Finally defendant contends that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's argument at the close of the sentencing proceeding. As during closing arguments for the guilt-innocence phase, defense counsel made no objection during closing argument in the sentencing proceeding. Defendant again argues that the prosecutor improperly argued victim impact evidence; but we have concluded that the prosecutor's reference to the victim's rights was de minimis. Defendant also argues that the prosecutor delivered a harangue against the calm and rational consideration of evidence as required by due process and improperly condemned defense counsel's conduct as "ravishing and degrading" the victim. We have carefully reviewed the argument and find it was within the wide latitude permitted by case law. *E.g.*, *State v. Price*, 326 N.C. 56, 84, 388 S.E.2d 84, 100 (1990).

PRESERVATION ISSUES

[22] Defendant raises two additional issues which he concedes have been decided against him by this Court: (i) The North Carolina death penalty statute, and consequently the death sentence in this case, are unconstitutional and (ii) the trial court erred in denying defense counsel's motion to withdraw from representation, or in the alternative to select a new jury after the guilty verdicts, because the jurors' rejection of the defense theory and counsel's role in presenting it would have precluded their rational consideration of evidence submitted in mitigation. 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

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 existence of 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 the murder to be especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The record also supports the jury's findings that the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4), and while the defendant was engaged in the commission of first-degree rape, first-degree sexual offense, first-degree kidnapping, and common-law robbery, N.C.G.S. § 15A-2000(e)(5). Defendant was convicted of first-degree murder upon theories both of premeditation and deliberation and of felony murder; and both theories are supported by the evidence. Therefore, the underlying felonies of first-degree rape, first-degree sexual offense, first-degree kidnapping, and robbery were properly submitted in aggravation. *State v. McNeil*, 324 N.C. 33, 57, 375 S.E.2d 909, 923 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991). We also conclude that nothing in the record suggests the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[23] We turn to our final statutory duty, proportionality review. We first compare similar cases from a pool of all cases arising after 1 June 1977, the effective date of the capital punishment statute. We consider cases tried capitally and found free of error upon direct appeal to this Court and in which the jury recommended death or life imprisonment or the trial court imposed life imprisonment after the jurors failed within a reasonable period of time to agree upon a sentencing recommendation. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993). Our consideration is also limited to cases roughly similar as to the crime and the defendant. *Id.*

Salient characteristics of the instant case include (i) an attack on a random victim; (ii) a brutal strangulation, found by the jury to be especially heinous, atrocious, or cruel, in the course of kidnapping, rape, and sexual offense; (iii) defendant's insistence, even in the face of clear evidence to the contrary, that the victim consented to the sexual acts; (iv) defendant's insistence, notwithstanding clear evidence to the contrary, that he left the victim alive; and (iv) de-

fendant's theft of the dead victim's personal effects and subsequent theft from her bank account. The jurors found three aggravating circumstances and declined to find the existence of any of the five statutory mitigating circumstances submitted for their consideration. Of the twenty-seven nonstatutory mitigating circumstances submitted, the jury found eighteen existed.

"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. *Stokes* and *Bondurant* are not similar to the instant case.

Stokes is dissimilar in that it involved a group who planned to rob a place of business, but no evidence showed who was the ringleader. By contrast, defendant Sexton alone was responsible for all the crimes in the instant case. Further, defendant Stokes was only seventeen years old, but defendant Sexton was twenty-three years old at the time of the murder. In addition, in *Stokes* there was no evidence of premeditation and deliberation, but defendant Sexton was convicted upon this theory, as well as felony murder.

Bondurant is dissimilar in that the defendant immediately exhibited remorse and concern for the victim's life by helping him get medical treatment. By contrast, defendant Sexton showed no concern for Kimberly Crews' life. Notwithstanding his testimony that he thought she was not dead, the evidence showed he robbed her of her personal effects and went immediately to a bank in order to attempt, and succeed at, further theft.

In *State v. McCollum*, 334 N.C. at 240-42, 433 S.E.2d at 162-63, this Court reviewed the seven cases, including *Stokes* and *Bondurant*, in which we have thus far found the death penalty disproportionate.[2] In only one of the cases, *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), did the jury find the existence of multiple aggravating circumstances. In *Young*, this Court

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2. 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).

> focused on the failure of the jury . . . to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons.

McCollum, 334 N.C. at 241, 433 S.E.2d at 162. The instant case is dissimilar to *Young* in that three aggravating circumstances, including especially heinous, atrocious, or cruel were found by the jury.

For all the foregoing reasons, we conclude that each of the cases wherein this Court has found the death penalty to be disproportionate is distinguishable from the instant case.

> In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

McCollum, 334 N.C. at 242, 433 S.E.2d at 163.

In *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470, (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 argued that a numerical analysis of proportionality pool cases involving sexual assault showed that juries recommended life sentences in over half of such cases. The Court, noting the inaccuracy in defendant's statistics, *id.* at 339, 384 S.E.2d at 505 (footnotes omitted), stated "[n]umerical disparity, whether in favor of the [S]tate or in favor of the defendant, is not dispositive on proportionality review." *Id.* at 340, 384 S.E.2d at 505. Instead, we "proceed with factual comparisons within the category of murders accompanied by sexual assault." *Id.* at 340, 384 S.E.2d at 506.

In another death-affirmed case involving rape and kidnapping cited therein, *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981),

cert. denied, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982), significant mitigating evidence was presented; but the jury also found that the murder was especially heinous, atrocious, or cruel. Since the decision in *Artis*, two additional cases involving sexual assault have come into the pool. *State v. Jennings*, 333 N.C. 579, 430 S.E.2d 188 (1993); *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991). In *Richardson*

> [t]he jury returned verdicts of guilty of common law robbery, first-degree rape, and first-degree murder, finding both that the murder occurred during the commission of the felonies of rape and common law robbery and that it was committed with malice, premeditation and deliberation. The jury found aggravating circumstances and no mitigating circumstances, but nevertheless recommended life imprisonment for the murder conviction.

328 N.C. at 506-07, 401 S.E.2d at 402. Defendant Richardson was not charged with kidnapping. We have reviewed the record, which shows that only two aggravating circumstances, murder committed during the course of rape and pecuniary gain, were submitted; and the jury found both existed. Again, significant mitigating evidence was presented. We find defendant Sexton's case distinguishable on the basis that the jury in *Sexton*, unlike the juries in *Young* and *Richardson*, found the especially heinous, atrocious, or cruel circumstance.

Jennings involved not rape but sexual assault by a wife on her eighty-year-old husband. Although the nature of the assault was more grisly than in defendant's case, both defendants were convicted of murder upon theories both of premeditation and deliberation and felony murder and both juries found the existence of the (e)(9) circumstance. In *Jennings*, one mitigating circumstance labeled a statutory circumstance, "no record of criminal convictions," was submitted and found to exist by the jury. 333 N.C. at 630, 430 S.E.2d at 215. Twenty-one nonstatutory mitigating circumstances were submitted; of these the jury found the existence of three. *Id.* at 615, 630, 430 S.E.2d at 206, 215. The jury recommended death.

On its facts, defendant's case is clearly more like *Artis* and *Rook* and it shares with *Jennings* the finding of the existence of the (e)(9) circumstance. In light of all the cases discussed herein, we cannot say that the sentence imposed was excessive or dispropor-

tionate, considering both the crime and the defendant. We hold defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death penalty is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. KERRY LEMAR MORSTON

No. 353A92

(Filed 17 June 1994)

1. **Constitutional Law § 183 (NCI4th)— conspiracy to commit first-degree murder and first-degree murder—conviction and punishment for both**

Defendant was properly convicted of, and punished for, both conspiracy to commit first-degree murder and first-degree murder. The crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result.

Am Jur 2d, Criminal Law §§ 279 et seq.

2. **Assault and Battery § 23 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—victim a bystander at murder—transferred intent**

Defendant was properly convicted of, and punished for, assault with a deadly weapon with intent to kill inflicting serious injury where the assault victim was struck by bullets in her living room when her husband was shot and killed when he answered the door to their home. The evidence tended to show that defendant possessed the intent to shoot and kill Detective Harris; under the doctrine of transferred intent, this intent suffices as the intent element for the felony of assault upon Mrs. Harris with a deadly weapon with intent to kill inflicting serious injury. There is no authority for the proposition that an assault conviction arising out of the same circumstances surrounding the murder and based on the doctrine of transferred intent "should not lie" where the defendant is punished separately for murder.

Am Jur 2d, Assault and Battery §§ 56-58.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon. 92 ALR2d 635.

3. **Assault and Battery § 81 (NCI4th)— discharging a firearm into occupied property—murder at the front door—intent to fire into occupied dwelling—separate offense**

The trial court did not err by failing to dismiss a charge of discharging a firearm into occupied property or arrest judgment where defendant fired at a detective as the detective answered his door and bullets also struck the detective's wife inside the house. The evidence tended to show that Bernice McDougald instructed Shannon McKenzie that McKenzie was to knock on the front door of Detective Harris' home; defendant was to shoot Harris immediately when Harris came to the door; and McDougald, McKenzie, the defendant and five others then drove to the Harris residence and executed their plan. Moreover, although defendant contends that there is no rationale to support the discharging a firearm conviction because the purpose underlying the offense, which the defendant believes to be "to protect unknown and unseen occupants of a dwelling from being hit by a bullet," was satisfied by his assault conviction, discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes.

Am Jur 2d, Assault and Battery §§ 48 et seq.

4. **Criminal Law § 426 (NCI4th)— first-degree murder—prosecutor's comment—defendant's post-arrest silence—not improper**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion for a mistrial, which had been based on a reference by the prosecutor to defendant's exercise of his right to remain silent following his arrest. Neither the prosecutor's questions nor the witness's responses ever expressly referred to the defendant's exercise of his right to remain silent during custodial interrogation; instead, the witness twice clarified that he had not actually interviewed the defendant.

Am Jur 2d, Trial §§ 237-243.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

5. Evidence and Witnesses § 2642 (NCI4th)— attorney-client privilege—partially waived—cross-examination of attorney

Any error was not prejudicial where defendant was charged with the first-degree murder of a detective; an attorney who had initially represented another participant in the conspiracy and murder testified as to a conversation he had had with his client; the State introduced that testimony to corroborate the testimony of the client, who had been allowed to plead guilty to second-degree murder in return for his testimony; and the attorney indicated on cross-examination that he had authority from his client to testify only as to what the client had told him about the murder and invoked attorney-client privilege as to whether the benefits of a deal with the State had been discussed. The client had already testified that he had been permitted to plead guilty to second-degree murder and conspiracy in exchange for his testimony, had read the terms of his plea arrangement to the jury, and had testified that his agreement had kept him from the death penalty and that he hoped his testimony would help him when he was sentenced.

Am Jur 2d, Witnesses § 228.

6. Evidence and Witnesses § 2284 (NCI4th)— murder—pathologist's testimony—pain and suffering of victim

The trial court did not err during the guilt phase of a first-degree murder prosecution by overruling defendant's objections to testimony from the medical examiner about the pain the victim would have experienced. The evidence tended to show the severity and nature of the wounds and assisted the jury in determining whether the defendant acted after premeditation and deliberation.

Am Jur 2d, Expert and Opinion Evidence §§ 264 et seq.

7. Evidence and Witnesses § 870 (NCI4th)— first-degree murder and conspiracy—statements of other participants—not hearsay—explanation of subsequent conduct

The trial court did not err in a prosecution for first-degree murder and conspiracy by admitting testimony concerning

statements made in defendant's presence from a witness who was present but did not participate and from a woman who gave the participants a ride afterwards. The statements were offered not to prove the truth of any matter asserted therein, but to explain the subsequent conduct of the defendant and his accomplices and the context in which the murder occurred.

Am Jur 2d, Evidence §§ 497 et seq.

8. **Criminal Law § 831 (NCI4th)— first-degree murder—accomplice testimony—special instruction**

The trial court did not err in a first-degree murder and conspiracy prosecution by denying defendant's request for a special instruction on accomplice testimony where the court instructed on accomplice testimony in accord with the appropriate pattern jury instruction. The instruction was more than adequate to address the concerns associated with the credibility of accomplice testimony generally and this testimony in particular.

Am Jur 2d, Trial § 1225.

Propriety of specific jury instructions as to credibility of accomplices. 4 ALR3d 351.

9. **Homicide § 552 (NCI4th)— first-degree murder—instruction on second-degree murder—not submitted**

The trial court did not err in a prosecution for first-degree murder by denying defendant's request to submit second-degree murder to the jury where the evidence tended to show that defendant willingly conspired to murder a detective and the evidence that defendant was the person who actually killed the detective and that he did so by driving to the detective's home and inflicting multiple gunshot wounds after more than ample time and opportunity to consider and reject killing the victim was essentially uncontroverted. This evidence would only have justified submitting possible verdicts of guilty of first-degree murder or not guilty.

Am Jur 2d, Homicide § 526.

10. **Homicide § 521 (NCI4th)— first-degree murder—premeditation and deliberation—intoxication—evidence not sufficient**

The trial court did not err in a first-degree murder and conspiracy prosecution by not submitting second-degree murder

to the jury where, although some evidence exists tending to show that the defendant had consumed alcohol and possibly illicit drugs on the night of the murder, it was insufficient to support an instruction by the trial court on voluntary intoxication raising an issue for the jury as to whether the defendant was so intoxicated by voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill.

Am Jur 2d, Homicide §§ 482 et seq.

Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

11. Criminal Law § 425 (NCI4th)— first-degree murder—prosecutor's argument—defendant's failure to call particular witness—no error

There was no error in a prosecution for first-degree murder and conspiracy where defendant contended that a reference in the prosecutor's closing argument to a witness not called tended to shift the burden of producing evidence to the defendant, but the prosecutor at worst merely commented on the defendant's failure to produce a witness to refute the State's case. Additionally, the prosecutor's statements were by way of reply to a comment by counsel for defendant concerning the absence of the alleged witness in question.

Am Jur 2d, Trial §§ 245-249.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

12. Criminal Law § 447 (NCI4th)— first-degree murder—prosecutor's argument—comment on impact on victim's family—no error

There was no error in a prosecution for first-degree murder and conspiracy in the prosecutor's argument to the jury concerning the impact of the crimes on the victim's family and the community.

Am Jur 2d, Trial §§ 296 et seq.

13. Criminal Law § 440 (NCI4th)— first-degree murder—State's witness—prosecutor's comment on witness's sentence—no error

There was no error in a first-degree murder prosecution where the prosecutor stated to the jury in his closing argument that a state's witness who was an accomplice and who had pled guilty and testified was facing a "life plus" sentence or a sentence of "life plus 30 years." This argument was fully supported by the evidence and was not improper.

Am Jur 2d, Trial §§ 305, 306.

14. Criminal Law § 442 (NCI4th)— first-degree murder—prosecutor's argument—duty of jury

There was no error in a prosecution for first-degree murder and conspiracy where defendant contended that the prosecutor argued to the effect that the jurors were accountable to the police, the witnesses, the community, and society in general, but the argument instead contended that the jurors had an obligation to convict based upon the evidence which had been introduced at trial and which had been discovered due to the proper performance of law enforcement officers and witnesses.

Am Jur 2d, Trial §§ 225 et seq.

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

15. Assault and Battery § 14 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—instructions—transferred intent

Defendant was not entitled to a new trial with regard to his conviction for assault with a deadly weapon with intent to kill inflicting serious injury based on the trial court's instructions on the doctrine of transferred intent.

Am Jur 2d, Assault and Battery §§ 48 et seq.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon. 92 ALR2d 635.

16. Criminal Law § 1100 (NCI4th)— conspiracy to commit murder—aggravating factors—same evidence supporting both factors

The trial court erred when sentencing defendant for conspiracy to commit murder by finding in aggravation that "[t]he

offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws" and that "[t]he offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws" based on the same item of evidence, that defendant had conspired to murder a law enforcement officer who was interfering with the drug trade. A discrepancy between the trial court's statement in open court and the sentencing form was resolved in defendant's favor.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1098 (NCI4th)— assault and discharging a weapon into occupied property—elements of offense—aggravating factors—same evidence

The trial court erred when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property by improperly aggravating these offenses with evidence the State had previously used to prove an element of the offenses. N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Ellis, J., on 28 May 1992, in the Superior Court, Hoke County, sentencing the defendant to life imprisonment for first-degree murder. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 19 May 1993. Heard in the Supreme Court on 2 February 1994.

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

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

MITCHELL, Justice.

On 13 May 1991, the Hoke County Grand Jury indicted the defendant, Kerry Lemar Morston, for first-degree murder and conspiracy to commit first-degree murder. On 19 August 1991, the

Grand Jury indicted the defendant for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into occupied property. He was tried capitally at the 27 April 1992 Mixed Session of Superior Court, Hoke County. The jury returned verdicts finding the defendant guilty of premeditated and deliberate first-degree murder and all of the other charges against him.

At the conclusion of a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. The trial court sentenced the defendant in accord with the jury's recommendation. The trial court also sentenced the defendant to thirty years imprisonment for conspiracy to commit first-degree murder, twenty years imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury and ten years imprisonment for discharging a firearm into occupied property. Under the judgments entered by the trial court, these latter three sentences are to be served consecutively to each other and to the life sentence imposed for the first-degree murder conviction. 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 also allowed his motion to bypass the Court of Appeals on his appeal from the additional judgments.

The State's evidence tended to show the following. Shortly after 7:00 p.m. on 4 April 1991, members of the Southern Pines Police Department, including the victim, Detective Ed Harris, investigated a report of gunshots at the Holiday Town Apartments in Southern Pines, North Carolina. A large group gathered in the parking lots and grassy common areas of the apartment complex and a heated exchange of words took place between Detective Harris and Bernice McDougald, a reputed drug dealer.

After the officers left the apartment complex, McDougald met with seven other people, including the defendant. McDougald told the group that Detective Harris was "f---ing up the business" and that he was going to "get rid of" Harris that night. At the time McDougald made these statements, three members of the group, including the defendant, were armed. Two of the group members held 30-30 rifles, while the defendant was armed with

a 9-millimeter semi-automatic handgun. McDougald subsequently procured his own 30-30 rifle.

Once McDougald had armed himself, he told another member of the group, Shannon McKenzie, that McKenzie was to knock on the front door of Harris' home. McDougald instructed the defendant that when Harris answered the door, the defendant was to "shoot the s--- out of him." The defendant made no reply. McDougald then stated that he would also shoot Harris.

The group traveled by car to the Harris residence in another part of Southern Pines. While in the car, McDougald told the group that if anyone wanted to back out, they could. The defendant then stated that he was going to do what he had to do and that if he saw fear in anyone's eyes, he would kill them.

The group arrived at the Harris residence around 10:00 p.m. They drove a short distance beyond the house and stopped. The driver, John Chisolm, was told to drive around and return in twenty-five minutes. The other seven members of the group, including the defendant, then walked to Detective Harris' home. As they approached the house, a car pulled up and Harris' son, Anthony, got out of the car and went inside the house.

After the car drove away, Shannon McKenzie and the defendant walked to the front door of the Harris residence. McKenzie rang the doorbell and ran. Harris was sitting in his den with his wife, Judy, when the doorbell rang. Harris got up and opened the door leading from the den into a utility room. At the opposite end of the utility room was the front door to the house. Detective Harris closed the door leading into the den, turned on the front porch light and opened the front door. The defendant then shot Harris at least four times through the screen and glass storm door. McDougald also shot Harris. The defendant ran away from the house toward the highway, where he found McKenzie, Chisolm and the getaway car. Once in the car, the defendant exclaimed, "I got him, I got him."

McKenzie explained at trial that because Chisolm "looked scary," the defendant and McKenzie got out of the car and began running. They eventually came upon McDougald, who was with two other members of the group. After walking for some time, the five men decided to go to the mobile home of one Anna Hurd. Once there, they washed themselves and McDougald wiped down the weapons

and hid them under a bed. McDougald also sprayed himself with Hurd's perfume so that anyone who subsequently encountered him would think that he had been with a woman.

McDougald asked Hurd to drive the men to the Fox Club, a local nightclub. After passing a police car on the road, however, McDougald decided that he did not want to go to the Fox Club, so he asked Hurd to drive them to "the projects."

The following morning, Anna Hurd learned of Detective Harris' murder from a television news report and drove to the Holiday Town Apartments. She saw the defendant and Terry Evans, another of the eight men who had travelled to Detective Harris' home the previous night. As Hurd approached and asked what was going on, both men smiled and Evans began to chant, "Ed is dead, Ed is dead." The defendant then said to Hurd, "We did it. Yes, you heard what he said, we did it. We did it, we did it. It is finished." The defendant then walked over to Hurd's car, in which Hurd's niece, Patrice Hurd, was sitting. The defendant told Patrice that he had shot Detective Harris. The defendant said that he was expecting to collect $20,000 and asked Patrice if she wanted to accompany him to the Bahamas.

Bullets or parts of bullets had also traveled through the door leading into the den of the Harris home. One of these bullets had severed one of Judy Harris' fingers. After hearing the shots, Anthony Harris had run into the utility room and had found his father lying in a pool of blood and glass. Detective Harris was still conscious and attempted to speak to Anthony. Although he could not make it out clearly, Anthony thought his father said, "Wendell McLaurin" and "black, male, projects." Mrs. Harris had then pulled Detective Harris' patrol car around to the front of the house and Anthony placed Detective Harris in the backseat of the car. On their way to the hospital, Anthony attempted in vain to revive his father.

An autopsy revealed that Detective Harris had suffered gunshot wounds to the face, wrist, chest, back and abdomen. These wounds caused his death. The defendant presented no evidence at his trial. Other pertinent evidence is discussed at other points in this opinion where it is relevant.

By his first assignment of error, the defendant contends that his convictions and sentences for conspiracy to commit first-degree

murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property must be vacated because they arose out of the same conduct underlying the first-degree murder conviction and therefore constitute improper multiple punishments for the same offense. Specifically, the defendant insists in his brief that he "is unfairly being punished sixty extra years in three multiple convictions even though he only had one course of conduct involving one mental element and one physical act." He therefore maintains that the trial court erred in denying his motions to dismiss those charges at the close of the State's evidence and his motions to arrest the judgments entered on those charges. We disagree.

We first observe as a general matter that "it is well established that two or more criminal offenses may grow out of the same course of action." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). In such a situation, "the perpetrator may be convicted of and punished for both crimes." *Id.* at 524, 243 S.E.2d at 352. We now turn to the defendant's specific arguments regarding each of his convictions.

[1] With regard to his conviction for conspiracy to commit first-degree murder, the defendant argues that where, as here, a defendant "is separately being punished for murder," a conviction for conspiracy to commit murder "should not lie." It is a fundamental principle of substantive criminal law, however, that a defendant properly may be convicted of, and punished for, both conspiracy and the substantive offense which the defendant conspired to commit. *See, e.g., State v. Lowery*, 318 N.C. 54, 74, 347 S.E.2d 729, 742-43 (1986); *State v. Brewer*, 258 N.C. 533, 559-60, 129 S.E.2d 262, 280-81, *appeal dismissed*, 375 U.S. 9, 11 L. Ed. 2d 40 (1963). This is so because " 'the crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result.' " *Lowery*, 318 N.C. at 74, 347 S.E.2d at 742 (quoting *State v. Small*, 301 N.C. 407, 428 n.14, 272 S.E.2d 128, 141 n.14 (1980)). Therefore, the defendant in the present case properly was convicted of, and punished for, both conspiracy to commit murder and first-degree murder.

[2] With regard to his conviction for assault with a deadly weapon with intent to kill inflicting serious injury, the defendant insists that the trial court erred in failing to dismiss the charge or arrest judgment on the conviction because he had no intent to assault

Judy Harris. He argues that the evidence at trial only tended to show that his assault upon Mrs. Harris was "incidental" to the shooting of Detective Harris. In its instructions on the felonious assault charge, the trial court instructed the jury on the doctrine of transferred intent. Under this doctrine, "it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required mental element toward *someone*, that intent suffices as the intent element of the crime charged as a matter of substantive law." *State v. Locklear*, 331 N.C. 239, 245, 415 S.E.2d 726, 730 (1992) (emphasis added); *see also State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) ("It has been aptly stated that '[T]he malice or intent follows the bullet.' "). The requisite mental state for assault with a deadly weapon with intent to kill inflicting serious injury is the intent to kill. *See State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994); *see also* N.C.G.S. § 14-32(a) (1993). The defendant in the present case concedes that the evidence tended to show that he possessed the intent to shoot and kill Detective Harris. Under the doctrine of transferred intent, this intent suffices as the intent element for the felony of assault upon Mrs. Harris with a deadly weapon with intent to kill inflicting serious injury.

The defendant further maintains that where a defendant is being punished separately for murder, an assault conviction arising out of the same circumstances surrounding the murder and based on the doctrine of transferred intent "should not lie." However, the defendant fails to cite, and we have not found, any authority to support this proposition. We conclude that the defendant in the present case was properly convicted of, and punished for, assault with a deadly weapon with intent to kill inflicting serious injury.

[3] With regard to his conviction for discharging a firearm into occupied property, the defendant argues that the trial court erred in failing to dismiss the charge or arrest judgment upon his conviction because he did not intend to discharge a firearm into occupied property. He argues that the evidence only tended to show that he intended to shoot Detective Harris "wherever and whenever he first saw him." The evidence presented at the defendant's trial belies this assertion, however. The evidence tended to show that Bernice McDougald instructed Shannon McKenzie that McKenzie was to knock on the front door of Detective Harris' home. When Harris came to the door, the defendant was to shoot Harris immediately. McDougald, McKenzie, the defendant and five others

then drove to the Harris residence and executed their plan. This was sufficient evidence from which a rational trier of fact could find, as the jury did in this case, that the defendant intended to fire his weapon into an occupied dwelling. *See State v. Wilson*, 315 N.C. 157, 163, 337 S.E.2d 470, 474 (1985) ("While intent is a state of mind sometimes difficult to prove, the mind of an alleged offender may be read from his acts, conduct, and inferences fairly deducible from all of the circumstances.").

The defendant also maintains that there is no rationale to support the discharging a firearm conviction in the present case because the purpose underlying this offense, which the defendant believes to be "to protect unknown and unseen occupants of a dwelling from being hit by a bullet," was satisfied by his assault conviction. In *State v. Shook*, 293 N.C. 315, 237 S.E.2d 843 (1977), we held that a defendant properly could be convicted of, and punished for, both discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. In *Shook*, the defendant fired into a tavern which was occupied by a number of patrons. While the shots were intended for one Yarborough, whose automobile the defendant thought he had identified outside of the tavern, one of the bullets penetrated a piece of plywood and struck another patron. The defendant complained that the trial court erred in denying his motion to arrest judgment because the two offenses in fact constituted only one offense, thereby exposing him to double jeopardy. We rejected this contention, explaining that the two offenses are "entirely separate and distinct." *Id.* at 320, 237 S.E.2d at 847. Although *Shook* dealt with a double jeopardy challenge, it is instructive in the present case. We conclude that discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes. The defendant in the case at bar was properly convicted of, and punished for, both offenses.

Having rejected the defendant's general assertions in support of this assignment and his specific arguments regarding each offense, we conclude that this assignment of error is without merit.

[4] By his next assignment of error, the defendant argues that he is entitled to a new trial because the trial court erroneously denied his motion for a mistrial on the ground that the prosecutor had improperly referred to his exercise of his right to remain silent following his arrest. We do not agree.

Prior to trial, the defendant moved to prohibit the State from making any reference to his exercise of his right to remain silent. The trial court ordered the State "not to present any evidence that the [d]efendant refused to make a statement after having been advised of his *Miranda* rights," but stated that it would allow the State to "present evidence that the [d]efendant was advised of and understood his *Miranda* rights." At trial, the prosecution called SBI Agent Michael Wilson who testified that he had interviewed Anna Hurd on the day after Detective Harris' murder. The following dialogue then took place:

[PROSECUTOR]: Did you interview anybody else that day?

[WILSON]: Yes, sir, I did.

[PROSECUTOR]: What other individual did you interview?

[WILSON]: I interviewed [the defendant].

[PROSECUTOR]: What time was the first time you saw [the defendant]?

[WILSON]: The first time I saw [the defendant] was at approximately 9:15 or 9:20 p.m. on . . . April 5th.

At this point the defendant's counsel objected and moved to strike. Out of the jury's presence, the prosecutor explained that he was merely attempting to elicit the exact time of the defendant's arrest, which he explained was "important . . . based on some of the cross-examination that [the defendant's counsel] has heretofore engaged in." The defendant's counsel then moved for a mistrial. The trial court denied the motion for a mistrial and sustained the defendant's objection to the prosecutor's last question. The trial court then told the prosecutor that since there was "not an interview as such," the matter "needs to be corrected" so as not to "leav[e] the jury with an inappropriate notion." The prosecutor replied, "I will just ask the officer did he interview the defendant. Is that satisfactory?" The defendant's counsel responded, "Yes, that's all right."

The jury was returned to the courtroom and Agent Wilson testified that the defendant had been arrested "at approximately 9:15." The following dialogue then occurred:

[PROSECUTOR]: You did not interview him at that time, did you?

[WILSON]: No, I did not.

[PROSECUTOR]: Would that be a.m. or p.m.?

[WILSON]: That would be p.m.

[PROSECUTOR]: On what date?

[WILSON]: April 5th, 1991.

The trial court then excused the jury while the court and both parties discussed an unrelated matter.

While the jury was out of the courtroom, the defendant's counsel renewed his previous objection and motion for a mistrial, explaining that he was expecting the prosecutor to establish that Agent Wilson had not interviewed the defendant at *any* time. The trial court instructed the prosecutor to clarify the matter immediately. Upon the jury's return to the courtroom, the prosecutor clarified the matter as follows:

[PROSECUTOR]: Just to clarify one thing, Special Agent Wilson, you never at any time interviewed the defendant, is that correct?

[WILSON]: That's correct.

The defendant now contends that the prosecutor's examination of Agent Wilson constituted an "erroneous unconstitutional comment" on the defendant's exercise of his right to remain silent. Specifically, the defendant argues that the combination of Agent Wilson's original testimony that he had interviewed the defendant and the lack of any evidence regarding any statement given by the defendant led the jury to conclude either that he had refused to give a statement or that he had successfully suppressed an inculpatory statement. The defendant further maintains that the trial court's attempts to remedy the error only served to compound the prejudice by unduly emphasizing Agent Wilson's testimony. Finally, the defendant insists that a mistrial was warranted because the prosecutor's improper examination of Agent Wilson was an intentional violation of the court's pretrial order.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the Supreme Court of the United States explained that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." *Id.* at 468 n.37, 16 L. Ed. 2d at 720 n.37; *see also State v. Williams*, 305 N.C. 656, 673-74, 292 S.E.2d 243, 254, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74

L. Ed. 2d 1031 (1983) (explaining that arguments of this sort are based on footnote thirty-seven of *Miranda*). Therefore, the prosecution in a criminal trial may not "use . . . the fact that [the defendant] stood mute or claimed his privilege in the face of accusation." *Id.* This Court has affirmed this principle in a number of cases. *See, e.g., State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 199-200, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 602 (1993); *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983); *State v. McCall*, 286 N.C. 472, 483-84, 212 S.E.2d 132, 139 (1975).

In the present case, however, the prosecution did not make use of the defendant's exercise of his right to remain silent following his arrest. Neither the prosecutor's questions nor Agent Wilson's responses ever expressly referred to the defendant's exercise of his right to remain silent during custodial interrogation. Instead, Agent Wilson twice clarified that he had not actually interviewed the defendant. Therefore, we conclude that the State's examination of Agent Wilson did not constitute an improper comment on the defendant's exercise of his right to remain silent. The trial court thus did not err in denying the defendant's motion for a mistrial. We reject this assignment of error.

[5] By another assignment of error, the defendant maintains that he is entitled to a new trial because the trial court erroneously allowed a State's witness to invoke the attorney-client privilege and thereby refuse to answer certain questions on cross-examination. We disagree.

The witness in question, Mr. Charles L. Hicks, had briefly served as Shannon McKenzie's appointed counsel until McKenzie's family retained a private attorney. The State called Mr. Hicks for the purpose of corroborating McKenzie's testimony. Mr. Hicks testified, over the defendant's objection, that he had engaged in a three-hour conversation with McKenzie on 9 April 1991, during which McKenzie and he had discussed the events surrounding the murder of Detective Harris. Mr. Hicks then read to the jury a lengthy memorandum he had generated detailing the substance of his conversation with McKenzie.

On cross-examination, the defendant's counsel asked Mr. Hicks whether McKenzie and he had discussed "the potential benefits of making some type of a statement that would be conceivably useful to the State." Mr. Hicks responded by invoking the attorney-client privilege and professing his belief that "I have authority

from my client to testify as to what he told me happened that particular night and nothing further." On redirect examination, Mr. Hicks testified that McKenzie had not entered into any agreement with the State during the period of Mr. Hicks' representation. On re-cross examination, Mr. Hicks again invoked the attorney-client privilege when asked whether McKenzie and he had discussed "the benefits of making a deal."

The defendant now contends that the trial court erred in allowing Mr. Hicks, based upon the attorney-client privilege, to refuse to answer, because McKenzie's waiver of the privilege with regard to a portion of the conversation (the portion dealing with the events surrounding Detective Harris' murder) constituted a waiver of the privilege with regard to the entire conversation. Assuming, *arguendo*, that the trial court erred in permitting Mr. Hicks to refuse to answer and that the error was of constitutional magnitude, we conclude that the error was harmless. *See* N.C.G.S. § 15A-1443(b) (1988).

The defendant insists that the trial court's alleged error was prejudicial because it deprived him of evidence that McKenzie had contemplated a plea arrangement with the State and therefore "had an early scheme and motive to lie." McKenzie himself had already testified, however, that the State had permitted him to plead guilty to second-degree murder and conspiracy to commit murder in exchange for his truthful testimony at the defendant's trial. McKenzie also read the terms of his plea arrangement to the jury. Although McKenzie testified that he had not reached an agreement with the State regarding his sentence, he admitted on cross-examination that his testimony had kept him "from facing the death penalty" and that he hoped his testimony would "help" him when it came time for him to be sentenced. In light of such evidence, any testimony by Mr. Hicks to the effect that McKenzie and he had discussed the possible benefits of a plea arrangement would have been cumulative evidence. Thus, the record before us clearly establishes that any error in allowing Mr. Hicks to refuse to testify about any such discussion was harmless beyond a reasonable doubt. We therefore reject this assignment of error.

[6] By his next assignment of error, the defendant contends that the trial court erroneously overruled his objections during the guilt-determination phase of his trial to expert testimony regarding the painful nature of Detective Harris' wounds. Dr. Deborah L. Radisch,

the Associate Chief Medical Examiner of the State of North Carolina, performed the autopsy on Detective Harris' body. Dr. Radisch testified on behalf of the State that Detective Harris had suffered gunshot wounds to his face, wrist, chest, back and abdomen. Over the defendant's objection, Dr. Radisch also testified about the pain Detective Harris would have experienced as a result of the wounds to his chest, abdomen, wrist and back. The defendant insists that the trial court erred in overruling his objections to this testimony because it was irrelevant and therefore inadmissible. We disagree.

In *State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991), we explained that "[i]n determining whether a defendant acted after premeditation and deliberation, the nature of [the] wounds to a victim is a circumstance to be considered." *Id.* at 162, 405 S.E.2d at 177. We therefore concluded that expert testimony from the medical examiner who had performed the autopsy on the victim regarding the amount of time it would have taken the victim to die from each individual wound was relevant and admissible "to show the number and severity of the wounds." *Id.* at 162-63, 405 S.E.2d at 177; *see also State v. Ginyard*, 334 N.C. 155, 159, 431 S.E.2d 11, 13 (1993); *State v. Bray*, 321 N.C. 663, 671, 365 S.E.2d 571, 576 (1988). Similarly, we conclude in the present case that Dr. Radisch's testimony regarding the pain associated with the individual wounds suffered by Detective Harris was relevant and admissible; it tended to show the severity and nature of the wounds and assisted the jury in determining whether the defendant acted after premeditation and deliberation. Accordingly, this assignment of error is without merit.

[7] By another assignment of error, the defendant argues that the trial court erred in failing to exclude hearsay testimony of two State's witnesses. The first of these witnesses, Scott Fairly, testified that he was present when the defendant and his accomplices conspired to murder Detective Harris, but that he did not accompany the group to the Harris residence. Over the defendant's objection, Fairly testified about a number of statements made by Bernice McDougald in the defendant's presence. On appeal, the defendant specifically complains of the following statements made in the defendant's presence by McDougald on the night of the murder and subsequently related to the jury by Fairly: (1) that Detective Harris was "f---ing up the business," (2) that McDougald needed money to buy a house and Detective Harris was "in the way of making this money," (3) that McDougald had flushed an ounce of cocaine

down a toilet on the night of the murder and (4) that Harris "is just f---ing me up. I need me a house." The second witness in question, Anna Hurd, testified over the defendant's objection that while she was driving the five members of the group to the Fox Club, someone said to her that if they came upon a roadblock, she was "to stop and let them out," that she would then be "on [her] own" and that if anyone asked, she "hadn't seen them." The defendant insists that by overruling his objections to this testimony, the trial court improperly allowed the State to elicit inadmissible hearsay statements made by Bernice McDougald and other members of the group that conspired to murder Detective Harris. We do not agree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). However, "[w]hen evidence of such statements by one other than the witness testifying is offered for a proper purpose other than to prove the truth of the matter asserted, it is not hearsay and is admissible." *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990); *see also State v. Reid*, 335 N.C. 647, 661, 440 S.E.2d 776, 784 (1994). For example, a statement made by one person to another is not hearsay if introduced for the purpose of explaining the subsequent conduct of the person to whom the statement was made. *Id.*

In the present case, the statements of Bernice McDougald which Fairly related to the jury were offered not to prove the truth of any matter asserted therein, but rather to explain the subsequent conduct of the defendant and his accomplices in shooting Detective Harris and the context in which the murder occurred. The exact words used by McDougald thus were not important to the case; what *was* important was that McDougald made a statement and the remainder of the group responded. *Reid*, 335 N.C. at 661, 440 S.E.2d at 784. As the statements were offered not to prove the truth of the matter asserted, but rather for some other, proper purpose, they were not hearsay and were admissible. *Id.*; 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 192 (4th ed. 1993).

Similarly, the statements related to the jury by Anna Hurd were offered not to prove the truth of the matter asserted, but rather merely to show that the statements were made. *See State*

v. Faucette, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990) (explaining that evidence is not hearsay if offered only to prove that a statement was made). Indeed, the statements related to the jury by Anna Hurd were directives to take action; they "asserted" no "matter" which could be subjected to any evaluation for truthfulness and could not have been hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992). Hurd merely testified that someone said to her that if they came upon a roadblock, she was "to stop and let them out," that she would then be "on [her] own" and that if anyone asked, she "hadn't seen them." These statements were introduced merely to show that they were made and to shed light on the circumstances surrounding the murder of Detective Harris and the conduct of the defendant and his accomplices immediately thereafter. *See State v. Meekins*, 326 N.C. 689, 695-96, 392 S.E.2d 346, 349 (1990) ("Any evidence offered to shed light upon the crime charged should be admitted by the trial court."). The statements therefore were properly admitted.

The trial court properly allowed the testimony of Scott Fairly and Anna Hurd complained of by the defendant. This assignment of error is without merit.

[8] By his next assignment of error, the defendant insists that the trial court erred in denying his request for a special instruction on accomplice testimony. Without objection from the defendant, the trial court instructed the jury on accomplice testimony in accord with the appropriate pattern jury instruction on this issue. *See* N.C.P.I.—Crim. 104.25 (1986). At the conclusion of its charge to the jury, the trial court stated that it would "consider any requests or corrections to the charge or any other additional matters which anyone deems necessary for the court to submit a proper and accurate charge to the jury." The defendant requested the following special instruction on accomplice testimony:

> The promise [to give truthful testimony] in the cooperation agreement between [Shannon] McKenzie and the State adds little to the truth-telling obligation imposed by the oath. The prosecutor often has no way of knowing whether the witness is telling the truth or not. The books are not filled with perjury indictments of government witnesses who have gone beyond the facts and an acquittal would not mean that as a matter of course the government would seek such an indictment or even fail to make its promised recommendation of leniency.

The trial court denied the defendant's request, reasoning that the pattern jury instruction already given was adequate and appropriate. We agree with the trial court.

The defendant seems to have taken the requested instruction at issue nearly verbatim from a concurring opinion in *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir.), *cert. denied*, 439 U.S. 913, 58 L. Ed. 2d 260 (1978) (Friendly, J., concurring). In his concurring opinion in that case, Judge Friendly was concerned with an Assistant United States Attorney's repeated references during closing argument to a witness' plea arrangement with the government. The majority had found no error in the prosecutor's remarks. While Judge Friendly agreed that the defendant was not entitled to a new trial, he expressed his concern with the prosecutor's repeated references to the witness' motivation for testifying truthfully. Judge Friendly deemed these remarks to be "prosecutorial overkill" and explained that had the defendant objected to the remarks, the trial court should have sustained the objection. *Id.* Judge Friendly felt that "if matters had gone too far to make a striking of the remarks an effective cure," the trial court should have instructed the jury in accord with the instruction requested by the defendant Morston in the present case. *Id.*

We see no need for such an instruction in the present case. The trial court instructed the jury on accomplice testimony as follows:

> There is evidence which tends to show that the witness, Shannon McKenzie, was an accomplice in the commission of the crime as charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to accomplish the crime or he may knowingly help and encourage another in the crime either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of this witness with the greatest care and caution. If after doing so you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

As previously noted, this instruction is identical in all material respects to the appropriate pattern jury instruction on accomplice testimony. *See* N.C.P.I.—Crim. 104.25 (1986). Further, it was more than adequate to address the concerns associated with the credibili-

ty of accomplice testimony generally and the testimony of Shannon McKenzie in particular. No additional instruction on the issue was necessary. *Cf. State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991) ("The 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."). The trial court thus did not err in refusing to give the defendant's requested special instruction. We overrule this assignment of error.

[9] By another assignment of error, the defendant argues that he is entitled to a new trial on the charge of first-degree murder because the trial court erred in denying his request to submit a possible verdict of second-degree murder for consideration by the jury. We do not agree.

First-degree murder "is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); *see also* N.C.G.S. § 14-17 (1993). A killing is "premeditated" if "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. A killing is "deliberate" if the defendant acted "in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* Premeditation and deliberation "generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence." *Id.*

Where a defendant is charged with premeditated and deliberate first-degree murder, an instruction on the lesser-included offense of second-degree murder need be given "only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater." *State v. Strickland*, 307 N.C. 274, 287, 298 S.E.2d 646, 654 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *see also Hopper v. Evans*, 456 U.S. 605, 611, 72 L. Ed. 2d 367, 373 (1982). As we have previously explained:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of

> murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Strickland, 307 N.C. at 293, 298 S.E.2d at 658; *see also State v. Eason*, 328 N.C. 409, 430, 402 S.E.2d 809, 820 (1991).

The defendant insists that positive evidence was introduced in the present case directly tending to negate the elements of premeditation and deliberation. The defendant argues that the evidence tended to show, *inter alia*, that Bernice McDougald was the clear leader of the group which carried out the murder of Detective Harris, that the defendant had remained silent for the most part and that the defendant had "made few conscious decisions" on the night of the murder.

Other evidence tended to show, however, that the defendant willingly conspired to murder Detective Harris and carried this conspiracy through to its completion. Although the defendant did not speak when instructed by McDougald to "shoot the s--- out of [Detective Harris]," the defendant manifested his assent by his subsequent voluntary participation. The defendant also provided verbal confirmation of his intentions by stating that he was going to do what he had to do and that if he saw fear in the eyes of anyone, he would kill them. Once the group arrived at the Harris residence, the defendant, pursuant to the plan formulated at the Holiday Town Apartments, waited for Detective Harris to answer his door and then fired on Detective Harris at least four times. The defendant then fled and attempted to conceal his participation in the killing by washing himself and relinquishing his weapon to McDougald. On at least two occasions following the murder, the defendant boasted of his role as the perpetrator.

We conclude that this evidence was "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." *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658. Even if it is assumed, as the defendant contends, that substantial evidence tended to show that Bernice McDougald was the "leader" of the group which carried out the murder of Detective Harris, and that the defendant "remained silent for the most part" and "made few conscious decisions" on the night of the murder, such evidence

was insufficient to support a conviction for second-degree murder. The evidence that the defendant was the person who actually killed Detective Harris and that he did so by driving to the Harris home and inflicting multiple gunshot wounds on Detective Harris after more than ample time and opportunity to consider and reject killing the victim was essentially uncontroverted. This evidence would only have justified submitting possible verdicts of guilty of first-degree murder or not guilty. *Id.*

[10] The defendant also argues in support of this assignment that positive evidence at trial tending to show that he did not have the capacity to premeditate and deliberate required submission of a possible verdict of guilty of second-degree murder to the jury in this case. Specifically, various witnesses testified that the defendant had consumed "a considerable amount" of gin less than one hour before Detective Harris' murder, that the defendant had mixed crack cocaine and a pain reliever with his gin, that the defendant's eyes were "big and red" and that the defendant "looked like he was high." Although some evidence exists tending to show that the defendant had consumed alcohol and possibly illicit drugs on the night of the murder, it was insufficient to support an instruction by the trial court on voluntary intoxication raising an issue for the jury as to whether the defendant was so intoxicated by voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 347-49, 372 S.E.2d 532, 537-38 (1988); *cf. State v. Baldwin*, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (evidence that the defendant had consumed "about five or six" beers and an "indeterminate amount" of illicit drugs at some time prior to the murder was insufficient to show that he was so intoxicated as to be incapable of forming the intent necessary to commit premeditated and deliberate murder); *State v. Strickland*, 321 N.C. 31, 41-42, 361 S.E.2d 882, 888 (1987) (evidence that the defendant "had had two drinks" earlier on the evening of the murder was insufficient to show that he was so intoxicated at the time of the crime that he was incapable of forming the intent necessary to commit first-degree murder).

For the foregoing reasons, we conclude that none of the evidence pointed to by the defendant, nor any inference which could fairly be drawn therefrom, tended to show a homicide of a lower grade than first-degree murder. Thus, the evidence in the case at bar would not permit a jury to rationally find the defendant guilty of second-degree murder. *Strickland*, 307 N.C. at 287, 298 S.E.2d

at 654. Accordingly, the trial court did not err in refusing to submit such a possible verdict to the jury. This assignment of error is without merit.

[11] The defendant contends by his next assignment of error that he is entitled to a new trial because of several allegedly improper remarks made by the prosecutors during their closing arguments to the jury. We do not agree.

Trial counsel are allowed wide latitude in jury arguments. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Counsel are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences to be drawn therefrom. *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Control of closing arguments is in the discretion of the trial court. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

> Additionally, as this Court has previously pointed out, "for an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial error.' " *Soyars*, 332 N.C. at 60, 418 S.E.2d at 487-88 (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977)). In order to reach the level of "prejudicial error" in this regard, it now is well established that the prosecutor's comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157, *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431 (1974)).

State v. Green, 336 N.C. 142, 186, 443 S.E.2d 14, --- (1994). In the present case, the defendant contends that several portions of the arguments of the prosecutors denied him due process and thereby amounted to prejudicial error. We address each of the defendant's contentions in support of this assignment individually.

During closing arguments, one prosecutor stated:

> Don't get confused about non-issues. [Defense counsel] has talked about certain witnesses that the State didn't call. He has talked about that. That is not the evidence members of the jury. That's not evidence of what witnesses the State has or has not called. I am not suggesting to you that the defendant has any burden in this case but you can turn that issue around.

> If there was some Wendell McLaurin out there, if there was a Wendell McLaurin in the phone book, if there was a Wendell McLaurin in the City Directory in Southern Pines or Aberdeen or Moore County, don't you think that would have been brought to your attention by the defendant?

The defendant objected and moved for a mistrial. The trial court denied the defendant's motion for a mistrial but sustained his objection. The trial court then instructed the jury: "You will not consider the last part of the argument. The defendant has no pertinent duty of any kind to prove anything. Remember that; that's been told to you in the past."

The prosecutor then argued at considerable length concerning the evidence and testimony of witnesses introduced at trial. During the review of such evidence and witnesses, the prosecutor stated at one point, "Where is Wendell McLaurin, if such a person ever existed?" Counsel for the defendant moved to strike that statement. The trial court had the jury removed to the jury room. Counsel for the defendant then acknowledged that the statement of the prosecutor was "perhaps not objectionable in and of itself," but contended that in light of the previous argument of the prosecutor, it tended to shift the burden of producing evidence to the defendant. The trial court then stated: "We should refrain from any way implying that the defendant has any duty to bring Mr. McLaurin here. Both of you obviously have a right to talk about Mr. McLaurin. I think the way this last argument went it is not objectionable and I overrule the objection."

It is well established that a prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986). Here, at worst, the prosecutor merely commented on the defendant's failure to produce a witness to refute the State's case. Such statements do not constitute impermissible comments. *Id.* Additionally, the prosecutor's statements were by way of reply to a comment by counsel for the defendant concerning the absence of the alleged witness in question. This argument is without merit.

[12] The defendant next argues in support of this assignment that the prosecutor made an improper argument to the jury concerning the impact and effect of the crimes committed by the defendant on the victim's wife and son and the community. Specifical-

ly, the defendant contends that prejudicial error was committed when the prosecutor was permitted to argue as follows:

> Ladies and gentlemen, Judy Harris and Anthony Harris are as much victims in this case as Ed Harris. You could see that and you could feel that in their testimony. You saw the stress that they were under, the pressure that they were under, the effort to maintain their composure and to keep from crying. They were fighting back tears. . . . What happened at Ed Harris' house . . . was a great tragedy. Not only for Ed Harris. Not only for Judy and Anthony Harris. Not only for the Southern Pines Police Department but also for this community. If a person can't be safe in his own home, if his family can't be safe in their house, what have we come to? . . . The bullets that tore through Ed Harris' body . . . shattered the lives of several people. It killed Ed Harris. Judy Harris and Anthony Harris, their lives will never ever be the same again. . . . It was a bad dream that Anthony Harris and Judy Harris will never wake up from.

Viewed in context, we do not believe that the arguments complained of here were improper. *See, e.g., State v. Rogers*, 323 N.C. 658, 661-64, 374 S.E.2d 852, 855-56 (1989); *State v. Cummings*, 323 N.C. 181, 190-93, 372 S.E.2d 541, 548-49 (1988), *vacated and remanded on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990). Certainly they did not descend to the level of a denial of due process. This argument is without merit.

[13] The defendant next argues in support of this assignment that the prosecutor misrepresented the evidence by stating that Shannon McKenzie, who had pled guilty to one count of second-degree murder and one count of conspiracy to commit murder, was facing a "life plus" sentence or a sentence of "life imprisonment plus 30 years." We conclude that this argument was fully supported by the evidence and was not improper. Therefore, the trial court did not err in denying the defendant's objection when the argument was made.

[14] Finally, the defendant argues in support of this assignment of error that the trial court erred by permitting the prosecutor to argue as follows:

> You all have an obligation and a duty in this case based upon all the evidence that you have heard . . . to find the defendant

> guilty. The law enforcement officers have done their jobs. They have investigated this case. Scott Fairly, Shannon McKenzie, Patrice Hurd, Anna McLean [Hurd] have given testimony. They have done what they were required to do pursuant to a subpoena to come to court. Members of the jury . . . we can have all the law we want on the books. It is against the law to commit murder. . . . When it gets right down to it, members of the jury, the buck stops with you. We can have those laws on the books. We can have witnesses to come in to testify. We can have investigators to investigate but until you are willing to convict people who have been proven guilty beyond a reasonable doubt, the law is nothing but words on paper.

The defendant contends that this was an improper argument by the prosecutor to the effect that the jurors were accountable to the police, the witnesses, the community and society in general. He argues that this caused the jury to base its verdict on its perceived accountability to those groups rather than on the evidence presented at trial. We do not agree with this reading of the prosecutor's argument. Instead, we perceive the argument as a proper argument contending that the jurors had an obligation to convict based upon the evidence which had been introduced at trial and which had been discovered due to the proper performance of law enforcement officers and witnesses. This argument is without merit.

For the foregoing reasons, we have rejected the defendant's arguments in support of this assignment. This assignment of error is without merit and is overruled.

[15] By another assignment of error, the defendant maintains that he is entitled to a new trial with regard to his conviction for assault with a deadly weapon because the trial court's instructions on the doctrine of transferred intent were unconstitutional. Specifically, the defendant contends that the trial court's instructions established a conclusive presumption that relieved the State of its burden of proof. The defendant acknowledges, however, that we have previously rejected this contention. *See State v. McHone*, 334 N.C. 627, 644, 435 S.E.2d 296, 306 (1993), *cert. denied*, --- U.S. ---, --- L. Ed. 2d --- (1994); *State v. Locklear*, 331 N.C. 239, 244-46, 415 S.E.2d 726, 729-30 (1992). Having considered the defendant's argument with regard to this issue, we find no compelling reason to depart from our prior holdings which the defendant correctly recognizes as dispositive. This assignment of error is without merit.

[16] By his next assignment of error, the defendant argues that he is entitled to resentencing on his conviction for conspiracy to commit murder because the trial court improperly employed the same evidence to prove more than one aggravating factor under the Fair Sentencing Act. Among the factors the trial court found in aggravation of the defendant's conspiracy conviction were that "[t]he offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws" *and* that "[t]he offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws." *See* N.C.G.S. § 15A-1340.4(a)(1)(d) (1988 & Supp. 1993). The defendant argues that the trial court erroneously relied upon the same evidence in finding both of these aggravating factors. We agree.

Under the Fair Sentencing Act, "the same item of evidence may not be used to prove more than one factor in aggravation." N.C.G.S. § 15A-1340.4(a)(1). We have recognized and applied this principle on a number of occasions. *See, e.g., State v. Kyle*, 333 N.C. 687, 705, 430 S.E.2d 412, 422 (1993); *State v. Erlewine*, 328 N.C. 626, 638, 403 S.E.2d 280, 287 (1991); *State v. Davis*, 325 N.C. 607, 633, 386 S.E.2d 418, 432 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. Brown*, 312 N.C. 237, 250, 321 S.E.2d 856, 863-64 (1984).

In the present case, the trial court used the same item of evidence—that the defendant had conspired with Bernice McDougald and others to murder a law enforcement officer who was interfering with their drug trade—as the basis for finding both aggravating factors. This is contrary to the statutory mandate and therefore constitutes error.

The State contends, however, that the trial court in fact did not find both of these aggravating factors. The State notes that while the sentencing form indicates that the trial court found both factors, the transcript contains the following statement of the trial court to the contrary:

> In case No. 91-CRS-1442 wherein the jury has unanimously returned a verdict of guilty of conspiracy to commit murder . . . [t]he court will find as aggravating factors, aggravating factor [No.] 4b, that the offense was committed to *hinder* the lawful exercise of a governmental function or the enforcement of the law, No. 5, [that] the offense was committed against a present or former law enforcement officer and No. 15, that

> the defendant had prior convictions for criminal offenses punishable by more than 60 days confinement.

(Emphasis added). Based on this portion of the transcript, the State insists that the trial court did not find the aggravating factor that the offense was committed to *disrupt* the lawful exercise of a governmental function or the enforcement of laws. The State therefore argues that the indication on the sentencing form that this aggravating factor had been found by the trial court was merely a clerical error.

While the State may indeed be correct, we believe that the better course is to err on the side of caution and resolve in the defendant's favor the discrepancy between the trial court's statement in open court, as revealed by the transcript, and the sentencing form. *Cf. State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) ("Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, . . . we resolve the ambiguity in favor of the defendant."); *State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11-12 (1971) (where the trial court stated in open court that the defendant would be sentenced to six years imprisonment, but the signed judgment indicated a sentence of eight years imprisonment, the court of appeals remanded for imposition of the six-year sentence). We therefore conclude that the trial court improperly found two factors in aggravation on the basis of the same item of evidence. Thus, while the verdict returned against the defendant for conspiracy to commit murder shall remain undisturbed, the sentence for this offense must be vacated and this case is remanded to the Superior Court, Hoke County, for resentencing in accordance with the provisions of Articles 81 and 81A of Chapter 15A of the North Carolina General Statutes. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) ("in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing").

[17] By his final assignment of error, the defendant argues that he is entitled to resentencing on his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into occupied property because the trial

court improperly aggravated these offenses under the Fair Sentencing Act with evidence the State had previously used to prove an element of each of these offenses. *See* N.C.G.S. § 15A-1340.4(a)(1). The State concedes that the defendant is entitled to resentencing on these two convictions for this reason. Therefore, while the verdicts returned against the defendant for assault with a deadly weapon with intent to kill inflicting serious injury and for discharging a firearm into occupied property shall remain undisturbed, the sentence for each of these offenses is vacated and these cases are remanded to the Superior Court, Hoke County, for resentencing in accordance with the provisions of Articles 81 and 81A of Chapter 15A of the North Carolina General Statutes. *See Ahearn*, 307 N.C. at 602, 300 S.E.2d at 701.

In summary, we hold that the defendant's conviction of first-degree murder and the sentence of life imprisonment entered thereon were without error. As to each of the other charges against the defendant, we find no error in the guilt-determination phase and leave the verdicts finding the defendant guilty of those crimes undisturbed. However, for reasons previously stated in this opinion, the sentences entered upon those convictions must be vacated and this case remanded to the Superior Court, Hoke County, to the end that the defendant be resentenced for each of those crimes.

NO. 91CRS1442, COUNT #1, FIRST-DEGREE MURDER: NO ERROR.

NO. 91CRS1442, COUNT #2, CONSPIRACY TO COMMIT MURDER: GUILT PHASE, NO ERROR; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING IN ACCORDANCE WITH THE PROVISIONS OF ARTICLES 81 AND 81A OF CHAPTER 15A OF THE NORTH CAROLINA GENERAL STATUTES.

NO. 91CRS3253, COUNT #1, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: GUILT PHASE, NO ERROR; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING IN ACCORDANCE WITH THE PROVISIONS OF ARTICLES 81 AND 81A OF CHAPTER 15A OF THE NORTH CAROLINA GENERAL STATUTES.

NO. 91CRS3253, COUNT #2, DISCHARGING A FIREARM INTO OCCUPIED PROPERTY: GUILT PHASE, NO ERROR;

SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING IN ACCORDANCE WITH THE PROVISIONS OF ARTICLES 81 AND 81A OF CHAPTER 15A OF THE NORTH CAROLINA GENERAL STATUTES.

STATE OF NORTH CAROLINA v. FRED HOWARD COFFEY, JR.

No. 253A91

(Filed 17 June 1994)

1. **Criminal Law § 1355 (NCI4th)— first-degree murder— mitigating circumstance—no significant history of prior criminal activity—activity subsequent to murder but before sentencing—not relevant**

The trial court erred when sentencing defendant for a first-degree murder committed in 1979 by admitting convictions in 1986 as relevant to the mitigating circumstance of no significant history of prior criminal activity. "History of prior criminal activity" in N.C.G.S. § 15A-2000(f)(1) pertains only to that criminal activity committed before the murder; if this language were to refer to defendant's criminal activity up to the time of sentencing, the word "prior" would have no meaning since at the time of sentencing the defendant's criminal activity prior to sentencing is identical to his "history of criminal activity." The only other meaningful point in time is the date of the crime, which is the point of reference for nearly every aggravating and mitigating circumstance, including that aggravating circumstance in N.C.G.S. § 15A-2000(e)(3) pertaining to whether defendant had been previously convicted of a felony involving the use or threat of violence to the person. There was prejudice in that the jury almost certainly considered defendant's entire criminal history in determining whether the mitigating circumstance existed. N.C.G.S. § 15A-1443(a).

Am Jur 2d, Criminal Law §§ 598, 599.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263.

2. Evidence and Witnesses § 2171 (NCI4th)— first-degree murder—sentencing—defense psychiatric experts—cross-examination concerning indecent liberties convictions after murder—prejudicial

The trial court erred in a sentencing hearing for the first-degree murder of a ten year old girl in 1979 by allowing the State to cross-examine a defense psychiatrist and psychologist concerning defendant's indecent liberties convictions in 1986 where the experts had used the convictions as part of the basis for a diagnosis of pedophilia and PTSD. Under N.C.G.S. § 8C-1, Rule 705, a party cross-examining an expert witness may generally inquire into the facts on which the expert's opinion is based, but the court must inquire under N.C.G.S. § 8C-1, Rule 403 whether the testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice. The prejudicial effect of nine counts of indecent liberties is manifest and it is evident that the convictions had little or no probative value for the purpose of supporting the experts' opinions. Moreover, defendant's pedophilia was irrelevant to the aggravating circumstances submitted and does not bear on any of the mitigating circumstances other than the ones dealing with emotional disturbance and impaired capacity, for which it only corroborates the experts' opinions.

Am Jur 2d, Expert and Opinion Evidence §§ 32 et seq.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation. 42 ALR4th 937.

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

Justice MITCHELL dissenting.

Justice MEYER joins in this dissenting opinion.

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from judgment sentencing him to death imposed by Saunders, J., presiding at a resentencing hearing held at the 6 May 1991 Criminal Session of the Superior Court, Mecklenburg County. Heard in the Supreme Court on 3 November 1992.

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

James P. Cooney III, for defendant-appellant.

EXUM, Chief Justice.

On 16 February 1987 defendant was indicted for the first degree murder of ten-year-old Amanda Ray, who died on 18 July 1979. Defendant was convicted at trial on theories of premeditation and deliberation and felony murder, based on the underlying felony of kidnapping. After a sentencing hearing following this trial, the jury recommended a death sentence, and judgment was so entered in October 1987. On appeal to this Court, we found no error in the guilt proceeding, but we ordered a new sentencing hearing because the verdict form employed by the jury did not include an issue as to whether the mitigating circumstances were insufficient to outweigh the aggravating circumstances, as required by N.C.G.S. § 15A-2000(c)(3). *State v. Coffey (Coffey I)*, 326 N.C. 268, 389 S.E.2d 48 (1990). On resentencing, a second jury also recommended the death sentence. The trial court again entered judgment sentencing defendant to death, and defendant appeals from that judgment.

I.

At the resentencing proceeding the State reiterated the facts surrounding the murder. The body of ten-year-old Amanda Ray was found in a wooded area near a lake in Mecklenburg County on 19 July 1979. An autopsy revealed that she had a black eye and bruises and that she died of asphyxiation. An investigation began immediately which produced several witnesses linking Amanda Ray with someone matching defendant's description on 18 July 1979 near a lake. The investigation continued for several years eventually revealing that dog hairs on defendant's couch and in defendant's van matched dog hairs found on Amanda Ray's clothing when her body was found. Defendant was questioned about the death of Amanda Ray in 1986 and was subsequently charged.[1]

The State also introduced testimony of Janet Ashe and Rev. James Hall indicating that defendant, in the months before the

1. For a more thorough account of the evidence, see *Coffey I*, 326 N.C. at 274-77, 389 S.E.2d at 51-53.

murder, masturbated in the presence of three-year-old Angel Ashe. This incident was admitted to establish the aggravating circumstance of murder committed during the course of a kidnapping.[2]

Defendant did not testify at the resentencing proceeding. Instead he presented two experts, psychologist Dr. Steven B. Bondy and psychiatrist Dr. John M. Billinsky. Dr. Bondy interviewed defendant twice and administered five tests to defendant. He diagnosed defendant as suffering from major depression, chronic post traumatic stress disorder (PTSD), and pedophilia. Defendant's PTSD was the result of repeated sexual abuse by his father. As a result of the pedophilia and PTSD, defendant was mentally and emotionally disturbed at the time of the murder and his capacity to conform his conduct to the requirements of the law was impaired. On cross-examination it was revealed, over objection, that Dr. Bondy's diagnoses were based in part on defendant's convictions for indecent liberties with children. Defendant had previously attempted to exclude the admission of his criminal record through a pre-trial motion, which was denied. The convictions which were introduced were: convictions in 1974 in Virginia Beach, Virginia, for two counts of indecent exposure and one count of indecent liberties involving three children; and convictions in 1986 in Caldwell County, North Carolina, for nine counts of indecent liberties with children involving three different children. The trial court instructed the jury to consider defendant's convictions solely for the purpose of supporting the witness' diagnoses.

Dr. Billinsky's opinion testimony was essentially the same as that of Dr. Bondy. He interviewed defendant twice and spoke with his family members. He diagnosed defendant as suffering from adjustment disorder with mixed emotional features, pedophilia, and chronic PTSD. Defendant's PTSD was the result of sexual abuse by his father. Based on defendant's pedophilia and PTSD, Dr. Billinsky concluded that defendant was under the influence of a mental or emotional disturbance at the time of the murder and that his capacity to appreciate the criminality of his conduct was

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2. We held in *Coffey I* that evidence of the Angel Ashe incident was properly admitted to show that the murder was committed during the course of the felony of kidnapping. *Coffey I*, 326 N.C. at 280-81, 389 S.E.2d at 56. We note at this juncture that the State did not assert at trial nor has it asserted on appeal that defendant's convictions for indecent liberties with children, which are the primary subject of this appeal, were relevant to show that the crime was committed during the course of a kidnapping.

impaired. On cross-examination it was revealed that Dr. Billinsky's diagnosis of pedophilia was based in part on defendant's convictions in 1974 and 1986.

Also testifying for defendant were his mother and sister. Defendant was molested by his father from the age of six. Defendant was also forced to watch his father sexually abuse his siblings, including his sister. Resistance to the sexual abuse was met with physical abuse. Defendant's father threatened to kill defendant if he exposed the sexual abuse. After defendant's mother discovered the sexual abuse, she moved away with defendant. Defendant's father would then occasionally kidnap defendant and his sister, take them to a motel, and sexually abuse them. Defendant left home to join the Navy at the age of sixteen, eventually leading to service in Vietnam.

After the presentation of evidence the trial judge submitted two aggravating circumstances: (1) the death occurred while the defendant was engaged in a kidnapping, and (2) the death was especially heinous, atrocious, or cruel. Defendant requested 23 mitigating circumstances, the majority of which were submitted to the jury. The State also, over defendant's objection, requested that the statutory mitigating circumstance of "no significant history of prior criminal activity" be submitted. The court submitted this circumstance.

The jury found both aggravating circumstances. One or more jurors found that defendant was under the influence of a mental disturbance; that his capacity to appreciate the criminality of his conduct was impaired; that he was mentally, physically, and sexually abused by his father; that he suffered a deprived and unstable childhood; that he dutifully served his country during wartime in Vietnam; that he had previously attended classes at a college; that defendant was a hard worker in prison; and that he had continued his education by taking correspondence courses from prison. No juror found that defendant had no significant history of prior criminal activity. The jury sentenced defendant to death.

II.

The first issue presented on appeal is whether the trial court erred in denying defendant's motion in limine, and overruling his objection at trial, which sought to exclude evidence relating to his convictions in 1974 and 1986. Evidence of criminal activity not

related to the crime charged must be relevant to some issue in the case to be admissible; such evidence is inadmissible when introduced to prove defendant's character "in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b); *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d 805, 806 (1990). The State argues that this evidence was relevant (A) to rebut the mitigating circumstance of no significant history of prior criminal activity, and (B) to explore the bases of the opinions of defendant's expert witnesses.

A.

[1] The State argues that the trial court had a duty to submit the mitigating circumstance of "no significant history of prior criminal activity" notwithstanding defendant's objection since that circumstance was supported by the evidence. *See 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), *rev'd on other grounds* in *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). It then argues that any evidence bearing on that mitigator was relevant and admissible, including defendant's convictions in 1974 and 1986. We reject the State's argument as to the convictions in 1986.

The mitigator on which the State relies to demonstrate relevance pertains to the defendant's "history of prior criminal activity." After considering the language of this mitigator and its relation to the sentencing scheme, we hold that the history of prior criminal activity refers to defendant's criminal activity prior to the murder for which he is being sentenced, not prior to sentencing. The crimes for which defendant was convicted in 1986 therefore were not relevant to the mitigator on which the State relies.[3]

In determining the meaning of the mitigating circumstance found at N.C.G.S. § 15A-2000(f)(1) we are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968); *State v.*

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3. We emphasize that the mitigating circumstance at issue here relates to "criminal activity," not criminal convictions. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). The record does not indicate when defendant committed the acts for which he was convicted in 1986. The clear inference from the record, however, is that the acts resulting in conviction in 1986 did not occur prior to the murder of Amanda Ray in 1979.

Cloninger, 83 N.C. App. 529, 531, 350 S.E.2d 895, 897 (1986); *see also* 73 Am. Jur. 2d *Statutes* § 250 (1974). We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because "[i]t is always presumed that the legislature acted with care and deliberation . . . ." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970).

Applying this canon of construction to the statute at hand, it is clear that the mitigating circumstance at N.C.G.S. § 15A-2000(f)(1) pertains only to that criminal activity committed before the murder. The mitigating circumstance at issue here concerns defendant's "history of prior criminal activity." If this language were to refer to defendant's criminal activity up to the time of sentencing, the word "prior" would have no meaning since at the time of sentencing the defendant's criminal activity prior to sentencing is identical to his "history of criminal activity." In order to give the word "prior" meaning, therefore, we must construe N.C.G.S. § 15A-2000(f)(1) as referring to defendant's criminal activity committed prior to some event other than sentencing.

The only other meaningful point in time is the date of the crime, which is the point of reference for nearly every aggravating and mitigating circumstance.[4] We find therefore that "history of prior criminal activity" as used in N.C.G.S. § 15A-2000(f)(1) refers to criminal activity occurring before the murder.

This interpretation is confirmed by the aggravating circumstance found at N.C.G.S. § 15A-2000(e)(3), pertaining to whether "defendant had been previously convicted of a felony involving the use or threat of violence to the person." In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), we held that this aggravator does not include crimes committed after the murder. Recognizing the relationship between this circumstance and the mitigator pertaining

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4. All eleven aggravating circumstances relate to the defendant at the time of the murder; for example, whether the murder was "committed for pecuniary gain" and whether the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(6), (9). Six of the seven specific statutory mitigating circumstances other than the one at issue here likewise focus on the defendant at the time of the murder, such as whether the defendant was under the influence of an emotional disturbance or duress. *See Id.* § 15A-2000(f)(2), (5). Of the nineteen aggravating and mitigating circumstances, only one clearly includes defendant's conduct after the murder; N.C.G.S. § 15A-2000(f)(8) provides as a mitigating circumstance that the "defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony."

defendant's history of prior criminal activity, it has been stated: "Just as prior conviction of a felony involving violence is designated an aggravating circumstance, the absence of any significant history of prior criminal activity calls for mitigation of sentence." II Model Penal Code § 210.6 commentary at 137 (1980). To the extent that the mitigating circumstance of "no significant history of prior criminal activity" is related to the aggravating circumstance that "defendant had been previously convicted of a felony involving the use or threat of violence," it seems clear that the legislature intended the same time frame to be used in both circumstances. Thus, the aggravating circumstance in N.C.G.S. § 15A-2000(e)(3) is some indication that the mitigating circumstance of no significant history of prior criminal activity does not include crimes committed after the murder.

Our review of cases elsewhere reveals that the only jurisdiction to have addressed this precise issue decided it in accord with our analysis.[5] In *Scull v. State*, 553 So.2d 1137, 1143 (Fla. 1988), the court rejected the State's argument that "the term 'prior' [means] prior to the sentencing, not the commission of the murder." In doing so it overturned the earlier decision in *Ruffin v. State*, 397 So.2d 277 (per curiam), *cert. denied*, 454 U.S. 882, 70 L. Ed. 2d 194 (1981). The court in *Scull* effectively adopted the reasoning of the dissenting opinion in *Ruffin*, where three justices stated that to consider crimes committed after the murder for the mitigator

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5. We note that numerous cases from other jurisdictions address aggravating circumstances such as that "defendant was previously convicted in this state of a class 1 or 2 felony involving violence." *See People v. White*, 870 P.2d 424 (Colo. 1994). In that context, several courts have held that "previously convicted" means convicted prior to sentencing, not prior to the criminal act. *See id.* at 442-45 (citing cases from other jurisdictions); Thomas M. Fleming, Annotation, 65 A.L.R.4th 838, 918-24 (1988) (same); *accord State v. McCullers*, 77 N.C. App. 433, 436, 335 S.E.2d 348, 350 (1985) (aggravating factor of "prior convictions" includes convictions up to time of sentencing); *but see Gargliano v. State*, 639 A.2d 675, 683 (Md. App. 1994) (interpreting "repeat offender" statute as enhancing sentence only when conviction for one crime precedes conduct of second crime). We find such cases inapposite as N.C.G.S. § 15A-2000(f)(1) refers to "criminal activity," not "criminal convictions." When interpreting "previous criminal convictions," the word "previous" can mean previous to sentencing and still have meaning; in that context, "previous" clarifies that the sentencer is not to consider the conviction for which the defendant is then being sentenced. When interpreting "prior criminal activity," however, the word "prior" has no real meaning if it means prior to sentencing. We also note that these cases are not in conflict with our holding in *Goodman* since the aggravator applied in that case refers to whether defendant "*had been* previously convicted," not whether defendant "was previously convicted."

of no significant history of prior criminal activity "goes against any common-sense interpretation of the phrase 'history of prior criminal activity' and amounts to tortured logic . . . ." *Id.* at 284 (Sundberg, C.J., dissenting, joined by England and McDonald, JJ.). We agree with the reasoning of this dissent, which was later adopted in *Scull*, that "prior" must mean prior to the crime for which the defendant is charged.

Thus, the State's contention that defendant's convictions in 1986 were admissible to rebut the mitigator of no significant history of prior criminal activity is without merit.

B.

[2] The State next argues that defendant's convictions, including those in 1986, were admissible since they formed the basis of the opinions of defendant's expert witnesses. The State relies on Rule 705, which provides:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

N.C. R. Evid. 705.

It is clear that under Rule 705 a party cross-examining an expert witness generally may inquire into the facts on which the expert's opinion is based. Rule 705, however, "does not end the inquiry. In determining whether to allow an expert to testify to the facts underlying an opinion, the court must inquire whether, under [Rule] 403, the testimony should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice." *United States v. Gillis*, 773 F.2d 549, 554 (4th Cir. 1985); *accord* N.C. R. Evid. 403. Ordinarily the question of whether evidence should be excluded lies within the discretion of the trial judge; that discretion, however, "is not unlimited." *State v. Scott*, 331 N.C. 39, 42, 413 S.E.2d 787, 789 (1992).

We find the probative value of defendant's convictions in 1986 to be substantially outweighed by the danger of unfair prejudice when those convictions are introduced by the State solely to

demonstrate the bases of the experts' opinions. The convictions in 1986 were therefore not admissible under the provisions of Rule 705 permitting inquiry into the basis of an expert's opinion.

The prejudicial effect of nine counts of indecent liberties with children is manifest. The danger is that the jury, in deciding whether defendant should be sentenced to death, would make its decision considering not only the murder of Amanda Ray and the aggravating and mitigating circumstances, but also the incidents of sexual abuse committed upon children several years later. The "overwhelming potential for prejudice" that is generated through the introduction of evidence relating to prior criminal activity was recognized in *State v. Scott*, 331 N.C. at 44, 413 S.E.2d at 789-90.

Further, the State has not pointed to any issue for which the convictions, when used to support defendant's experts, were probative. The State seems to view Rule 705 as giving it carte blanche to introduce the basis of an adverse expert opinion regardless of its prejudicial effect and probative value. As stated above, however, this is not the case. Here it is evident that the convictions had little or no probative value when introduced by the State for the asserted purpose of supporting the experts' opinions.

The essence of the testimony of Dr. Bondy and Dr. Billinsky was that as a result of defendant's PTSD and pedophilia, he was under a mental disturbance at the time of the murder and his capacity to appreciate the criminality of his conduct was impaired. The experts testified that the convictions were important to their diagnosis of pedophilia. The State, however, did not challenge the diagnosis of pedophilia on cross-examination, in closing arguments, or otherwise. The cross-examination of Dr. Bondy and Dr. Billinsky consisted almost exclusively of probing defendant's treatability and propensity for violence. In closing the State conceded defendant's pedophilia and challenged only whether his pedophilia contributed to his actions. In fact, the State repeatedly referred to defendant as a "child molester."

We also emphasize that defendant's pedophilia was irrelevant to both of the aggravating circumstances submitted. The aggravating circumstances submitted to the jury were that the murder occurred during the course of a kidnapping and that the murder was especially heinous, atrocious, or cruel. The State argued neither at trial nor on appeal that defendant's pedophilia was relevant to these aggravators. Further, we are unable to see how those convictions bear on the aggravators submitted. *See* N.C. R. Evid. 404(a)

("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ."). Thus, the convictions are not probative of the existence of either aggravating circumstances the State sought to establish. Likewise, we cannot see how defendant's pedophilia bears on any of the mitigating circumstances submitted other than the ones dealing with an emotional disturbance and impaired capacity, for which they only corroborate the experts' opinions.

In sum, the evidence of defendant's convictions in 1986 was extremely prejudicial. Further, those convictions when introduced under Rule 705 by the State are of little, if any, probative value. Under these circumstances, the probative value of defendant's convictions in 1986 is substantially outweighed by the potential for prejudice; and the convictions should have been excluded under Rule 403 upon defendant's motion in limine and his objection at trial.

We also find that this error requires reversal as it cannot be said that there is no reasonable possibility that the error affected the outcome. N.C.G.S. § 15A-1443(a) (1988). As stated earlier, the evidence relating to convictions in 1986 for nine counts of indecent liberties and indecent exposure was highly prejudicial and "its effect . . . can only have been to arouse the passion and prejudice of the jury." *See State v. Kimbrell*, 320 N.C. 762, 768, 360 S.E.2d 691, 694 (1987) (improper admission of evidence relating to defendant's devil-worshipping requires new trial). The State even emphasized defendant's pedophilia, and history of sexual abuse of children, in closing arguments when it repeatedly referred to the defendant as a "child molester."

Further, the jury almost certainly considered those convictions improperly when it determined that defendant did have a significant history of prior criminal activity. In its closing argument the State argued:

> The prior criminal activity, as we heard, includes a conviction for indecent liberties and two counts of indecent exposure with children in 1974, in Virginia Beach, Virginia. In 1979 he masturbated in front of Angel Ashe. *And in 1986, he was convicted of nine counts of taking indecent liberties with children.* (Emphasis added).

The court, over defendant's objection, instructed the jury on the mitigating circumstance of no significant history of prior criminal history as follows:

> You may find this mitigating circumstance if you find that an episode of masturbation and convictions for indecent liberties and indecent exposure do not constitute a significant history of prior criminal activity.

The trial court in no way restricted the jury's consideration of defendant's history of criminal activity to his criminal activity before the killing of Amanda Ray. Based on the presentation of evidence, the State's arguments, and the jury instruction, the jury almost certainly considered, improperly, defendant's entire criminal history in determining whether the statutory mitigating circumstance of no significant history of prior criminal activity existed. This error entitles defendant to a new sentencing proceeding. N.C.G.S. § 15A-1443(a).

NEW SENTENCING PROCEEDING.

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

Justice MITCHELL dissenting.

The defendant's experts testified that his status as a pedophiliac was an important part of what they felt was his impaired capacity to appreciate the criminality of his acts at the time he killed the ten-year-old child victim in the present case. On cross-examination by the State, each of those experts specifically testified that the defendant's many prior convictions for taking indecent liberties with children was an important factor in the diagnosis of pedophilia. Ordinarily such evidence is admissible under N.C.G.S. § 8C-1, Rule 705, which provides that an expert may testify to the facts on which the expert's opinion is based. The majority concludes, however, that the probative value of this evidence was substantially outweighed by danger of unfair prejudice and that the trial court abused its discretion by failing to exclude it under N.C.G.S. § 8C-1, Rule 403. I do not agree.

The majority finds that the testimony during the cross-examination of the defendant's experts that the defendant's convictions were an important basis for their diagnosis of pedophilia

had no tendency to weaken that diagnosis in the eyes of the jury. Although that is one possible view of the evidence in question, I believe a jury reasonably could have found the evidence to weaken the reliability of the diagnosis of the experts. Therefore, I believe that the majority has inadvertently invaded the province of the jury by applying the findings the majority would make from the evidence while failing to recognize that the evidence would support contrary findings.

It appears to me that the State was attempting to convince the jury that the two expert witnesses in question would testify that anyone who had been convicted of numerous offenses of taking indecent liberties with children is a pedophiliac and, inevitably, unable to appreciate fully the criminality of his conduct in murdering a child. If the jury so found, the jury reasonably could have given the experts' testimony less credibility than it would have given that testimony absent the State's cross-examination concerning the weight the experts gave the defendant's prior crimes.

The majority further says that because the prosecutor referred to the defendant during closing arguments as a "child molester," the State conceded the defendant's pedophilia and challenged only whether his pedophilia contributed to his actions. Regardless of whether the prosecutor argued (1) that the defendant was not a pedophiliac or (2) that pedophilia did not impair his capacity to appreciate the criminality of his conduct in killing the child victim in the present case, I believe the jury reasonably could have found the evidence of the defendant's prior convictions for taking indecent liberties with children relevant and probative as to either of those points.

The fact that the prosecutor referred to the defendant as a "child molester" did not, as the majority contends, amount to conceding that the defendant suffered from the medical condition of pedophilia. Quite the contrary, the State was attempting to convince the jury that the defendant was a criminal—a "child molester"—and not simply a mentally ill pedophiliac whose capacity to appreciate his criminal conduct was impaired. For these reasons, I believe that the majority errs in holding that the trial court abused its discretion by failing to exclude the evidence of the defendant's prior convictions for taking indecent liberties with children. The evidence was admissible under Rule 705 and its pro-

bative value was not outweighed by any danger of unfair prejudice so as to require its exclusion under Rule 403.

For the foregoing reasons, I respectfully dissent from the decision of the majority.

Justice MEYER joins in this dissenting opinion.

HOMER R. VERNON, EMPLOYEE PLAINTIFF v. STEVEN L. MABE BUILDERS, EMPLOYER, AND NATIONWIDE INSURANCE, CARRIER, DEFENDANTS

No. 275A93

(Filed 17 June 1994)

1. **Workers' Compensation § 285 (NCI4th)— qualification for permanent partial and permanent total disability—most favorable remedy**

Where an employee qualifies for both permanent partial disability benefits under N.C.G.S. § 97-31 and permanent total disability benefits under N.C.G.S. § 97-29, the legislature, having created the two mutually exclusive remedies side by side, intended that the employee have the benefit of the more favorable remedy.

Am Jur 2d, Workers' Compensation § 383.

2. **Workers' Compensation § 339 (NCI4th)— Form 26 compensation agreement—approval by Industrial Commission—determination of fairness**

The Industrial Commission is statutorily required to make a full investigation and determination that a Form 26 compensation agreement is fair and just in order to approve the agreement so as to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both sections 97-29 and 97-31 have the benefit of the more favorable remedy. N.C.G.S. §§ 97-17, 97-82.

Am Jur 2d, Workers' Compensation §§ 507-516.

3. Workers' Compensation § 339 (NCI4th)— Form 26 compensation agreement—permanent partial disability—entitlement to total disability—remand for determination of fairness

In approving a Form 26 compensation agreement between plaintiff and defendants for permanent partial disability benefits under N.C.G.S. § 97-31, the Industrial Commission failed to act in a judicial capacity to determine the fairness of the agreement where plaintiff's physician rated plaintiff as having a fifteen percent permanent disability of the back and stated that he did not think plaintiff could return to work; thus, plaintiff may have been entitled to permanent total disability benefits under N.C.G.S. § 97-29 as well as permanent partial disability benefits based on the fifteen percent rating under section 97-31; and an employee in the Industrial Commission claims department simply checked the rating on the form against the medical report attached thereto, verified the payment information, and approved the agreement. Therefore, the claim must be remanded to the Industrial Commission for a full investigation and determination as to whether the Form 26 compensation agreement is fair and just and in accord with the intent and purpose of the Workers' Compensation Act considering plaintiff's entitlement to benefits under N.C.G.S. § 97-29.

Am Jur 2d, Workers' Compensation §§ 507-516.

Justice MEYER dissenting.

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 110 N.C. App. 552, 430 S.E.2d 676 (1993), affirming a decision of the Industrial Commission. On 7 October 1993 this Court allowed plaintiff's petition for discretionary review of an additional issue. Heard in the Supreme Court 2 February 1994.

Elliot Pishko Gelbin & Morgan, P.A., by J. Griffin Morgan, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare and Ashley Baker, for defendant-appellees.

Lore & McClearen, by R. James Lore; and Patterson, Harkavy & Lawrence, by Henry N. Patterson, Jr., and Martha A. Geer, for The North Carolina Academy of Trial Lawyers, Amicus Curiae.

WHICHARD, Justice.

This is a workers' compensation case. Plaintiff, Homer R. Vernon, sustained injuries to his back while lifting a heavy door in the employment of defendant Steven L. Mabe Builders. Plaintiff signed a Form 26 compensation agreement ("Supplemental Memorandum of Agreement as to Payment of Compensation") for permanent partial disability benefits under N.C.G.S. § 97-31, which agreement was approved by the Industrial Commission ("Commission"); subsequently, plaintiff moved to set aside the agreement to pursue a claim for permanent total disability benefits under N.C.G.S. § 97-29. The Commission denied plaintiff's motion.

On appeal to the Court of Appeals, plaintiff argued, *inter alia*, that in approving the Form 26 compensation agreement between plaintiff and defendants, the Commission did not act in a judicial capacity, as the statute required, to determine the fairness of the agreement. The Court of Appeals majority disagreed and affirmed the Commission's decision. *Vernon v. Steven L. Mabe Builders*, 110 N.C. App. 552, 558-59, 430 S.E.2d 676, 680 (1993). Judge Wynn dissented, believing the Commission was required to act in a judicial capacity to determine whether the Form 26 compensation agreement was fair. Plaintiff exercised his right to appeal to this Court pursuant to the dissent.

The dispositive question is whether the statute requires the Commission, in approving Form 26 compensation agreements, to act in a judicial capacity to determine the fairness of the agreement. We hold that it does, and we accordingly reverse the Court of Appeals.

I.

Plaintiff, a fifty-two-year-old former sharecropper, was employed by defendant-employer as a carpenter's helper. He performed a variety of construction jobs, including picking up debris and loading it on trucks, pouring footings, trimming, hanging doors, and working on scaffolds to hang molding.

Plaintiff was injured on 16 October 1986 while lifting a heavy, solid-core door; he subsequently underwent surgery to correct a herniated disc. Defendants admitted liability and began paying plaintiff compensation pursuant to a Form 21 agreement ("Agreement for Compensation for Disability") approved by the Commission on 19 January 1987.

On 13 August 1987 plaintiff reached maximum medical improvement. Plaintiff's physician rated plaintiff as having a fifteen percent permanent disability of the back and stated that he did not think plaintiff could return to work. Defendants stopped paying plaintiff's temporary total disability benefits on 13 August 1987. Shortly thereafter, defendants' insurance adjuster sent a Form 26 compensation agreement stating that plaintiff was entitled under section 97-31 of the Workers' Compensation Act ("Act") to forty-five weeks of compensation at the rate of $264.02 per week. The adjuster wrote plaintiff that once the form had been approved by the Commission, plaintiff would again begin receiving his payments.

Plaintiff's wife had to read the letter and the Form 26 compensation agreement to him. Plaintiff—who was illiterate, unrepresented, and unknowledgeable about workers' compensation benefits—signed the Form 26 compensation agreement and returned it to defendants. He was unaware at the time that he had any other choice.

Defendants submitted the Form 26 compensation agreement to the Commission for approval. An employee in the claims department simply checked the rating listed on the form against the physician's report attached thereto, verified the payment information, and approved the agreement. She was not an attorney and was unaware that under *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 95-96, 348 S.E.2d 336, 340 (1986), an employee entitled to permanent partial disability benefits under section 97-31 of the Act, but also, because his injuries render him totally and permanently disabled, entitled to permanent total disability benefits under section 97-29, may select the more favorable remedy.

On 7 September 1989 plaintiff moved to set aside the Form 26 compensation agreement. After a hearing on 21 March 1990, the deputy commissioner concluded that there was no error due to fraud, misrepresentation, undue influence or mutual mistake of fact, and, as noted, denied plaintiff's motion. The Commission adopted and approved the opinion and award of the deputy commissioner.

The Court of Appeals affirmed, as noted, concluding that "there is no requirement—either in the Workers' Compensation Act, The Rules of the Industrial Commission, or in case law—that the Commission, in approving a Form 26 compensation agreement, determine that the agreement is fair." *Vernon*, 110 N.C. App. at 559, 430 S.E.2d at 680. The court drew a distinction between "compensa-

tion agreements," such as the Form 26 compensation agreement at issue, and "compromise settlement agreements." "It is true that *compromise* settlements must be determined to be fair and equitable and in the best interests of the parties before they will be approved by the Commission," it stated, *id.* at 558, 430 S.E.2d at 680, "[but] the agreement at issue is not a compromise settlement agreement," *id.* at 559, 430 S.E.2d at 680. Judge Wynn dissented, noting that this Court has stated that " '[t]he Industrial Commission stands by to assure fair dealing in *any* voluntary settlement.' " *Id.* at 559-60, 430 S.E.2d at 681 (quoting *Biddex v. Rex Mills*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953) (emphasis added)). The Court of Appeals also concluded that there was sufficient evidence in the record to support the Commission's finding that the Form 26 compensation agreement was not entered into by reason of misrepresentation or mutual mistake, and that plaintiff was not entitled to have the agreement set aside pursuant to N.C.G.S. § 97-17 (1991). *Id.* at 557-58, 430 S.E.2d at 679-80.

II.

Plaintiff contends first that the Court of Appeals erred in concluding that "there is no requirement . . . that the Commission, in approving a Form 26 compensation agreement, determine that the agreement is fair." We agree.

The Act provides:

> **§ 97-17. Settlements allowed in accordance with Article.**
>
> Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.

N.C.G.S. § 97-17 (1991). It further provides:

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval.

If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified.

N.C.G.S. § 97-82 (1991).

The Commission recognizes, pursuant to these sections, two forms of voluntary settlements, namely, the compensation agreement in uncontested cases, and the compromise or "clincher" agreement in contested or disputed cases. In North Carolina the uncontested claims procedure takes the form of a voluntary settlement agreement between parties, subject to the approval of the Commission. For example, as was done in plaintiff's case, "[a] Form 26 Agreement may be entered into after the end of the healing period to provide for payment of . . . permanent partial disability benefits [pursuant to section 97-31] based upon a doctor's evaluation, or 'rating,' of any remaining physical impairment." N.C. Industrial Commission, *Bulletin: Information About The North Carolina Workers' Compensation Act* 5 (1 January 1993). Under compromise agreements "the employee receives a lump sum of money and payment of any remaining medical compensation bills in return for terminating the claim and any right to reopen it." *Id.*

Over forty years ago, interpreting sections 97-17 and -82, this Court stated:

> The Industrial Commission stands by to assure fair dealing in *any* voluntary settlement . . . .
>
> . . . .

> . . . [Section 97-82] was inserted in the statute to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the Act. Therefore, in approving the settlement in which compensation is awarded, the Commission acts in a judicial capacity. The voluntary settlement as approved becomes an award enforceable by a court decree.

Biddex, 237 N.C. at 663, 75 S.E.2d at 780 (emphasis added). Later, this Court stated that it presumed the Commission approves voluntary settlements "only after a full investigation and a determination that the settlement is fair and just." *Caudill v. Manufacturing Co.*, 258 N.C. 99, 106, 128 S.E.2d 128, 133 (1962) (considering a compromise agreement). "The law thus undertakes to protect the rights of the employee in contracting with respect to his injuries." *Id.*

When an employee's injuries are included in the schedule set out in section 97-31, he would be entitled to permanent partial disability benefits under that section. When an employee's injuries render him totally and permanently disabled, he would, alternatively, be entitled to compensation benefits under section 97-29; section 97-31 is not the "exclusive remedy for an employee who also qualifies for compensation under section 29." *Whitley*, 318 N.C. at 98, 348 S.E.2d at 341. Indeed,

> [a]n employee may recover compensation under section 31 without regard to actual loss of earning ability. Diminished earning ability is conclusively presumed with respect to the losses included in the schedule for the period specified therein. . . . *[S]ection 31 . . . was not, we believe, intended to mean that the presumption . . . should be used to the . . . detriment [of the employee who can prove diminished earning capacity].* The purpose of the schedule [in section 31] was to expand, not restrict, the employee's remedies.

Id. at 99, 348 S.E.2d at 342 (citations omitted) (emphasis added).

[1] Applying established rules of statutory construction, we have concluded that the legislature, having created the two mutually exclusive remedies side by side, intended that the employee qualifying for both have the benefit of the more favorable one. *See Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987) (" 'The pervasive canon of statutory construction [is] that where

two remedies are created side by side in a statute the claimant should have the benefit of the more favorable.' ") (quoting 2 Arthur Larson, *The Law of Workmen's Compensation* § 58.25 (1987)).

> One purpose of the Act is to compensate injured employees for lost earning ability. 'The term disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.' [N.C.G.S.] § [97-]2(9). The Act represents a compromise between the employer's and employee's interests. The employee surrenders his right to common law damages in return for guaranteed, though limited, compensation. The employer relinquishes the right to deny liability in return for liability limited to the employee's loss of earning capacity. . . . *Allowing a totally and permanently disabled employee lifetime compensation effectuates the purpose of the Act to compensate for lost earning ability.*

Whitley, 318 N.C. at 98-99, 348 S.E.2d at 341-42 (citations omitted) (emphasis added).

> [T]he entire compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. To this end, the public has enacted into law a scale of benefits that will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the worker less than this amount, make him a potential public burden.

3 Arthur Larson, *The Law of Workmen's Compensation* § 82.41, at 15-1204, -1205 (1993).

[2] We hold, therefore, that the statute requires, on the part of the Commission, a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualify-

ing for disability compensation under both sections 97-29 and -31 have the benefit of the more favorable remedy.

Defendants contend that the legislature requires "a full investigation and a determination that the settlement is fair and just" only in the case of compromise agreements, not in the case of Form 26 compensation agreements. The Commission, defendants point out, has thus interpreted the statute; rule 501(4) of the Workers' Compensation Rules states that "[compensation] agreements in proper form and conforming to the provisions of the Act will be approved by the Industrial Commission." N.C. Industrial Commission, *Workers' Compensation Rules of the North Carolina Industrial Commission*, Rule 501(4) (1993). Defendants contend that "compromise agreements are a final adjudication of an employee's rights while compensation agreements leave the door open for future medical expenses and further payment of benefits following a change of condition," that the "vast difference" between compensation and compromise agreements rationalizes such a distinction. We disagree.

"While 'the construction of statutes adopted by those who execute and administer them is evidence of what they mean,' *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 76, 241 S.E.2d 324, 329 (1978), that interpretation is not binding on the courts." *Ferrell v. Dept. of Transportation*, 334 N.C. 650, 661, 435 S.E.2d 309, 317 (1993). The legislature has not made any such distinction between compensation and compromise agreements; section 97-17 refers to "settlements" and "settlement agreement[s]," and section 97-82 refers to "an agreement in regard to compensation under this Article." N.C.G.S. §§ 97-17, -82. Further, such agreements, compensation or compromise, as approved by the Commission, "become[ ] an award enforceable by a court decree." *Biddex*, 237 N.C. at 663, 75 S.E.2d at 780; *see also, e.g., Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (Considering a Form 26 compensation agreement, the Court stated that "[t]he Commission's approval of settlement agreements is as conclusive as if made upon a determination of facts in an adversary proceeding."). Both compromise and compensation agreements finally determine the employee's rights, and if the agreements involve an election of remedies, as here, the employee, by selecting one over the other, will be foreclosing certain rights. We conclude, therefore, that our construction of the statute, although contrary to that of the Commission, both accords with the legislative intent and is the more reasonable one.

[3] In the present case, the medical report attached to the Form 26 compensation agreement stated that plaintiff sustained a fifteen percent permanent disability and that the physician did not think plaintiff could return to work; thus, plaintiff may have been entitled to permanent total disability benefits under section 97-29, as well as permanent partial disability benefits based on the fifteen percent rating under section 97-31. However, under section 97-29 plaintiff would receive such benefits for as long as he remained totally disabled rather than the forty-five weeks provided for in the Form 26 compensation agreement under section 97-31. The claims department employee only checked the rating listed on the form against the medical report attached thereto, verified the payment information, and approved the agreement. That employee also stated at the hearing that "even [though] the doctor's rating also said that the claimant would probably not be able to return to work, . . . we still approve [an agreement for permanent partial disability benefits under section 97-31] if it matches the information in the file." She apparently assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits, and, particularly, his right to claim permanent total disability compensation under section 97-29 rather than permanent partial disability compensation under section 97-31. Thus, in approving the Form 26 compensation agreement between plaintiff and defendants, the Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement.

Although the Commission entered no findings regarding plaintiff's capacity to work, *see, e.g., Little v. Food Service*, 295 N.C. 527, 533, 246 S.E.2d 743, 747 (1978) ("[T]he criterion for compensation in cases covered by [sections] 97-29 or -30 is the extent of the claimant's 'incapacity for work.' "), the full and complete medical report attached to the Form 26 compensation agreement between plaintiff and defendants was sufficient evidence upon which the Commission could have based a conclusion that the agreement was not fair and just and in accord with the intent and purpose of the Act. Accordingly, we reverse the decision of the Court of Appeals, and remand to that court for further remand to the Industrial Commission for a full investigation and a determination as to whether the Form 26 compensation agreement between plaintiff and defendants is fair and just and in accord with the intent and purpose of the Act, considering plaintiff's entitlement to benefits under N.C.G.S. § 97-29. *See Gupton*, 320 N.C. at 43, 357 S.E.2d at 678

("A proceeding determined under a misapprehension of the applicable principles of law must be remanded to the Commission for consideration and adjudication of all the employee's compensable injuries and disabilities.").

III.

As to the additional issue of whether competent evidence exists in the record to support the Commission's finding that the Form 26 compensation agreement was not entered into by reason of misrepresentation or mutual mistake, we conclude that the petition for discretionary review was improvidently allowed.

IV.

In summary, as to the issue on direct appeal based on the dissenting opinion of Wynn, J., we hold that the Court of Appeals erred in affirming the Industrial Commission. As to the additional issue, we conclude the petition for discretionary review was improvidently allowed. Accordingly, we reverse the decision of the Court of Appeals and remand the case to the Court of Appeals with instructions to remand to the Industrial Commission for a full investigation and a determination as to whether the Form 26 compensation agreement between plaintiff and defendants is fair and just and in accord with the intent and purpose of the Act, considering plaintiff's entitlement to benefits under N.C.G.S. § 97-29.

REVERSED IN PART, AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice MEYER dissenting.

I agree with the majority with regard to the Court of Appeals' assertion that "there is no requirement—either in the Workers' Compensation Act, The Rules of the Industrial Commission, or in case law—that the Commission, in approving a Form 26 agreement, determine that the agreement is fair." *Vernon v. Steven L. Mabe Builders*, 110 N.C. App. 552, 559, 430 S.E.2d 676, 680 (1993). Implicit in the Workers' Compensation Act is the requirement of fairness to both employer and employee. In addition, as the majority has noted, our prior decisions have indicated that the Commission does have an obligation to ensure the fairness of voluntary settlements.

I wish to point out, however, that in the limited context of a Form 26 settlement agreement, and presumably a Form 21 settlement agreement, the Commission fulfills its requirement to determine the fairness of the agreement if, on the face of the document, the settlement affords compensation in the manner prescribed by N.C.G.S. § 97-31 or 97-29 and otherwise complies with pertinent provisions of the Act. In making such a determination, the Commission is free to establish its own rules for the review of such form settlement agreements, which it has done. *See* Workers' Compensation Rules of the N.C. Industrial Commission, Rule 501, Annotated Rules of North Carolina (Michie 1994) [hereinafter "Workers' Compensation Rules"]. In essence, the Commission thereby properly abides by a legislative determination of what is a fair settlement in compensation for the injuries sustained by the employee.

Further, despite the fact that the Commission has adopted differing rules for the approval of form settlement agreements and compromise settlement agreements, I do not believe that the Commission views itself as without responsibility to ensure the fairness of all voluntary settlement agreements. It is my view that if the Commission adopts and follows rules designed to ensure that voluntary settlement agreements are in accordance with the provisions of the Workers' Compensation Act, it has fulfilled its obligation to ensure a fair settlement.

N.C.G.S. § 97-17 specifically states that "[n]othing herein contained shall be construed so as to prevent settlements made by and between the employee and employer *so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article.*" N.C.G.S. § 97-17 (1991) (emphasis added). Commission Rule 501(4) states that "[a]greements in proper form and conforming to the provisions of the Act will be approved by the Industrial Commission." Workers' Compensation Rules, Rule 501(4).

Form 26 agreements are designed to secure benefits calculated by the legislature to be fair and just compensation for the injury sustained by the employee. These benefits are mainly enumerated in N.C.G.S. § 97-31, entitled "Schedule of Injuries; Rate and Period of Compensation," and in N.C.G.S. § 97-29, entitled "Compensation Rates for Total Disability." Presumably, when the General Assembly determined the specific rates of compensation that would be forthcoming in the event of an enumerated injury, it made the deter-

mination that such compensation was fair. Thus, if the Commission abides by a rule that requires a voluntary settlement to conform to the provisions of the Act, it has met its obligation to ensure the fairness of the settlement. In the present case, the record indicates that the claims supervisor properly engaged in such a determination, although apparently unaware of our decision in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986).

In its order, the Commission made the following findings of fact:

> When the Form 26 Agreement was submitted to the Commission for approval, Sandra McLamb of the claims department reviewed it to ascertain whether it was supported by the medical information in the file. The report by Dr. Kelly confirmed the permanent partial disability rating, and the payment information was correct, so she approved the agreement. Although she was not aware of changes in the law effected by the Supreme Court in Whitley v. Columbia Lumber Manufacturing Company, 318 N.C. 89[ ] (1986), it was the Industrial Commission's policy to not substitute its judgment for the parties or act as an advocate for either side as long as the information in the file supported the settlement agreement. Plaintiff was free to make an election of remedies, and the Commission would approve the resulting settlement as long as there was supporting documentation and the settlement complied with the law.

It is my view that the procedures followed by the Commission in this case were sufficient to meet the Commission's obligation to ensure a fair settlement.

The fact that the employee in this case may have been eligible for a more favorable settlement does not make the settlement he chose unfair. Nor does it constitute an agency decision rendered under a misapprehension of existing law. Even if the claims supervisor had been aware of our decision in *Whitley*, as long as the remedy elected by the claimant is consistent with the schedule of benefits, period of payment, and other provisions of the Act, approval of the agreement does not constitute a misapprehension of existing law.

It is likely that, due to the ongoing interpretation of the Workers' Compensation Act, similar situations will arise in the future. It is unrealistic to expect that Commission employees whose job it

is to approve such settlements can stay abreast of all developments in workers' compensation law as soon as these developments occur. It is equally unrealistic to expect the few Commission employees whose job it is to approve form settlements to become advocates and render advice as to fairness in the many thousands of such form settlements that are submitted each year. As a result of this decision, it may be that, in order to assure compliance with the majority's requirement, the Commission will find it necessary to require that claimants be represented by counsel before they approve form settlement agreements. This, in my view, conflicts with the policies and intent of the Workers' Compensation Act.

FORSYTH MEMORIAL HOSPITAL, INC., A NORTH CAROLINA NONPROFIT CORPORATION, AND CAROLINA MEDICORP, INC., A NORTH CAROLINA NONPROFIT CORPORATION, v. ARMSTRONG WORLD INDUSTRIES, INC., A PENNSYLVANIA CORPORATION

No. 319PA92

(Filed 17 June 1994)

1. Pleadings § 108 (NCI4th)— Rule 12(b)(6) motion to dismiss— statute of limitations or repose

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some recognized legal theory. A statute of limitation or repose may be the basis of a Rule 12(b)(6) dismissal if on its face the complaint reveals the claim is barred.

Am Jur 2d, Pleading §§ 226 et seq.

2. Limitations, Repose, and Laches § 33 (NCI4th)— installation of flooring—improvement to real property—furnishing of materials

Upon installation, vinyl flooring became an improvement to plaintiffs' real property within the meaning of the real property improvement statute of repose, N.C.G.S. § 1-50(5). Furthermore, as used in § 1-50(5)(b)(9), the phrase "any person furnishing materials" refers to a materialman who furnished

materials to the job site either directly to the owner of the premises or to a contractor or subcontractor on the job.

Am Jur 2d, Building and Construction Contracts § 114.

3. Limitations, Repose, and Laches § 29 (NCI4th)— floor coverings containing asbestos—manufacturer as materialman—applicable statute of repose

The real property improvement statute of repose, N.C.G.S. § 1-50(5), not the products liability statute of repose set forth in N.C.G.S. § 1-50(6), governs plaintiffs' claims for negligence, breach of implied warranty, and willful and wanton misconduct by defendant in manufacturing and supplying floor coverings containing asbestos that were used in the construction of an addition to plaintiffs' hospital where plaintiffs' allegations permit them to prove that defendant manufacturer was a materialman, furnishing the offending materials to the job site, rather than a remote manufacturer.

Am Jur 2d, Building and Construction Contracts § 114; Products Liability §§ 909-923.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

4. Limitations, Repose, and Laches §§ 27, 29 (NCI4th)— improvement to real property—remote manufacturer—applicable statute of repose

If defendant were only a remote manufacturer whose materials found their way to plaintiffs' job site indirectly through the commerce stream, defendant would not be a materialman and would not have furnished materials on the job site within the meaning of the real property improvement statute of repose. In such a case, the products liability, rather than the real property improvement, statute of repose would apply to plaintiffs' claim based on materials containing asbestos used in the construction of an addition to plaintiffs' hospital.

Am Jur 2d, Building and Construction Contracts § 114; Products Liability §§ 909-923.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

5. Limitations, Repose, and Laches § 29 (NCI4th)— floor coverings containing asbestos—breach of warranty—negligence—claims barred by statute of repose

The six-year limitation of N.C.G.S. § 1-50(5)(a) barred plaintiffs' claims against defendant manufacturer for breach of warranty and negligence in furnishing floor coverings containing asbestos that were used in the construction of an addition to plaintiffs' hospital where the floor coverings were furnished in 1977 and 1978 and plaintiffs filed their action on 30 August 1990.

Am Jur 2d, Building and Construction Contracts § 114.

6. Limitations, Repose, and Laches §§ 15, 31 (NCI4th)— improvement to real property—statute of repose—inapplicability to claim for willful and wanton negligence

The statute of repose for claims involving nonapparent property damage, N.C.G.S. § 1-52(16), has no application to a claim arising out of an improvement to real property; rather, by providing in N.C.G.S. § 1-50(5)(g) that the six-year limitation prescribed by the subdivision applies "to the exclusion of the limitation periods set forth in G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2)," the legislature intended that all other provisions of the real property improvement statute of repose apply exclusively to claims based upon or arising out of the defective or unsafe condition of an improvement to real property, including the provision of subsection (e) which excepts claims sounding in fraud or willful or wanton misconduct from the six-year limitation period. Therefore, under N.C.G.S. § 1-50(5), no statute of repose could be asserted as a defense to a claim of willful and wanton negligence in furnishing floor covering materials containing asbestos for the construction of an addition to plaintiffs' hospital.

Am Jur 2d, Building and Construction Contracts § 114; Limitation of Actions § 135.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

Justice MEYER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 107 N.C. App. 110, 418 S.E.2d 529 (1992), affirming an order of dismissal entered by Wood, J., at 18 February 1991 Civil Session of Superior Court, Forsyth County. Heard in the Supreme Court 17 February 1993.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Michael Patrick, for Plaintiff/appellant.

Hutchins, Tyndall, Doughton and Moore, by H. Lee Davis, Jr. and Thomas J. Doughton, for Defendant/appellee.

EXUM, Chief Justice.

This is an action arising out of the purchase and installation on plaintiffs' premises of asbestos-contaminated construction materials allegedly furnished by defendant. Plaintiffs filed suit sounding in negligence, breach of implied warranty and willful and wanton disregard for the rights of plaintiffs and others similarly situated. The issue presently dividing the parties concerns which statute of repose governs the action and whether such statute of repose time bars the claim. Because under plaintiffs' allegations, they may be able to prove that defendant, as a materialman, supplied directly to the jobsite the offending materials, plaintiffs' claim may be governed exclusively by the real property improvement statute of repose, N.C.G.S. § 1-50(5)(a)-(b) (1983), rather than the products liability statute of repose, N.C.G.S. § 1-50(6) (1983). While the six-year limitation period of section 1-50(5)(a) may bar plaintiffs' claim for negligence and breach of implied warranty, it would not bar their claim for willful and wanton misconduct because fraud and willful and wanton misconduct are specifically excepted from the six-year limitation period. N.C.G.S. § 1-50(5)(e).

Plaintiffs own and operate a hospital in Forsyth County known as Forsyth Memorial Hospital, Inc. Plaintiffs filed this action on 30 August 1990 in Forsyth County Superior Court, alleging that "[f]loor tile and sheet vinyl flooring manufactured, sold and furnished by defendant was installed during the construction of certain parts of the hospital," including an addition constructed in 1976 and 1977. During hospital renovations in 1989-90, plaintiffs discovered that some of the flooring materials supplied by defendant contained asbestos, an allegedly known hazardous material, and that plaintiffs were forced to incur additional costs resulting from its removal. The complaint further alleged that at the time of the manufacture

of the flooring material, defendant was aware that the asbestos in the flooring material was not readily identifiable by others and that if inhaled, the asbestos could cause asbestos-related disease. Despite this knowledge, plaintiffs alleged, defendant manufactured and sold the asbestos-contaminated materials until 1983.

In praying for both compensatory and punitive damages, plaintiffs alleged negligence, breach of implied warranty and intentional, willful and wanton disregard of the rights of plaintiffs and others similarly situated. The superior court dismissed the action on defendant's Rule 12(b)(6) motion and the Court of Appeals affirmed. We now reverse in part the Court of Appeals and hold plaintiffs' claim for willful and wanton misconduct was wrongfully dismissed.

[1] Because this appeal is before us by way of the Court of Appeals on a motion to dismiss for failure to state a claim upon which relief can be granted, we take all allegations of fact as true. *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 351, 416 S.E.2d 166, 168 (1992). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting "the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). A statute of limitation or repose may be the basis of a 12(b)(6) dismissal if on its face the complaint reveals the claim is barred. *Oates v. Jag*, 314 N.C. 276, 333 S.E.2d 222 (1985); *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E.2d 693, *disc. rev. denied*, 297 N.C. 176, 254 S.E.2d 39 (1979); *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E.2d 243, *disc. rev. denied*, 290 N.C. 555, 226 S.E.2d 513 (1976); *Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E.2d 671 (1972); Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 608 (1969).

Analyzing the sufficiency of plaintiffs' claim first requires a determination of the applicable statute of repose. The Court of Appeals held, and we agree, that plaintiffs' complaint was governed by the real property improvement statute of repose, N.C.G.S. § 1-50(5) (1983). N.C.G.S. § 1-50(5) is the statute of repose governing claims of defective improvements to real property against a materialman, who is one furnishing or supplying materials used in building construction, renovation or repair. *See Carolina Builders Corp. v. Howard-Veasey Homes*, Inc., 72 N.C. App. 224, 229, 324

S.E.2d 626, 629, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985); N.C.G.S. § 44A-8 (1989). It provides:

> a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.
>
> b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> . . .
>
> 9. *Actions against any person furnishing materials*, or against any person who develops real property or who performs or *furnishes* the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

N.C.G.S. § 1-50(5)(a)-(b) (emphasis added).

[2] We conclude, as did the Court of Appeals, that upon installation the vinyl flooring became an improvement to plaintiff's real property. We also conclude that the phrase, "any person furnishing materials," refers to a materialman who furnished materials to the jobsite either directly to the owner of the premises or to a contractor or subcontractor on the job.

Our conclusion finds support in other jurisdictions. *See Snow v. Harnischfeger Corp.*, 823 F. Supp. 22, 25 (D. Mass. 1993) (defendant's "particularized service in designing and constructing [the materials] installed . . . makes it an actor within the protection of the Massachusetts statute of repose"); *City of Dover v. International Tel. and Tel. Corp.*, 514 A.2d. 1086, 1089 (Del. Super Ct. 1986) (defendant "was more than a mere supplier of [the materials], because [defendant] fabricated the [materials] it delivered" to plaintiff). *But see Independent School District #197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990); *Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 331 S.E.2d 476 (1985) (extending statute of repose to apply to even remote manufacturers); *Corbally v. W.R. Grace & Co.*, 993 F.2d 492 (5th Cir. 1993); *Nichols*

by Nichols v. Swimquip, a Div. of Weil McClain, 171 Cal. App. 3d 216, 217 Cal. Rptr. 272 (1985) (declining to extend statute's coverage to materialmen on job). Though the statutes of repose in the cases supporting our position do not specifically refer to "any person furnishing materials" but rather to "furnishing the design" of any improvement to real property, the United States Court of Appeals for the Sixth Circuit has construed "furnishing the design" to mean the same as "[furnishing materials] intended to become part of the realty." *In Re Beverly Hills Fire Litigation*, 695 F.2d 207, 225 (6th Cir. 1982).

[3] Defendant contends that section 1-50(5) is not applicable to plaintiffs' claim because the statute was not intended to cover actions against manufacturers of products. Although plaintiffs' complaint alleged that defendant manufactured, sold and furnished material purchased by plaintiffs, defendant contends it did not allege defendant directly sold material to plaintiffs or to the contractor who installed the material. Defendant submits plaintiffs' claim should be governed by N.C.G.S. § 1-50(6), the products liability statute of repose applicable to manufacturers of allegedly defective products, which provides:

> (6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

N.C.G.S. § 1-50(6) (1983). Defendant contends this provision clearly applies to manufacturers, whereas the Court would have to "strain the language of G.S. 1-50(5) to make it also apply."

Insofar as plaintiffs' claims are concerned, the difference in the two statutes of repose, as we will show, is this: The real property improvement statute of repose expressly exempts all claims sounding in fraud or willful and wanton misconduct, whereas the products liability statute of repose contains no such exemption.

[4] Defendant construes plaintiffs' complaint too narrowly. "A complaint should not be dismissed under Rule 12(b)(6) '. . . unless it affirmatively appears that the plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260

S.E.2d 611, 613 (1979)). We agree that if defendant were only a remote manufacturer whose materials found their way to plaintiffs' jobsite indirectly through the commerce stream, then defendant would not be a materialman and would not have furnished materials on the jobsite within the meaning of the statute. In such a case, the products liability, rather than the real property improvement, statute of repose would apply. Plaintiffs' complaint, however, which alleges that the installed "floor tile and sheet vinyl flooring was manufactured, sold and *furnished* by ARMSTRONG" would permit plaintiffs to prove that defendant not only manufactured the flooring but also was a materialman for the job. Thus, the viability of plaintiffs' claim vis-a-vis the real property improvement statute of repose will rest on plaintiffs' ability to prove that defendant was a materialman, furnishing the offending material to the jobsite, rather than a remote manufacturer. Should plaintiffs prove only that defendant was a remote manufacturer and not a materialman, then the products liability statute of repose, § 1-50(6), would bar all of plaintiffs' claims.

[5] Assuming, without deciding, that plaintiffs will be able to prove that defendant was a materialman for the real property improvements, we now address the application of the real property improvement statute of repose to plaintiffs' claims. The Court of Appeals held, and we agree, that the six-year limitation of section 1-50(5)(a) barred plaintiffs' claims for breach of warranty and negligence. As for plaintiffs' claim of willful and wanton behavior, N.C.G.S. § 1-50(5)(e) provides:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or *willful or wanton negligence* in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

N.C.G.S. § 1-50(5)(e) (1983) (emphasis added). Further, N.C.G.S. § 1-50(5)(g) provides that "[t]he limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2)." N.C.G.S. § 1-50(5)(g) (1983).

The Court of Appeals concluded that because the limitation period of § 1-50(5) did not apply to the willful and wanton misconduct claim, none of the other provisions of § 1-50(5), including the exclusionary provision of § 1-50(5)(g), applied. Therefore, plaintiffs' claim was governed and barred by the statute of repose for claims involving nonapparent property damage, N.C.G.S. § 1-52(16), which provides:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C.G.S. § 1-52(16) (1983).

[6] We conclude section 1-52(16) has no application to a claim arising out of improvement to real property. Rather, the real property improvement statute of repose applies exclusively to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property. We believe that by providing in § 1-50(5)(g) that "the six-year limitation prescribed by the subdivision applies to the exclusion of the limitation periods set forth in N.C.G.S. §§ 1-15(c), 1-52(16), and 1-47(2)," the legislature intended that all other provisions of the real property improvement statute of repose apply exclusively to such claims, including the provision which excepts claims sounding in fraud or willful and wanton misconduct from the six-year limitation period. The result is that under section 1-50(5), no statute of repose may be asserted as a defense to a claim of willful and wanton misconduct.

We find our resolution of this issue supported by *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). In *Feibus*, this Court considered the applicability of N.C.G.S. § 1-15(b), predecessor to section 1-52(16), to a claim alleging fraud against a defendant construction company for the defective and unsafe improvement to real property. Section 1-15(b) provided as follows:

> *Except where otherwise provided by statute*, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person or defect in or damage to the property which originated under the circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years for the last act of the defendant giving rise for relief.

N.C.G.S. § 1-15(b) (repealed 1979) (emphasis added). The defendant in *Feibus* contended that the ten-year statute of limitation in section 1-15(b) applicable to cases involving concealed injury should apply to *all* types of concealed injuries, even those expressly covered by other statutes. Actions sounding in fraud were expressly covered by N.C.G.S. § 1-52(9), which provided a three-year statute of limitations period running from the date of discovery of facts constituting fraud. The defendant argued that pursuant to the well-established rule of statutory construction, the two statutory provisions should be construed harmoniously. According to the defendant, section 1-15(b) would be applied as an outside limit on accrual of actions sounding in fraud, requiring such claims to be brought within ten years following the last act of the defendant. *Id.* at 304, 271 S.E.2d at 392. This Court held that because section 1-15(b) expressly limited its scope to those actions not "otherwise provided by statute," the principle of statutory construction cited by defendant was inapplicable. *Id.* Section 1-52(9) specifically provided the period of limitation and the time of accrual for fraud actions; therefore, section 1-15(b) had no application. *Id.*

The circumstances here are essentially the same as those addressed in *Feibus*. As with its predecessor, the terms of section 1-52(16) apply "unless otherwise provided by statute." Therefore, since section 1-50(5) is the statute of repose governing actions against a materialman arising out of improvement to real property, it applies to the exclusion of 1-52(16).

Defendant contends this Court previously has held that where the limitation in section 1-50(5) does not apply, the limitation periods codified in section 1-52(16) are applicable. *Rowan County Bd. of*

Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992). In *Rowan County*, the plaintiff, Rowan County Board of Education, asserted claims of negligence, fraud and misrepresentation and breach of implied warranty against the defendant, U.S. Gypsum Co. ("USG"), arising out of the manufacture and installation of ceiling plaster containing asbestos in Rowan County public schools. In a suit filed in 1985, Rowan County alleged the contaminated materials were purchased and installed between 1950 and 1960. USG moved for summary judgment on the ground that Rowan County's claims were barred by the applicable statutes of limitation and repose, N.C.G.S. §§ 1-15(b), 1-50(5), 1-50(6), 1-52(5). The trial court granted the motion. Reversing the trial court, the Court of Appeals held that the statutes of limitation and repose do not run against a political subdivision of the State pursuing a governmental purpose. This Court affirmed, holding that the plaintiff escaped the running of any statute of limitation or repose under the common law doctrine of *nullum tempus occurit regi*, or claims asserted by the sovereign may not be time-barred. In its analysis the Court noted: "Clearly, if USG is correct that the statutes of limitation and repose apply to Rowan, Rowan's suit, which was brought twenty-four years after the last installation, was time-barred." *Id.* at 6, 418 S.E.2d at 652. Defendant contends that, by this language, the Court implicitly acknowledged the applicability of section 1-52(16).

We do not agree. By this statement, the Court in *Rowan* merely conjectured as to the case's result were the Court to have sustained USG's contentions. The Court did not expressly, or by implication, rule on which statute of repose might be applicable.

For the foregoing reasons, the decision of the Court of Appeals is affirmed as to disposition of plaintiffs' negligence and breach of warranty claims, and reversed as to disposition of plaintiffs' claim sounding in willful and wanton misconduct, and remanded to the Court of Appeals for remand to Superior Court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Justice MEYER dissenting.

I dissent from the majority's opinion determining that there is no statute of repose for fraudulent or willful or wanton negligence

claims brought against manufacturers of products who also deliver the product to a plaintiff. I believe that N.C.G.S. § 1-50(6) governs such claims as brought by the plaintiff here. N.C.G.S. § 1-50(6) was specifically enacted to deal with claims against manufacturers. *See Bernick v. Jurdan*, 306 N.C. 435, 446-47, 293 S.E.2d 405, 412-13 (1982). The statute states:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

N.C.G.S. § 1-50(6) (1983).

Since 1979, Chapter 99B and N.C.G.S. § 1-50(6) have applied to manufacturers of products. *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 50, 332 S.E.2d 67, 71 (1985). The action at issue here involves damages caused by a product manufactured by defendant. I believe that N.C.G.S. § 1-50(6) is a specific statute that addresses the claim at issue and as such should control questions regarding the statute of repose for such claims.

The majority concludes that N.C.G.S. § 1-50(5) applies because defendant here, in addition to being the manufacturer, allegedly delivered the defective goods to the plaintiff, thus becoming a materialman and subject to N.C.G.S. § 1-50(5) under the language of N.C.G.S. § 1-50(5)(a)(9), which states that actions may be taken "against any person furnishing materials." N.C.G.S. § 1-50(5)(a)(9) (1983). I believe that there is no reason to distinguish between a manufacturer of defective goods who does not deliver the defective goods and a manufacturer of defective goods who does deliver the defective goods. The evidence here is that the alleged willful or wanton negligence of the manufacturer occurred when the product was manufactured. There is absolutely no evidence that defendant's transportation and delivery of the defective product materials to the work site was in any way fraudulent or willfully or wantonly negligent. As I see no reason to distinguish between two manufacturers (one who only manufactured and one who manufactured and delivered), both of whose negligence occurred only in the manufacture of the goods, I believe that the correct statute to apply in determining the statute of repose is the statute that more specifically addresses this particular situation, N.C.G.S. § 1-50(6).

> Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability. "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell*, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979).

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citations omitted).

Assuming *arguendo*, however, that N.C.G.S. § 1-50(6) is inapplicable, I believe that claims of willful or wanton negligence or fraud in all events are barred by the ten-year statute of repose in N.C.G.S. § 1-52(16). Although N.C.G.S. § 1-50(5)(g) provides that "[t]he *limitation* prescribed by this subdivision shall apply to the exclusion of . . . G.S. 1-52(16)" (emphasis added), I conclude that there is no specific *limitation* prescribed by N.C.G.S. § 1-50(5) with regard to claims of fraud or willful or wanton negligence. *See Forsyth Memorial Hospital v. Armstrong World Industries*, 107 N.C. App. 110, 113, 418 S.E.2d 529, 531 (1992) (limitations as set forth in N.C.G.S. § 1-50(5) do not apply to allegations of willful or wanton negligence). N.C.G.S. § 1-50(5)(e) specifically states that the six-year limitation prescribed by this subdivision "shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials." As N.C.G.S. § 1-50(5) does not provide a limitation for claims of fraud or willful or wanton negligence, I would find that these claims are not otherwise provided for by statute and therefore are governed by N.C.G.S. § 1-52(16), which provides that

> [u]nless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C.G.S. § 1-52(16) (1983). The claims now before the Court were brought more than ten years after the last act of defendant and thus are barred by the statute of repose.

The majority's opinion will indefinitely extend liability for manufacturers who deliver their own goods. "Such a result would certainly defeat the intent of the legislature to limit the manufacturer's liability at some definite point in time." *Tetterton*, 314 N.C. at 56, 332 S.E.2d at 74. I simply cannot believe that the legislature intended that there be no statute of repose whatsoever for such claims as are now before the Court.

I would affirm the Court of Appeals, finding that the plaintiff's claim was barred either by N.C.G.S. § 1-50(6), the six-year statute of repose, or in all events by N.C.G.S. § 1-52(16), the ten-year statute of repose.

STATE OF NORTH CAROLINA v. BERNICE HUGH McDOUGALD

No. 28A93

(Filed 17 June 1994)

1. Evidence and Witnesses § 541 (NCI4th) — first-degree murder — escape — evidence of flight — admissible — probative value not outweighed by danger of prejudice

The trial court did not err in a first-degree murder prosecution by allowing the State to introduce evidence of defendant's escape from the Hoke County Jail. It is well settled that an escape from custody constitutes evidence of flight and evidence of flight is admissible as evidence tending to show the defendant's guilt. The probative value of the evidence is not outweighed by the danger of unfair prejudice because "unfair prejudice" contemplates evidence having an undue tendency to suggest decision on an improper basis. The evidence of defendant's escape could only be viewed as having a due tendency to suggest a decision on a proper basis.

Am Jur 2d, Homicide §§ 245 et seq., 578 et seq.

2. Evidence and Witnesses § 162 (NCI4th)— first-degree murder—threats by defendant during escape from jail—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence of threats defendant made during an escape from jail. The threats made by defendant during the course of his escape therefore were relevant to show the entire context of defendant's escape and the strength of his desire to escape. In light of this, evidence tending to show the entire context of defendant's escape could only be viewed as having a due tendency to suggest a decision on a proper basis and defendant was not unfairly prejudiced.

Am Jur 2d, Homicide §§ 245 et seq., 578 et seq.

3. Evidence and Witnesses § 1064 (NCI4th)— first-degree murder—flight—instructions—no plain error

There was no plain error in a first-degree murder prosecution in the trial court's instruction on flight where, except for that portion of the instruction informing the jury that "an escape from custody constitutes evidence of flight," the instruction is identical to the appropriate pattern jury instruction and that additional portion is a correct statement of the law. Flight is not an element of any of the offenses with which defendant was charged and the instruction thus could not have relieved the State of its burden of proving every element of the offenses.

Am Jur 2d, Evidence §§ 623 et seq.

Admissibility of evidence that defendant escaped or attempted to escape while being detained for offense in addition to that or those presently being prosecuted. 3 ALR4th 1085.

4. Criminal Law § 736 (NCI4th)— first-degree murder—flight—instructions—repetition

There was no plain error in a prosecution for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property where the court repeated its instruction on flight once for each of the three offenses. The instruction comported with the appropriate pattern jury instruction on flight and well-settled law with regard to such evidence; mere repetition of an otherwise proper instruction does not constitute error.

Am Jur 2d, Trial §§ 1164 et seq., 1242 et seq.

5. Criminal Law § 793 (NCI4th)— assault instructions—acting in concert—no error

The trial court did not err in an assault prosecution in its instructions on acting in concert where defendant contended that the court's repeated use of the phrase "the defendant or another or other acting in concert with the defendant" permitted the jury to find defendant guilty if the jury believed that the crime was committed by someone other than the defendant even if that person had no connection to defendant. The court merely explained to the jury that it could convict defendant if he acted, alone or with one or more persons, to commit the crime and he intended that the crime be committed.

Am Jur 2d, Trial §§ 1164 et seq., 1242 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Gore, J., on 6 October 1992, in the Superior Court, Scotland County, sentencing the defendant to life imprisonment for first-degree murder. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 2 September 1993. Heard in the Supreme Court on 17 March 1994.

Michael F. Easley, Attorney General, by Thomas S. Hicks, Assistant Attorney General, for the State.

John Bryson for the defendant-appellant.

MITCHELL, Justice.

On 6 July 1992, the Hoke County Grand Jury indicted the defendant, Bernice Hugh McDougald, for first-degree murder, conspiracy to commit first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property. Upon the defendant's motion, venue was changed to Scotland County. The defendant was tried capitally at the 24 September 1992 Criminal Session of Superior Court, Scotland County. The jury returned verdicts finding the defendant guilty of premeditated and deliberate first-degree murder and all of the other charges against him.

At the conclusion of a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended

a sentence of life imprisonment for the first-degree murder conviction. The trial court sentenced the defendant in accord with the jury's recommendation. The trial court also sentenced the defendant to imprisonment for thirty years for conspiracy to commit first-degree murder, imprisonment for twenty years for assault with a deadly weapon with intent to kill inflicting serious injury and imprisonment for ten years for discharging a firearm into occupied property. Under the judgments entered by the trial court, these latter three sentences are to be served consecutive to each other and to the life sentence imposed for the first-degree murder conviction. 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 judgments.

The State's evidence tended to show the following. Shortly after 7:00 p.m. on 4 April 1991, members of the Southern Pines Police Department, including the victim, Detective Ed Harris, investigated a report of gunshots at the Holiday Town Apartments in Southern Pines, North Carolina. As Harris and the other officers were searching the area for weapons and illicit drugs, a heated verbal exchange took place between Detective Harris and the defendant. Detective Harris told the defendant that he "better have hidden the dope good" because Harris would be returning with a search warrant.

After the officers left the apartment complex, the defendant met with seven other people, including Kerry Morston and Shannon McKenzie. The defendant told the group that Detective Harris was "f---ing up our business" and that it was "time to get rid of" Harris. At the time the defendant made these statements, three members of the group, including Morston, were armed. Two of the group members held 30-30 rifles, while Morston was armed with a 9-millimeter pistol. The defendant subsequently procured his own 30-30 rifle.

Once the defendant had armed himself, he told Shannon McKenzie that McKenzie was to knock on the front door of Harris' home. The defendant instructed Morston that when Harris answered the door, Morston was to "shoot the hell out of him." The defendant further stated that he would stand over Harris and shoot Harris himself once Harris had been felled by Morston.

The group traveled by car to the Harris residence located just outside of Southern Pines, arriving around 10:00 p.m. They drove a short distance beyond the house and stopped. The defendant told the driver, John Chisolm, to drive around and return in thirty minutes. The other seven members of the group, including the defendant, then walked to Detective Harris' home where they gathered near a shelter in the yard. As they were waiting near the shelter, a car pulled up and Harris' son, Anthony, got out of the car and went inside the house.

After the car drove away, Shannon McKenzie and Kerry Morston walked to the front door of the Harris residence at the defendant's direction. McKenzie rang the doorbell and ran. Harris was sitting in his den with his wife, Judy, when the doorbell rang. Harris got up and opened the door leading from the den into a utility room. At the opposite end of the utility room was the front door to the house. Detective Harris closed the door leading into the den, turned on the front porch light and opened the front door. Morston then shot Harris three or four times through the screen and glass storm door. McKenzie testified at trial that he also heard another shot coming from the direction of the shelter where the defendant was standing.

After hearing the shots, Judy and Anthony Harris ran into the utility room and found Detective Harris lying in a pool of blood and glass. Mrs. Harris pulled Detective Harris' patrol car around to the front of the house and Anthony placed Detective Harris in the backseat of the car. On their way to the hospital, Anthony attempted in vain to revive his father.

In the meantime, Kerry Morston and Shannon McKenzie fled on foot toward the highway, where they found Chisolm and the getaway car. Once in the car, Morston exclaimed, "I got him, I got him." Morston and McKenzie subsequently got out of the car and continued fleeing on foot. They eventually came upon the defendant, who was with two other members of the group. The defendant told them that he also had fired at Detective Harris. After some additional discussion, the five men decided to walk to the mobile home of one Anna Hurd. Once there, the defendant wiped down the weapons and hid them under a bed. Hurd later drove the men back to Southern Pines.

A subsequent autopsy revealed that Detective Harris had suffered fatal gunshot wounds to the face, wrist, chest, back and

abdomen. Bullets or parts of bullets had also traveled through the door leading into the den of the Harris home and one of these bullets had severed one of Judy Harris' fingers. Mrs. Harris' finger was surgically reattached on the night of the murder.

The defendant was arrested in connection with Detective Harris' murder on 5 April 1991 and placed in the Hoke County Jail. He shared a cell with Terry Evans, another member of the group of eight that had conspired to murder Detective Harris. On 19 August 1991, Ms. Glenda Blue, a jailer at the Hoke County Jail, received a call that the defendant's cell was flooded. Responding to the report, Ms. Blue carried a mop to the defendant's cell. When she later returned to retrieve the mop, Evans grabbed her and threw her to the floor. She gave her keys to Evans at the defendant's direction. Evans then forced Ms. Blue to open the cells that housed other members of the group. At some point Ms. Blue called for help, causing the defendant to remark: "We are going to have to do something with her, because if we can get her, nobody will find her until about 6:30." It is unclear from the evidence whether the defendant and his accomplices harmed Ms. Blue further. The defendant eventually escaped and was recaptured the next day at a motel in Bennettsville, South Carolina.

The defendant presented no evidence at his trial. Other pertinent evidence is discussed at other points in this opinion where it is relevant.

[1] By his first assignment of error, the defendant argues that he is entitled to a new trial because the trial court erroneously allowed the State to introduce evidence of his escape from the Hoke County Jail. The defendant acknowledges, however, that we previously have held that "[i]t is well settled in this [S]tate that an escape from custody constitutes evidence of flight." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990). Evidence of flight, in turn, is admissible as evidence tending to show the defendant's guilt. *State v. Patterson*, 332 N.C. 409, 420, 420 S.E.2d 98, 104 (1992); *see also State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986). The defendant nevertheless insists that evidence of an escape from incarceration bears "little or no relevance to the issue of flight." He therefore asks us to reconsider our prior decisions and establish a new rule that, absent unusual circumstances, evidence of an escape from incarceration is not admissible as evidence of flight. Having considered the defendant's argu-

ment in this regard, however, we find no compelling reason to depart from our prior holdings which the defendant correctly recognizes as dispositive.

Alternatively, the defendant contends that even if the evidence of his escape bore some relevance to the issue of flight, any probative value it possessed was "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). He therefore maintains that the trial court's decision to admit this evidence constituted an abuse of discretion under Rule 403 warranting a new trial. We disagree.

As the defendant correctly recognizes, "[w]hether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986). This Court will find an abuse of discretion "only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

We find no abuse of discretion on the part of the trial court in the present case. As noted above, the evidence that the defendant had escaped from the Hoke County Jail was relevant and probative in that it tended to show the defendant's consciousness of his guilt. *See Patterson*, 332 N.C. at 420, 420 S.E.2d at 104; *Parker*, 316 N.C. at 304, 341 S.E.2d at 560. Further, the term "unfair prejudice" contemplates evidence having "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." N.C.G.S. § 8C-1, Rule 403 official commentary; *see also Penley*, 318 N.C. at 41, 347 S.E.2d at 789; *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). In light of our prior holdings regarding evidence of flight, the evidence of the defendant's escape from the Hoke County Jail "could only be viewed as having a *due* tendency to suggest a decision on a *proper basis*." *Penley*, 318 N.C. at 41, 347 S.E.2d at 789. We therefore find no abuse of discretion on the part of the trial court in admitting this evidence. Accordingly, we overrule this assignment of error.

[2] The defendant contends by his second assignment of error that he is entitled to a new trial because the trial court erroneously allowed the State to introduce evidence of threats he made during his escape from the Hoke County Jail. Prior to trial, the defendant

moved to prohibit the State from introducing any evidence regarding any threats he may have made during his escape, arguing that such evidence would be irrelevant and that any probative value it did possess would be substantially outweighed by its prejudicial effect. The trial court postponed its decision on the motion. When the State called Ms. Glenda Blue, the Hoke County Jail employee overpowered by the defendant and Terry Evans, the trial court entertained the arguments of both parties out of the presence of the jury. The court ultimately concluded that Ms. Blue's testimony, which would recount threats made by the defendant during the course of his escape, was relevant as evidence of flight. The court further determined that the probative value of the evidence would outweigh any prejudicial effect. The court therefore allowed Ms. Blue to testify regarding the details of the defendant's escape, including the defendant's remark that something would have to be done with Ms. Blue "because if we can get her, nobody will find her until about 6:30." The defendant contends that the trial court committed reversible error in allowing this testimony. 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). Relevant evidence may be excluded, however, "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). As we explained above, "[w]hether to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court." *Penley*, 318 N.C. at 41, 347 S.E.2d at 789. Again, we find no abuse of discretion on the part of the trial court.

We have previously explained that "the degree or nature of the flight is of great importance to the jury in weighing its probative force." *State v. Jones*, 292 N.C. 513, 527, 234 S.E.2d 555, 562-63 (1977). Evidence of flight is " 'relative' proof which must be viewed in its entire context to be of aid to the jury in the resolution of the case." *Id.* at 527, 234 S.E.2d at 563. The threats made by the defendant during the course of his escape from the

Hoke County Jail therefore were relevant to show the entire context of the defendant's escape and the strength of his desire to escape.

Further, the trial court did not err in concluding that the probative value of this evidence was not substantially outweighed by any of the considerations set forth in Rule 403. As explained above, the evidence of the defendant's escape was highly probative in that it tended to show the defendant's consciousness of his guilt. In light of this fact, evidence tending to show the entire context of the defendant's escape "could only be viewed as having a *due* tendency to suggest a decision on a *proper basis*." *Penley*, 318 N.C. at 41, 347 S.E.2d at 789. The defendant therefore was not unfairly prejudiced by the introduction of this evidence. The defendant has failed to show that the trial court abused its discretion under Rule 403. This assignment of error is without merit.

[3] By his third assignment of error, the defendant maintains that the trial court erred in its instructions on evidence of flight. The trial court instructed the jury on flight as follows:

> Ladies and gentlemen, the State contends that the defendant fled. I instruct you that an escape from custody constitutes evidence of flight. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

The defendant specifically complains of that portion of the instruction informing the jury that "an escape from custody constitutes evidence of flight." The defendant insists that this portion of the instruction "amounted to a mandatory conclusive presumption that evidence of an escape was in fact evidence of flight." He argues that the instruction therefore denied him due process because it "had the ultimate effect of burden-shifting."

The defendant concedes, however, that he did not object to this instruction or request additional instructions. This assignment of error therefore is barred by Rule 10(b)(2) of the North Carolina

Rules of Appellate Procedure and the defendant is not entitled to relief unless the error, if any, constituted plain error. *State v. Odom*, 307 N.C. 655, 659-60, 300 S.E.2d 375, 378 (1983). We have recently explained the nature of a review for plain error:

> [T]o rise to the level of plain error, the error in the trial court's 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).

State v. Barton, 335 N.C. 696, 702-03, 441 S.E.2d 295, 298 (1994).

Having reviewed the trial court's instruction on flight, we find no plain error. Except for that portion of the instruction informing the jury that "an escape from custody constitutes evidence of flight," the instruction at issue is identical to the appropriate pattern jury instruction on evidence of flight. *See* N.C.P.I.—Crim. 104.36 (1986). Further, the additional portion of the instruction complained of by the defendant is a correct statement of the law. "It is well-settled in this [S]tate that an escape from custody constitutes evidence of flight." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990). This is precisely the principle of which the trial court apprised the jury. Finally, as the defendant correctly recognizes, flight is not an element of any of the offenses with which the defendant was charged in the present case. The trial court's instruction on flight thus could not have relieved the State of its burden of proving every element of the offenses with which the defendant was charged beyond a reasonable doubt. We therefore cannot say the trial court committed plain error. Accordingly, we reject this assignment of error.

[4] The defendant argues by his fourth assignment of error that the trial court erred by repeating its instruction on flight three times: once for each of the offenses of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property. Although the defendant did not object to the instructions when given or request additional instructions, he now contends that the trial court's repeti-

tion of the flight instruction constituted plain error in that it unduly emphasized the evidence of his escape and amounted to an improper expression of opinion by the trial court. We disagree.

The trial court in a criminal prosecution "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). Similarly, when delivering its instructions to the jury, the trial court "shall not express an opinion as to whether or not a fact has been proved." N.C.G.S. § 15A-1232 (1988). We conclude that the trial court ran afoul of neither of these statutory mandates in the present case.

As we have noted, the error, if any, with regard to the trial court's instruction on flight did not rise to the level of plain error. The instruction comported with the appropriate pattern jury instruction on evidence of flight and the well-settled law of this State with regard to such evidence. Mere repetition of an otherwise proper instruction does not constitute error. *Cf. State v. Bromfield*, 332 N.C. 24, 44-45, 418 S.E.2d 491, 502 (1992) (the trial court did not place undue emphasis on the State's theory of the case by employing the term "acting in concert" nearly forty times during the course of its instructions); *State v. Cousin*, 292 N.C. 461, 463, 233 S.E.2d 554, 556 (1977) (there was no improper expression of opinion where the trial court's instruction was "merely an introductory repetition" of an earlier unchallenged statement made by the prosecutor). Similarly, the fact that the trial judge in the present case repeated the instruction on flight with regard to three of the offenses with which the defendant was charged, without more, does not constitute an improper expression of opinion. This assignment of error is without merit.

[5] By his fifth and final assignment of error, the defendant contends that he is entitled to a new trial on the charge of assault with a deadly weapon with intent to kill inflicting serious injury because the trial court erred in its instructions on the theory of acting in concert as it applied to that charge. The trial court instructed the jury, in pertinent part, as follows:

> I charge that for you to find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove four things beyond a reasonable doubt. First, that *the defendant, Bernice McDougald or another or others act[ing] in concert with the defendant* assaulted the

> victim, Judy Harris, by intentionally shooting her or by shooting [her] while intentionally shooting at Ed Harris. Second, that *the defendant or another or others acting in concert with the defendant* used a deadly weapon. . . . Third, the State must prove that the defendant had the specific intent to kill Judy Harris or to kill another person at the time and place of the shooting. And fourth, that *the defendant or another or others acted in concert with the defendant* inflicting serious injury upon the victim, Judy Harris.
>
> . . . .
>
> For 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 assault with a deadly weapon with intent to kill inflicting serious injury, each of them is held responsible for the acts of the others done in the commission of that assault. However, the mere presence of a person at the scene of the crime is not enough to constitute acting in concert.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date Bernice McDougald, acting either by himself or acting together with Kerry Morston or others, intentionally shot the victim, Judy Harris, with a firearm or intentionally shot at Ed Harris with a firearm but hit Judy Harris and that the defendant intended to kill Judy Harris or Ed Harris and did seriously injure Judy Harris, it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury. However, if you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to this charge.

(Emphasis added.) The defendant insists that because of its repeated use of the phrase "the defendant or another or others acting in concert with the defendant," the trial court erroneously permitted the jury to find the defendant guilty of assault with a deadly weapon if the jury believed that the crime was committed by someone other than the defendant even if that person had no connection to the defendant. We disagree.

By its use of the phrase "the defendant or another or others acting in concert with the defendant," the trial court was merely

explaining to the jury it properly could convict the defendant of the crime charged if he himself acted, *alone or with one or more persons*, to commit the crime and he intended that the crime be committed. Indeed, the trial court subsequently clarified this point by instructing the jury that it properly could find the defendant guilty if it found that the defendant, "acting either *by himself or acting together with Kerry Morston or others*," assaulted Mrs. Harris and that the defendant possessed a specific intent to kill. Additionally, the trial court cautioned the jury that the defendant's "mere presence . . . at the scene of the crime is not enough to constitute acting in concert." Therefore, viewing the instruction as a whole, we conclude that the trial court informed the jury that it could convict the defendant of assault with a deadly weapon only if it found that the *defendant himself* acted, alone or with one or more persons, to commit the offense and that the *defendant himself* possessed an intent to kill. Accordingly, 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. JERMAINE RAY

No. 75A93

(Filed 17 June 1994)

Constitutional Law §§ 349, 354 (NCI4th)— cross-examination— privilege against self-incrimination partially invoked—no prejudicial error

There was no prejudicial error in a first-degree murder prosecution where a State's witness who had been present at the murder was allowed to describe the murder but invoke the Fifth Amendment testimonial privilege in response to questions on cross-examination concerning his drug dealing. Drug dealing was more than a collateral matter that went only to the credibility of this witness and the trial court should have either required the witness to answer questions or have stricken

all or part of his direct testimony after allowing him to assert the privilege. There was no prejudice, however, because defendant was able to get his contentions before the jury.

Am Jur 2d, Criminal Law §§ 937, 998.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination. 55 ALR Fed. 742.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Ellis, J., at the 31 August 1992 Session of Superior Court, Cumberland County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 17 November 1993.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

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

FRYE, Justice.

On 3 June 1991, defendant was indicted for the first-degree murder of Jermaine McNeil. In a capital trial the jury found defendant guilty of first-degree murder. Following a capital sentencing proceeding the jury recommended, and the trial court imposed, a sentence of life imprisonment.

Defendant raises on appeal a single issue based on two assignments of error. After a thorough review of the trial transcript, record on appeal, written briefs, and oral arguments, we conclude that defendant received a fair trial, free of prejudicial error.

The State presented evidence tending to show the following: Shortly before 8:00 p.m. on 16 November 1990, Alonzo Gallaway drove into the woods near a washerette on Murchison Road in Fayetteville to relieve himself. He saw a body, later identified as Jermaine McNeil, lying on the ground with blood around its face and head. Gallaway drove to a convenience store and called the police.

Officer Jeffrey Stafford responded to the call and thereafter acted as lead investigator on the case. During the course of the investigation, Stafford received information that Demetrius Hawkins might have been involved in the murder and he contacted Lorene Downing, Hawkins' aunt. Downing gave Stafford a statement to the effect that on the night of 16 November 1990, Hawkins had told her he "saw someone get killed." Stafford interviewed Hawkins who identified defendant as the person who shot and killed Jermaine McNeil. In his statement Hawkins stated that he, McNeil and defendant were walking near the washerette on Murchison Road when defendant shot McNeil. Defendant then tried to give the gun to Hawkins and told him that he had to shoot McNeil also, but Hawkins refused. Defendant then shot McNeil "a lot" of times.

Demetrius Hawkins testified that "Maine" was the nickname for the decedent. Hawkins then gave evasive or unresponsive answers and was asked by the prosecutor if he would like to confer with his attorney which he did. Thereafter, Hawkins testified that defendant (also known as "Stonewall") asked him and McNeil to walk over to his house with him. As they were walking behind the washerette, Hawkins heard shots fired. McNeil fell, saying "Stonewall, man you shot me." Defendant told McNeil to shut up and kept firing at him. Defendant had a black .357 magnum revolver. He tried to give Hawkins the gun, telling him that they were in it together. When Hawkins refused, defendant called him a "punk," reloaded the gun, and continued shooting McNeil. Hawkins testified that he believed defendant shot McNeil twelve times, reloading twice in the process. Hawkins testified that no one else was present during the shooting.

Hawkins stated that after the shooting he walked to defendant's house with him and then called a cab and went back to his aunt's house. He described telling Lorene Downing about the shooting, consistent with her testimony and that of Officer Stafford. Hawkins testified that defendant's girlfriend was the mother of McNeil's child and that defendant and McNeil had argued two weeks before the shooting about buying diapers for the child. Hawkins denied having anything to do with the shooting or any plan to lure McNeil to the point where he was shot. He also denied any knowledge that defendant had a gun prior to the shooting.

Hawkins further testified that he was charged with accessory after the fact of first-degree murder in the shooting of Jermaine

McNeil. He described his plea bargain with the State which provided that the accessory charge would be dropped in exchange for his testimony. Hawkins also testified that he had several drug-related charges pending, which were not affected by the plea bargain.

Lorene Downing testified that on 16 November 1990 she was temporarily staying at the house where Hawkins lived with another one of his aunts. At about 8:00 p.m., Hawkins woke her up and said he had to tell her something. He appeared nervous, upset and scared. He told her that he had seen a shooting and that he did not have anything to do with it. He said that he, "Maine," and another person were walking behind the laundromat when the third person shot "Maine" in the back. Downing testified that Hawkins told her, "they had tricked him back there to see some girls or something like that and shot him." The shooter tried to give the gun to Hawkins, but Hawkins would not take it. The shooter then began to shoot "Maine" again. Downing testified that Hawkins told her that the shooting did not have anything to do with drugs, but had to do with a girl. Hawkins refused to tell Downing who had done the shooting. Downing further testified that Hawkins said he was afraid to go to the police because "he would get shot, or they would kill him."

Autopsy results revealed that McNeil had been shot twelve times, six times in the head, five times in the chest and abdomen and once in the right buttock. The shot in the buttock was not fatal, but broke his leg and disabled him, after which the other shots were inflicted. McNeil died from these multiple gunshots, six of which inflicted lethal wounds.

Defendant presented no evidence.

Defendant assigns as error the trial court's failure to strike the testimony of the State's key witness, Demetrius Hawkins, who was permitted to assert his Fifth Amendment testimonial privilege in response to certain questions on cross-examination.

Demetrius Hawkins was the first witness called by the State. He was initially uncooperative, stating that he did not know or did not recall anything about the shooting of Jermaine McNeil. He eventually stated that responding to the prosecutor's questions might incriminate him. A fifteen-minute recess was taken during which time Hawkins conferred with his attorney who had accompanied him to court. Hawkins then testified that he witnessed defendant shoot Jermaine McNeil.

During direct examination of Hawkins the issue of drug dealing was raised. Hawkins was asked what he was doing to make a living at the time he met the victim and defendant and was specifically asked whether he was selling drugs. He was also asked whether he was holding any drugs at the time of the shooting. Hawkins testified that he was not working nor selling drugs when he met the victim and defendant and that he was not holding drugs at the time of the shooting. The prosecutor also posed questions about the involvement of other people in drug sales. He asked if Hawkins knew what McNeil was doing to make money. Over an objection which was later sustained, Hawkins answered that McNeil was selling drugs. When asked if he had personal knowledge that McNeil sold drugs, Hawkins said he did not. Hawkins was then asked if he had ever seen McNeil selling drugs or been around him when he was selling drugs or holding drugs for someone else. Hawkins responded that he had never seen McNeil selling drugs or been around him when he was selling and that he did not know if he had ever been around McNeil when McNeil was holding drugs for someone else. Hawkins was also asked if he remembered whether his aunt asked him if the shooting was about drugs and he testified that he didn't remember.

The prosecutor further inquired whether Hawkins knew someone named Sammy Ray Jones, also known as "Sammy D"; whether Hawkins knew what Sammy D did for a living; and whether he worked for Sammy D. Hawkins testified that he knew Sammy D, knew what Sammy D did for a living, but that he did not work for Sammy D. Following a hearsay objection by defendant, Hawkins was not allowed to state what Sammy D's occupation was. Hawkins was asked if he saw Sammy D on the day of the shooting and if he had any contact with Sammy D or Sammy D's mother since he (Hawkins) had been in jail. Hawkins testified that he did not see Sammy D at any time on the day of the shooting, nor had he had any contact with Sammy D since the shooting. Hawkins testified that he knew Sammy D's mother and pointed her out as she sat in the courtroom; he had not had any contact with her since he had been in jail.

On cross-examination, Hawkins testified that he sold drugs. He specifically testified that during the summer of 1990 he and a group of other people sold drugs in the Preston Avenue area of Cumberland County. Hawkins refused to answer other questions about the drug trade, asserting that the responses might incriminate

him. He refused to identify the source of his drugs; refused to say whether the victim sold drugs; refused to reveal the identity of the person to whom he took the proceeds of his drug sales; refused to say whether the person he took the proceeds to had a relative seated in the courtroom, apparently a reference to Sammy D's mother; and refused to say whether everyone working in the Preston Avenue area was working for Sammy D.

On redirect examination, Hawkins refused to say whether the victim was selling drugs, but did testify that defendant was selling drugs and that defendant was not working for the same person for whom Hawkins was working. Hawkins refused to say whether the victim and defendant were selling drugs on the day of the shooting. At the conclusion of Hawkins' testimony, defendant addressed the court outside the presence of the jury requesting that the witness be required to answer questions to which he had invoked the testimonial privilege or that the court strike his testimony. Defendant's motion was denied.

Defendant contends that allowing Hawkins to assert the testimonial privilege in response to these questions significantly impaired defendant's ability to test the truth of Hawkins' testimony. Thus, according to defendant, the trial court's failure either to require Hawkins to answer the questions or to strike his direct examination testimony was error requiring a new trial.

Under the Sixth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution, a criminal defendant has the right to confront witnesses against him. "The right of a defendant . . . to confront the witnesses against him, guaranteed by the Sixth Amendment, includes the right to test the truth of those witnesses' testimony by cross-examination." *United States v. Cardillo*, 316 F.2d 606, 610 (2d Cir.), *cert. denied*, 375 U.S. 822, 11 L. Ed. 2d 55 (1963). "This Court has repeatedly held that the right to confront is an affirmance of the rule of the common law that in criminal trials by jury the witness must not only be present, but must be subject to cross-examination under oath." *State v. Perry*, 210 N.C. 796, 797, 188 S.E. 639, 640 (1936).

Under the Fifth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution, a witness cannot be compelled to give self-incriminating evidence. "When the individual invokes the fifth amendment privilege, the trial court must determine whether the question is such that it may reasonably

be inferred that the answer may be self-incriminating." *State v. Eason*, 328 N.C. 409, 418, 402 S.E.2d 809, 813 (1991). Here, Hawkins testified that at the time of his testimony he was charged with the manufacture, sale and delivery of drugs in three different cases. Defendant questions whether Hawkins had a testimonial privilege to assert with regard to the questions asked in light of the fact that he admitted that he sold drugs and knew other drug dealers in the area. The State argues that the source of Hawkins' drugs and the identity of the person to whom Hawkins took the proceeds of his drug sales were matters directly related to the knowledge and intent elements of the charged crimes and, thus, Hawkins was properly allowed to assert the testimonial privilege. The trial court found that some of the answers to cross-examination questions could be incriminating and that Hawkins had a right to refuse to answer those questions. As this question is not raised on appeal, we do not consider whether the witness was properly allowed to assert the testimonial privilege.

The issue thus becomes whether defendant's right to confront witnesses through cross-examination was unreasonably limited by Hawkins' assertion of the testimonial privilege.

In *State v. Perry*, this Court examined the situation in which a defendant's right to confrontation and a witness' right against self-incrimination were in conflict. *Perry*, 210 N.C. at 797-98, 188 S.E. at 640. In *Perry*, the defendant and the witness were both indicted for the same murder. In defendant's separate trial, the witness testified for the State that he and the defendant were together on the night of the homicide, but that they separated for about an hour and a half. When they rejoined, the defendant told the witness that he (defendant) had killed the victim. On cross-examination, the defendant asked the witness if he owned a gun, where he kept it, and where he was during the time he and the defendant separated. The witness refused to answer these questions, asserting the testimonial privilege.

The Court held that the trial court erred by failing to strike the witness' testimony while allowing him to assert the testimonial privilege on cross-examination. The Court stated that while the witness could not be compelled to give testimony that would incriminate him,

> it is part of the express or implied understanding that an accomplice admitted to testify for the prosecution shall tell

> all he knows, . . . and he cannot refuse to answer a relevant question on cross-examination under the rule that he shall not incriminate himself . . . . In other words, an accomplice will not be permitted to disclose part of the facts and withhold the rest. He must tell the whole. The cross-examination of a witness is a right and not a mere privilege, . . . and any subject touched on in the examination-in-chief is open to cross-examination.

Perry, 210 N.C. at 797-98, 188 S.E. at 640 (citations omitted).

> Similarly, under federal law it has been stated:
>
> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination.

Cardillo, 316 F.2d at 611. If the witness invokes the privilege in response to questions regarding collateral matters, there is little danger of prejudice, but if the questions relate to the details of the direct examination, "there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of [the] direct testimony and, therefore, that witness's testimony should be stricken in whole or in part." *Id. See also United States v. Smith*, 342 F.2d 525 (4th Cir.), *cert. denied*, 381 U.S. 913, 14 L. Ed. 2d 434 (1965); *Lawson v. Murray*, 837 F.2d 653 (4th Cir.), *cert. denied*, 488 U.S. 831, 102 L. Ed. 2d 63 (1988) (the same principle applies to defense witnesses so that, "[t]he defendant's right to present witnesses in his own defense . . . does not carry with it the right to immunize the witness from reasonable and appropriate cross-examination.").

In *Cardillo*, the witness testified for the prosecution and, on direct examination, described the activities of himself, the defendant and others who were involved in the interstate transportation and sale of stolen furs. The witness invoked the testimonial privilege when asked whether he had committed other crimes in the past and whether he was guilty of certain crimes with which he was then charged. The court found that "[t]hese questions were purely

collateral for they related solely to [the witness'] credibility . . . and had no relation to the subject matter of his direct examination." *Cardillo*, 316 F.2d at 611.

A second witness in *Cardillo* testified that the defendant approached him about having an opportunity to purchase some stolen furs and asked to borrow some money. The witness testified that he gave the defendant $5,000 which the defendant used to purchase the stolen furs. After cross-examination revealed that the witness was not likely to have had $5,000 on hand, defense attorneys attempted to cross-examine him further on the source of the $5,000, but he refused to answer, invoking the privilege against self-incrimination. In determining whether the failure to strike the witness' testimony was reversible error, the court analyzed "the purpose of the inquiry and the role which the answer, if given, might have played in the defense." *Id.* at 612. The court concluded that if the questions had been posed in order to attack credibility, the answer would have been surplusage or cumulative, based on other testimony, and the refusal to strike would have been justified. However, on the *Cardillo* facts, the financial transaction was not collateral but directly related to the defendant's alleged criminal activities and to the witness' presence on the various occasions to which he testified. "The answers solicited might have established untruthfulness with respect to specific events of the crime charged," and under these circumstances the testimony should have been stricken. *Id.* at 613.

In applying the test set forth in *Cardillo*, courts have found that drawing the distinction between direct and collateral matters is often difficult. However, the essential question "must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony." *United States v. Rogers*, 475 F.2d 821, 827 (7th Cir. 1973) (quoting *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir.), *cert. denied*, 390 U.S. 1005, 20 L. Ed. 2d 105 (1968)).

In the instant case, drug dealing was more than a collateral matter that went only to the credibility of this witness. The direct examination testimony of Hawkins reflects that drug dealing was the basis of the relationship between the victim, defendant, and the witness, and it was the probable reason that the three were on Preston Avenue on the evening of the murder. The role of

drug dealing in the activities of the victim, defendant, the witness, and possible other parties was explored at some length by the prosecutor on direct examination of its witness, Demetrius Hawkins. Through this testimony the jury was told that the three men sold drugs, that they did so in the area of Preston Avenue where this homicide occurred, and that other persons were involved in the drug trade in this area, including a person named Sammy D, whose mother was a friend of the witness and was present in the courtroom but was not a witness for the State or defendant. It was reasonable to infer from Hawkins' testimony that Sammy D was an employer in the drug trade and that one or more of the three men present at the shooting worked for Sammy D. In fact, Hawkins' aunt testified that she had overheard Hawkins previously refer to working for Sammy D and, based on things she had heard Hawkins say around the house, she initially assumed that Sammy D was the assailant.

Thus, the issue of drug dealing among the victim, defendant, the witness and possibly others, as well as the role drug dealing may have played in this homicide, was raised and addressed during the direct examination of Hawkins. This is not a case "in which the assertion of the privilege merely preclude[d] inquiry into collateral matters which [bore] only on the credibility of the witness." *Cardillo*, 316 F.2d at 611. Rather, "the assertion of the privilege prevent[ed] inquiry into matters about which the witness testified on direct examination." *Id.* By asserting the testimonial privilege in response to selected questions on cross-examination, Hawkins attempted to "disclose part of the facts and withhold the rest." *Perry*, 210 N.C. at 798, 188 S.E. at 640. This, under the law, he cannot do. The trial court should have either required Hawkins to answer the questions, or stricken all or part of his direct testimony after allowing him to assert the testimonial privilege. Having allowed Hawkins to assert the testimonial privilege, the failure of the trial court to strike all or part of his direct testimony was error. Nevertheless, under the particular facts of this case, we conclude that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

Defendant apparently wanted to show that the witness, the victim and defendant were involved in the drug trade and that one or more of them worked for a person named Sammy D, who was also involved in the drug trade. The witness did indeed testify that he and defendant sold drugs. He also testified, over a defense

objection which was later sustained, that the victim sold drugs. The witness answered a number of questions regarding whether each of the young men worked for Sammy D. Hawkins testified that he did not work for Sammy D; that he did not know if the victim worked for Sammy D or if the victim worked for the same person Hawkins worked for; and that he did not know who defendant was working for, but that he was not working for the same person Hawkins was working for. Although he testified that he knew Sammy D and knew what Sammy D did for a living, following a hearsay objection by defendant, Hawkins was not allowed to state what Sammy D's occupation was. We also note that through his cross-examination of Hawkins' aunt, Lorene Downing, defendant elicited testimony that Hawkins did work for Sammy D. Defendant was thus able to get his contentions before the jury except when he objected to part of them. We accordingly find no prejudicial error in defendant's trial.

NO ERROR.

SYLVIA BENFIELD STEGALL v. ERNEST WILLIAM STEGALL

No. 268PA93

(Filed 17 June 1994)

Divorce and Separation §§ 172, 215 (NCI4th)— alimony and equitable distribution—divorce while claims pending—subsequent voluntary dismissal—right to refile claims

If alimony and equitable distribution claims are properly asserted by the filing of an action or a counterclaim and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after a judgment of absolute divorce is entered, a new action based on those claims may be filed within the one-year period provided by Rule 41(a)(1). Therefore, where plaintiff wife's claims for alimony and equitable distribution were pending at the time an absolute divorce was granted in defendant husband's action, and plaintiff thereafter voluntarily dismissed those claims pursuant to Rule 41(a)(1), plaintiff could properly refile those claims within one year of the voluntary dismissal.

Am Jur 2d, Divorce and Separation §§ 950 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Justice MEYER dissenting.

Justices MITCHELL and WHICHARD join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 110 N.C. App. 655, 430 S.E.2d 460 (1993), affirming an order of dismissal entered 21 February 1992 by Cathey, J., in District Court, Iredell County. Heard in the Supreme Court 6 December 1993.

Pressly & Thomas, P.A., by Gary W. Thomas, for plaintiff-appellant.

Pope, McMillan, Gourley, Kutteh and Simon, P.A., by Pamela H. Simon; and Hicks, Hodge and Cranford, P.A., by Fred A. Hicks, for defendant-appellee.

PARKER, Justice.

On 9 January 1989 plaintiff filed an action for absolute divorce which included claims for alimony and equitable distribution. During the pendency of plaintiff's action, on 2 February 1989 defendant filed an action for absolute divorce. On 13 March 1989 judgment of absolute divorce was granted in defendant's action. Thereafter, plaintiff on 8 October 1990 voluntarily dismissed her action pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) but filed a new action asserting her claims for alimony and equitable distribution on 18 February 1991 within the one-year period permitted under Rule 41(a)(1). Defendant moved under N.C.G.S. § 1A-1, Rule 12(b)(6) to dismiss the action, and the trial court granted the motion. Plaintiff appealed and the Court of Appeals affirmed the dismissal.

This Court granted plaintiff's petition for discretionary review. *Stegall v. Stegall*, 334 N.C. 439, 433 S.E.2d 170 (1993). The question presented for our review is whether plaintiff's claims for alimony and equitable distribution, asserted in her new action filed pursuant to Rule 41(a)(1), were barred by the judgment of absolute divorce. We agree with plaintiff's contention that the claims were not barred and reverse the decision of the Court of Appeals.

The pertinent provisions of N.C.G.S. § 50-11 provide:

(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

. . . .

(c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse, a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment [of] absolute divorce.

. . . .

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

N.C.G.S. § 50-11(a), (c), (e) (1987).[1] In addition,

[n]otwithstanding the provisions of this section, any divorce obtained under G.S. 50-5.1 or G.S. 50-6 by a supporting spouse shall not affect the rights of a dependent spouse with respect to

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1. Subsection (c) was amended effective 1 October 1991 and now provides as follows:

A divorce obtained pursuant to G.S. 50-5.1 or G.S. 50-6 shall not affect the rights of either spouse with respect to any action for alimony or alimony pendente lite pending at the time the judgment [of] divorce is granted. Furthermore, a judgment of absolute divorce shall not impair or destroy the right of a spouse to receive alimony or alimony pendente lite or affect any other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the judgment of absolute divorce.

N.C.G.S. § 50-11(c) (Supp. 1993).

> any action for alimony or alimony pendente lite that is pending at the time the judgment [of] divorce is granted.

N.C.G.S. § 50-19(c) (1987) (repealed effective Oct. 1, 1991).

> The rules of civil procedure provide as follows:
>
> If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C.G.S. § 1A-1, Rule 41(a)(1) (1990).

Applying these principles, the Court of Appeals reasoned that the rights to equitable distribution and alimony are lost after divorce, *Stegall v. Stegall*, 110 N.C. App. 655, 656, 430 S.E.2d 460, 461 (1993); and we reaffirm this general rule. Nevertheless, the court also explicitly recognized that Chapter 50 clearly contemplates the survival of those rights under certain circumstances. *Id.* Reasoning further from *Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), the court said that N.C.G.S. § 50-11(a) "operates as an absolute bar to any claim for alimony which is not pending when judgment of divorce is entered, and Rule 41(a) has no effect on that bar." *Id.* at 657, 430 S.E.2d at 462. The court also concluded that a claim for equitable distribution not pending when judgment of divorce is entered is similarly barred. In concluding plaintiff's claims were properly dismissed, the court stated that "the claims which plaintiff pursues now are not the claims which were pending when judgment of divorce was entered. When plaintiff voluntarily dismissed the original claims, they terminated and no suit was pending thereafter." *Id.* We find, however, that the court erred in declining to apply Rule 41(a)(1) to preserve plaintiff's claims since neither Chapter 50 nor case law requires such a result.

Initially, we expressly disavow the language in the Court of Appeals' opinion indicating that the claims for alimony and equitable distribution in plaintiff's second action were not the same claims for alimony and equitable distribution alleged in plaintiff's original

action as required by Rule 41(a)(1). Plaintiff filed a new civil action, but the claims therein, as best as can be determined from the record and briefs, were the same claims as in the first civil action.

Further, in *Banner*, Albert Banner filed an action for absolute divorce based on one year's separation from Pauline Banner. Mrs. Banner answered and counterclaimed for alimony but failed to set forth abandonment as the ground on which the counterclaim was based. At the pretrial conference the trial court denied Mrs. Banner's motion to amend her counterclaim; and her renewed motion at trial, which commenced on the same day, was also denied. Trial proceeded on the divorce action only. Before resting, Mrs. Banner took a voluntary dismissal pursuant to Rule 41(a)(1) of her counterclaim and also withdrew her answer. The court granted an absolute divorce, and judgment was entered on 25 April 1984. In the meantime, on 20 April 1984, Mrs. Banner filed an action seeking alimony and alimony pendente lite, citing the ground of abandonment. Mr. Banner's motion for summary judgment was granted. *Banner*, 86 N.C. App. at 398-99, 358 S.E.2d at 110-11.

On Mrs. Banner's appeal from summary judgment dismissing her action, the court reasoned that the action was barred "because the parties were already divorced." *Id.* at 401, 358 S.E.2d at 112. Mrs. Banner argued that under Rule 58, her action for alimony and alimony pendente lite was filed prior to entry of the divorce judgment. Therefore, her action was pending at the time the divorce judgment was entered and her alimony claim was still valid. However, the court found that although formal entry of judgment took place after Mrs. Banner's action was filed, she was "fully aware of the terms of" the divorce. *Id.* at 403, 358 S.E.2d at 113. Since "the judgment could not be formally entered until Mrs. Banner's counsel had reviewed it[,] Mrs. Banner should not now be allowed to file a new alimony claim, when she was responsible for the delay in" entry of the judgment. *Id.* Moreover, "[t]he divorce judgment here was granted in open court on 5 April 1984. At that time *there was no action for alimony or alimony pendente lite pending. Therefore, any claim for alimony brought after that date was barred.*" *Id.* (emphasis added). Further, as to Mrs. Banner's contention that her Rule 41(a)(1) voluntary dismissal kept her action alive and pending for one year, the court said that termination of the alimony counterclaim by means of voluntary dismissal meant "there was no alimony action *pending at the time the divorce judgment was granted.*" *Id.* at 404, 358 S.E.2d at 114 (emphasis added). The instant

case is distinguishable from *Banner* in that when the parties' divorce judgment was entered, plaintiff's claim for alimony was pending.

Since plaintiff's claim for equitable distribution was also pending, the instant case is also distinguishable from *Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987), wherein defendant wife failed to respond to plaintiff husband's action for absolute divorce but filed an action for equitable distribution after judgment of absolute divorce was entered. Further, *Carter v. Carter*, 102 N.C. App. 440, 402 S.E.2d 469 (1991), is also distinguishable for similar reasons. In *Carter*, plaintiff husband filed an action for absolute divorce and equitable distribution; defendant wife did not respond; plaintiff took a voluntary dismissal of his equitable distribution claim; and judgment of absolute divorce was entered. Defendant moved to set aside the judgment, and the trial court reaffirmed the decree but attempted to reserve the equitable distribution claim. The court held that the trial court could not "nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce." *Id.* at 446, 402 S.E.2d at 472.

In *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E.2d 385, *disc. rev. denied*, 328 N.C. 732, 404 S.E.2d 871 (1991), plaintiff husband filed an action for absolute divorce and equitable distribution. Defendant wife did not file a timely answer, and the trial court granted plaintiff a judgment of absolute divorce, continuing the issue of equitable distribution. After the judgment was entered, defendant filed an answer to plaintiff's complaint and moved for unequal distribution of the marital property. Thereafter, plaintiff took a Rule 41(a)(1) dismissal of his equitable distribution claim. *Id.* at 300, 399 S.E.2d at 386-87. On appeal defendant contended the trial court erred in dismissing her claim for equitable distribution. However, citing N.C.G.S. § 50-11(e), the court said defendant's right to equitable distribution was destroyed by the judgment of absolute divorce. Further, her claim was not preserved by the exception in section 50-11(e) for such claims asserted prior to judgment of absolute divorce or by the exception in section 50-11(f), which applies to cases wherein the trial court lacks personal jurisdiction over the defendant or jurisdiction to dispose of the property. *Id.* at 301, 399 S.E.2d at 387. The court did not address whether, having taken a Rule 41(a)(1) dismissal after judgment of absolute divorce was entered, plaintiff could have refiled, within the one-year period provided by the rule, his equitable distribution claim asserted before entry of the judgment.

Before this Court, defendant contends that the provisions of Chapter 50 and Rule 41(a)(1) are in conflict; and, therefore, Chapter 50 should control and bar plaintiff's claims. We disagree with this contention. Chapter 50 clearly contemplates that if properly asserted before divorce the right to equitable distribution may survive a judgment of absolute divorce; and if a claim for alimony is pending at the time a divorce judgment is entered, the right to alimony may survive the judgment. *Banner* teaches that even properly asserted alimony rights may be lost by the taking of a voluntary dismissal before entry of judgment of absolute divorce. *Lutz* left open the question of whether an equitable distribution claim asserted before entry of judgment of absolute divorce could, after entry of judgment, be dismissed and refiled under Rule 41(a)(1). We now hold that if alimony and equitable distribution claims are properly asserted, whether by the filing of an action or raising of counterclaims, and are not voluntarily dismissed pursuant to Rule 41(a)(1) until after judgment of absolute divorce is entered, a new action based on those claims may be filed within the one-year period provided by the rule.

In the instant case, plaintiff properly asserted her claims for alimony and equitable distribution before entry of judgment of absolute divorce. Since she did not take a voluntary dismissal of her action before entry of judgment of divorce, the claims were pending when judgment of absolute divorce was entered and were not destroyed by the judgment. Therefore, we hold the Court of Appeals erred in affirming the trial court's dismissal of the action.

REVERSED.

Justice MEYER dissenting.

Finding that N.C.G.S. § 50-11(a) acts as an absolute bar of an action for equitable distribution or alimony brought after the divorce, I conclude that the Court of Appeals was correct in determining that plaintiff's claims in this case were barred.

Chapter 50 establishes the specific rules under which claims for equitable distribution and alimony may be brought. The statute clearly states that such actions may not be brought "[a]fter a judgment of divorce" because at that time, "all rights arising out of the marriage . . . cease." N.C.G.S. § 50-11(a) (1993). The statute allows preservation of claims of alimony if the claim being litigated

after the divorce was pending when the judgment of divorce was entered, N.C.G.S. § 50-19(c) (1987) (repealed effective 1 October 1991), and of equitable distribution, if the right had been asserted before the absolute divorce was ordered, N.C.G.S. § 50-11(e) (1993). Case law has established that the particular cause of action for equitable distribution being contested after the divorce must have been pending at the time of the absolute divorce. *Lutz v. Lutz*, 101 N.C. App. 298, 399 S.E.2d 385 (plaintiff asserted a right to equitable distribution before divorce and voluntarily dismissed claim without prejudice after absolute divorce entered; defendant barred from bringing equitable distribution claim even though "right" of equitable distribution had been asserted prior to absolute divorce), *disc. rev. denied*, 328 N.C. 732, 404 S.E.2d 871 (1991).

I believe that case law and public policy dictate that for an action of equitable distribution and alimony to survive, the particular action requesting equitable distribution and or alimony must have been pending at the time of the divorce. In this case, the action at issue for equitable distribution and alimony was not pending at the time of the divorce. The original action pending at the time of the divorce had been voluntarily dismissed. A voluntary dismissal is a final termination of the original action. *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973); *see also Thomas v. Miller*, 105 N.C. App. 589, 591, 414 S.E.2d 58, 59, *disc. rev. denied*, 331 N.C. 557, 417 S.E.2d 807 (1992). Rule 41(a) allows that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a *new* action based on the same claim may be commenced within one year after such dismissal." N.C.G.S. § 1A-1, Rule 41(a) (1990) (emphasis added). Rule 41(a) clearly states that the action that is renewed in one year is a "new action based on the same claim." It is not the "same claim" as was originally brought. Chapter 50 provides that an action for alimony or equitable distribution must have been brought before the divorce because after the divorce, all rights arising out of the marriage "cease." N.C.G.S. § 50-11(a). I conclude that Chapter 50 does not allow a "new action" for equitable distribution and alimony to be brought after the judgment of divorce has been entered.

When there are two rules that address similar matters but seem to be in conflict, " 'the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute . . . unless it appears that the legislature

intended to make the general act controlling.' " *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 344, 389 S.E.2d 35, 39 (1990) (quoting *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)) (alteration in original). In this case, N.C.G.S. §§ 50-11(a), (e), and -19(c) specifically address the situations under which a claim for equitable distribution and alimony may be brought. Rule 41(a) states specifically that this rule shall be "[s]ubject to the provisions of . . . any statute of this State." Therefore, I believe that Chapter 50 should control the manner in which equitable distribution claims and alimony claims may be brought.

Case law has held that Rule 41(a) does not protect claims for alimony that are voluntarily dismissed before a divorce is entered. *Banner v. Banner*, 86 N.C. App. 397, 404, 358 S.E.2d 110, 113-14, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), *overruled on other grounds by Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991). I believe there is no reason to distinguish between a voluntary dismissal taken before divorce and a voluntary dismissal taken after the divorce judgment is entered. Once a claim of alimony or equitable distribution is voluntarily dismissed, it can only be renewed in a new action. Contrary to the majority's contention, I do not believe that the claim that was renewed in this case is the "same claim" that was pending at the time of the divorce. Thus, the second claim, or "new action," does not satisfy the requirements of Chapter 50 and must be barred.

Public policy dictates that after a divorce, if no claims are pending, the monetary and property concerns of the parties should be laid to rest so the parties may be free to dispose of the property. Divorce affects property rights of the parties, dissolving tenancies by the entirety. *Highway Commission v. Myers*, 270 N.C. 258, 261, 154 S.E.2d 87, 89 (1967). In this case, the couple was divorced in 1989; the original action for equitable distribution and alimony, which was pending at the time of the divorce, was dismissed in 1990. The parties should be able to rely on the finality of the divorce in regard to property when the absolute divorce has become final and no action arising out of the marriage is pending. Therefore, I believe that plaintiff's new action for equitable distribution and alimony, brought after the judgment of absolute divorce, cannot survive, and the Court of Appeals decision should be affirmed.

Justices MITCHELL and WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. VESTER TERRY SNEEDEN

No. 58A93

(Filed 17 June 1994)

Evidence and Witnesses § 727 (NCI4th)— rape—admission of prior conviction—no prejudicial error

Any error in the admission of testimony concerning a prior rape and conviction in a prosecution for first-degree rape, first-degree sexual offense, and kidnapping was not prejudicial where the evidence against defendant, including the victim's testimony at trial, her statements made to others following the incident, and the testimony and photos relating her physical and emotional condition following the incident, is overwhelming. There is no reasonable possibility that the jury would have reached a different result if testimony concerning the prior rape had not been admitted.

Am Jur 2d, Trial § 1121.

Appeal by defendant under N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 506, 424 S.E.2d 449 (1993), finding no error in defendant's trial before, and sentences imposed by, Bowen, J., presiding at the 29 January 1991 Criminal Session of Superior Court, Harnett County. Heard in the Supreme Court 12 May 1993.

Michael F. Easley, Attorney General, by Grayson G. Kelley, Special Deputy Attorney General, for the State-appellee.

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

EXUM, Chief Justice.

Upon proper indictments duly returned, defendant was tried and convicted of two counts of first degree rape, one count of first degree sexual offense, and one count of kidnapping—all committed against Angela Hatfield. He was sentenced to consecutive life terms for both rape convictions and to another consecutive life term for the sexual offense conviction. He was sentenced to nine years on the kidnapping conviction.

On appeal to the Court of Appeals, the majority of the panel found no error and thus affirmed the convictions. Judge Greene, however, dissented as he found error in the admission of the testimony of Mary Jo Welch Thaxton relating to her rape by defendant in 1967, for which defendant was convicted. *See State v. Sneeden*, 274 N.C. 465, 164 S.E.2d 7 (1968). Thus, the issue before this Court is whether defendant is entitled to a new trial due to the admission of Thaxton's testimony.

After carefully reviewing the case, we conclude that assuming, *arguendo*, the admission of the challenged evidence of the 1967 rape was error, the other clearly admissible evidence against defendant so overwhelmingly pointed to his guilt of the crimes charged that there is no reasonable possibility another result would have obtained had the challenged evidence not been admitted. Any error in the admission of this evidence is therefore not prejudicial, thus defendant is not entitled to a new trial. N.C.G.S. § 15A-1443(a) (1988).

The State's principal witness was Angela Hatfield, the victim, who testified in great detail about her abduction and rape by defendant on 17 July 1990. Hatfield, nineteen at the time of the incident, testified that on 17 July 1990 she drove to the unemployment office in downtown Fayetteville looking for work. Defendant, whom she had never seen before, pulled up beside her in his vehicle and said that he was looking for a secretary. Further conversation with defendant led Hatfield to believe that defendant owned or worked for a construction company and that he had a secretarial position which he was willing to offer her.

Defendant then requested Hatfield to follow him to Eutaw Shopping Center, the place where she supposedly would be working, and then to some job sites since her job would entail travelling to those sites during the day. Along the way defendant pulled over and convinced Hatfield to ride in his car. As defendant was driving through Harnett County with Hatfield he stopped near a pond purportedly to look at the fish. Defendant then went around to the passenger side of the car, where Hatfield was seated, and asked her to exit the car and look around. Hatfield complied and defendant continued to talk about the development of the area.

As defendant was directing Hatfield's attention toward the property he put a handcuff on her left hand. A struggle ensued in which defendant punched Hatfield in the jaw, at which time he was able to handcuff her other hand behind her back. Defendant

then showed Hatfield a gun and threatened to kill her. Hatfield asked defendant what he wanted, to which he replied that he wanted sex. Defendant then blindfolded Hatfield.

Defendant drove a short distance and stopped. Defendant led Hatfield, who was still blindfolded, inside a house. He took her to a back room and removed the blindfold and the handcuffs. Defendant then removed Hatfield's clothing. Threatening her with the gun, defendant proceeded to force Hatfield to perform oral sex on him. He then had vaginal intercourse with her. Defendant later forced her to engage in vaginal intercourse again. Hatfield then asked defendant if she could leave. Defendant responded affirmatively. The two exited defendant's house and defendant gave Hatfield her keys, which were in the back of his car.

Hatfield then drove to a car dealership where her boyfriend, Brian Heath Brown, worked. Hatfield was met there by Greg Elmore, an employee of the dealership who was a close friend of Brown and Hatfield. Brown soon approached Hatfield and Elmore, discovered what had happened, and drove her to the fire station, where his father worked. At the fire station Hatfield related the events of the rape to Brown's father.

Brown then proceeded to the hospital with Hatfield. At the hospital, Hatfield told nurse Angelika Streb what happened to her. A rape kit test was administered and photographs of bruises and scratches on her wrists, legs, jaw, and back were taken. Hatfield was then met by Lieutenant Atkins of the Harnett County Sheriff's Department.

Hatfield took Atkins to defendant's house and showed him the job sites she had seen earlier. She gave Atkins a full account of the incident with defendant. Hatfield later identified defendant from a picture lineup. At that time, Atkins took pictures of bruises and scratches on her body.

The State then proceeded to call numerous witnesses who corroborated Hatfield's testimony. James Gregory Elmore and Brian Heath Brown corroborated Hatfield's account of the events at the car dealership. When Hatfield arrived on 17 July 1990 she was crying and was having difficulty breathing. Hatfield told Elmore that she had been raped. Elmore grabbed her because she was having difficulty standing. She had several wounds, her hair was

"messed up," and her clothes were "messy." Brown took her to his father's fire station and then to the hospital.

Samuel H. Brown, the father of Brian Heath Brown, testified that when he saw Hatfield at the fire station where he worked she was hysterical and crying. She told him in detail the events subsequent to meeting the defendant earlier that day. Her hair was "disarrayed" and her wrist and jaw were injured.

Angelika Streb, the nurse who examined Hatfield at the hospital after the incident, explained the rape kit test she administered and related the description of events Hatfield described at the hospital. Streb wrote down the statements made by Hatfield and repeated them to Hatfield for verification. Streb also described injuries to Hatfield's arms, wrists, buttocks, shoulder, legs and jaw.

Dr. Reginald Sherard, who examined Hatfield following the incident, testified as to wounds found on Hatfield's jaw, neck, wrist, back and leg. He also testified to the rape kit test that was performed on Hatfield, which consists of obtaining the physical history of the victim and an examination for physical injuries, including a pelvic examination. Sherard found semen in Hatfield's vagina.

Officer Alan Dezzo of the Harnett County Sheriff's Department testified that at 2:40 p.m. on 17 July 1990 he went to the hospital responding to a call. Detective John Atkins interviewed Hatfield in Dezzo's presence after Hatfield completed the physical examination. Hatfield then took the officers to the site of the offense. Dezzo then testified to the statement given by Hatfield, which corroborated in detail the account as given by Hatfield in court.

Lieutenant John Atkins, a deputy sheriff and detective with Harnett County, testified that he was called to Cape Fear Valley Hospital by Officer Dezzo. There he met with Dezzo and Hatfield, whom he described as "distraught, withdrawn." Atkins photographed her wounds and obtained a complete description of the events of 17 July 1990. Hatfield then took Atkins and her father to the house where she had been raped. Later Atkins showed Hatfield a number of photographs including one of the defendant, and Hatfield picked out the photograph of the defendant as her assailant.

Belinda Hatfield, the victim's mother, testified that on 17 July 1990 her daughter told her she was going to look for a job. Belinda arranged to have lunch with her daughter Angela at their house at 12:30 p.m., and she became concerned when her daughter did

not arrive. She testified that it was unusual for her daughter to not call if she were going to be late. After 2:00 p.m. she received a call from Brian Brown indicating that Angela was at Cape Fear hospital. At the hospital she saw her daughter Angela, who was crying and very upset. She testified that Angela was very withdrawn that evening and that she would vacillate from being tearful to being silent. Angela did not sleep that night.

Angela's father testified that he went to Cape Fear hospital after receiving a phone call from his daughter's boyfriend. At the hospital Angela, who was "upset," told him that she'd been handcuffed and raped by a man larger than two hundred and fifty pounds. He testified that Angela was ninety-eight pounds. He noticed several injuries on Angela, including bruises to her legs, wrist and shoulder. He, Angela, and Lieutenant Atkins then went to the house to which she had been taken. He testified that Angela had trouble sleeping for nights after the assault.

Brenda Kay Bissette, an expert in forensic serology, testified that the body fluids present on Hatfield's panties originated from the semen of a male who had a certain type of semen present in only six percent of the male population, which matched the defendant's semen based on an analysis of defendant's blood.

Mary Jo Welch Thaxton testified that she had been raped by the defendant in 1967. According to Thaxton, the defendant, posing as a graduate student, met her at a bus station where she was waiting for a bus. He explained that he worked for a car rental company and that if she would help him deliver a car to a client, he would drive her to Greensboro. Defendant took her to a house, where he knocked her out and raped her. For this crime defendant was convicted and sentenced to life imprisonment, but was paroled in 1977. *See State v. Sneeden*, 274 N.C. 465, 164 S.E.2d 7 (1968).

The State then called Carla Wood. Wood testified that she had known defendant for many years. Several days prior to the incident with Hatfield, defendant invited her to look at his house for the purpose of hiring her to perform cleaning services. Defendant offered Wood money for sex and attacked her with a pistol when she refused. Wood was able to escape but did not report this incident to the police. Previously, defendant had given Wood $300.

The defense consisted of attempting to show that Hatfield consented to having sexual intercourse with defendant. Defendant testified that on 19 February 1990 he met Hatfield at a gas station. According to defendant, they began talking and he offered her a job. Over the next few days they met twice. They subsequently had sex at his house where he paid her $200. Defendant lost contact with Hatfield until May, when she went to his house for money. The next time he saw Hatfield was on 17 July 1990 at the unemployment office. She decided that the line was too long and followed defendant to his house, where she asked him for marijuana.

They then went to a pond to look at fish. Hatfield was playing with defendant's handcuffs when she put them on herself. Defendant did not have the key with him. Hatfield struggled with the handcuffs, which caused bruising and abrasions on her wrists. They returned to defendant's house, where the handcuffs were removed. They then engaged in oral sex and vaginal intercourse. Although defendant offered Hatfield $200, he did not have the money. Hatfield then became angry and left. Defendant was arrested that night in Fayetteville.

Defendant also testified that he had undergone several operations on his back and one on his hand. He suffered from phlebitis and had undergone triple bypass surgery. According to defendant, the condition of his heart renders him without much strength and with almost no stamina. Defendant denied attempting to have sex with Carla Woods, but he did acknowledge that she visited him on two occasions.

Elizabeth Brown Degon testified that she saw Hatfield and defendant sitting and talking in her restaurant in the "first quarter" of 1990. Degon, however, previously had been unable to identify a photograph of Hatfield when questioned by Officer Atkins. Degon also testified that defendant came into her restaurant with several different young women. Pete Eckley, a "very good friend[ ]" of defendant, and his employee Walter Bauer, also a "good friend" of defendant, testified that Hatfield had come to Eckley's garage with defendant in March 1990. They also testified that they often saw defendant with young women, especially blondes, and that he liked to "parade his women around." Mary Marx, defendant's neighbor, testified as to defendant's infirmities, which caused him to get out of breath simply by walking across a room.

Thus, under both the State's version of events and the account put forth by the defendant it was undisputed that Hatfield went with defendant into his house and had sexual intercourse with him there. On this presentation of evidence, therefore, the only issue for the jury was whether Hatfield consented to being taken to defendant's house and whether she consented to the sexual acts committed there. The jury found these acts by Hatfield to be nonconsensual, and thus convicted defendant of two counts of first degree rape, one count of first degree sexual offense, and one count of kidnapping. The issue before us is whether the admission of Thaxton's testimony was prejudicial error. An error by the trial court does not require reversal where there is no reasonable possibility that the result would have been different without the error. N.C.G.S. § 15A-1443(a) (1988); *State v. Turner*, 268 N.C. 225, 150 S.E.2d 406 (1966).

It first bears emphasis that Hatfield's testimony was thorough and detailed. She described with precision the events in downtown Fayetteville, at the shopping center, at the pond and finally at defendant's house. Her account was internally consistent and consistent with the physical evidence.

Several persons corroborated Hatfield's testimony by testifying that Hatfield related the same account to them on 17 July 1990. Upon leaving defendant's house, Hatfield drove straight to the car dealership. She was immediately taken to the fire station, where she informed Samuel H. Brown, the father of Brian Brown, that she had been raped. She proceeded to tell Samuel Brown in exacting detail the events leading up to, during, and following the rape. She was then taken to a hospital, where nurse Streb administered the rape kit test, which includes asking the victim to recount the events of the rape. Hatfield related to Streb in detail the events surrounding the rape. Later that same day Hatfield was interviewed by officers Atkins and Dezzo at the hospital, at which time she gave a thorough description of the events of the day. The accounts Hatfield gave to Brown, Streb and Dezzo were nearly identical to Hatfield's testimony at trial.

These witnesses who corroborated Hatfield's version of events critically diminish any effect that Thaxton's testimony may have had. It is almost inconceivable that, as defendant would have the jury believe, Hatfield concocted her story between the time she left him and the time she arrived at the car dealership. Similarly,

it is incredulous that Hatfield could recite her version, were it not true, with precise consistency several times on that same day. The only motive suggested by the defendant for Hatfield's statements to her family, her friends, the police and hospital personnel that she had been raped was that defendant reneged on his promise to pay her $200.

The evidence of Hatfield's physical appearance likewise supports her account. Nurse Streb, Dr. Sherard, Samuel Brown, and Edgar Hatfield testified that Angela Hatfield had numerous scratches and bruises to her wrists, legs, shoulder, jaw and neck. At trial the State introduced photographs of Hatfield's wounds that were taken on the evening of 17 July 1990 and later during the same week. Elmore and Brian Brown testified that at the dealership Hatfield was "bent over," she was having difficulty breathing, and her hair and clothes were messy. In fact, she could not stand on her own. Samuel Brown corroborated that Hatfield appeared "disarrayed."

The defense only addressed the injuries to Hatfield's wrists, asserting that these wounds occurred when Hatfield voluntarily put the handcuffs on herself. While we note that this version is inherently questionable in that it asserts that Hatfield's injuries were self inflicted, it totally fails to explain the numerous other injuries to Hatfield's body.

Similarly, the evidence of Hatfield's emotional condition bolstered her account. Several witnesses testified that she was hysterical and crying at the dealership and at the fire station. At the hospital she was described as upset, distraught and withdrawn. Hatfield's parents testified that Angela was withdrawn that evening and that she would become silent and then cry. In addition, she could not sleep that night and she had trouble sleeping on the following nights. This evidence is a strong indication that Hatfield suffered a traumatic event, such as a rape, on 17 July 1990. Aside from implying that Hatfield falsified her emotions after the incident at defendant's house in response to defendant's failure to pay her $200, the defense did not otherwise explain Hatfield's emotional reactions.

Thus the State's evidence, including Hatfield's testimony at trial, her statements made to others following the incident, and the testimony and photos relating her physical and emotional condition following the incident, is overwhelming. In light of this over-

whelming evidence of defendant's guilt, there is no reasonable possibility that the jury would have reached a different result if Thaxton had not testified and thus any error in the admission of her testimony would not be prejudicial. *See, e.g., State v. Foust*, 311 N.C. 351, 357, 317 S.E.2d 385, 388 (1984) (in light of overwhelming evidence that defendant raped victim, including victim's testimony which was corroborated by physical evidence, any error in admission of expert testimony relating to fibers was not prejudicial); *State v. Taylor*, 304 N.C. 249, 270, 283 S.E.2d 761, 775 (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) (since evidence that defendant was guilty of murder, kidnapping, robbery and assault was overwhelming based on eyewitness accounts, error in admission of defendant's statement that he had once abducted and shot a white girl was not prejudicial); *State v. Spaulding*, 288 N.C. 397, 407-08, 219 S.E.2d 178, 185 (1975), *rev'd on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976) (in light of overwhelming evidence of defendant's guilt of murder, such as testimony that defendant was seen over victim shortly before his death and that defendant was covered in blood, any error in admission of statements of co-defendants was harmless).

The decision of the Court of Appeals is, therefore,

AFFIRMED.

STATE OF NORTH CAROLINA v. ROBERT VERNON JONES, II

No. 148A93

(Filed 17 June 1994)

1. Criminal Law § 465 (NCI4th)— reasonable doubt—erroneous jury argument—error cured by court's instructions

Assuming *arguendo* that the prosecutor's definition of reasonable doubt in his jury argument was erroneous to the extent that it required an improperly high degree of doubt for acquittal, the trial court did not err by failing to immediately correct the prosecutor's erroneous definition where the trial

court followed the prosecutor's argument with proper instructions correctly defining the term "reasonable doubt."

Am Jur 2d, Trial § 640.

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

2. Jury § 96 (NCI4th)— jury voir dire—ruling prohibiting questions previously answered—statutory violation—harmless error

The trial court's ruling at the beginning of jury selection that counsel would not be permitted to ask any question of a prospective juror that had previously been asked of and answered by the juror violated the provision of N.C.G.S. § 15A-1214(c) which prohibits the trial court from preventing the prosecution or defense from asking a question of a prospective juror merely because the question has been previously asked by the court. However, defendant was not prejudiced by this statutory violation where this ruling prohibited only one question by defense counsel as to whether a juror understood that it was the prosecutor's burden to prove defendant guilty beyond a reasonable doubt; the juror later responded positively when asked whether she would hold the prosecutor to his burden of proving every element of the offense beyond a reasonable doubt; and defendant was thus not foreclosed from obtaining any information he sought.

Am Jur 2d, Jury §§ 195 et seq.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. 73 ALR2d 1187.

Appeal of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered on 7 August 1992, by Jenkins, J., in the Superior Court, Johnston County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 1 February 1994.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

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

MITCHELL, Justice.

The defendant, Robert Vernon Jones, II, was indicted for first-degree murder by a Johnston County Grand Jury on 9 September 1991. He was tried capitally at the 27 July 1992 Criminal Session of Superior Court, Johnston County. The jury returned a verdict finding the defendant guilty of first-degree murder. At the conclusion of a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment. The defendant appealed to this Court as a matter of right from the judgment of the trial court 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. The defendant testified that he was 24 years old and was a construction worker. He had a ninth grade education. Becky Murray, the victim, first left home in 1989 to live with her sister in the J S & J Trailer Park. The defendant met Becky in November of 1990 while she was living with her sister. They began dating in November. In March or April of the following year, Becky moved in with the defendant in the same trailer park. At some point, Becky and the defendant moved to the Bell Hope Trailer Park.

On 10 August 1991, David Purdue spent most of the day with the defendant and Becky. They spent much of the day in several bars drinking and playing pool. He then took the defendant and Becky to their mobile home in the Bell Hope Trailer Park and left them.

Karen Eddy lived next door to the defendant and Becky. At about 11:30 p.m. on the evening of 10 August 1991, she saw David Purdue bring the defendant and Becky to their mobile home. Later, the defendant woke her by beating on her bedroom window asking for help. When Karen opened the door to her mobile home, she saw the defendant holding Becky around the waist. The defendant carried Becky in and put her on the kitchen floor. Karen observed that Becky was unconscious and had swollen eyes and a swollen jaw. Both of her lips were "busted." Karen also noticed marks on Becky's neck and noticed that Becky's hair was wet. Karen sent her boyfriend to get his truck so that someone could take Becky and the defendant to the hospital. The defendant told Karen that he and Becky had gotten into an argument and he had hit her. In response to Karen's question as to what had made Becky

pass out, the defendant replied he had hit her in the throat. Karen checked Becky's pulse at her mobile home and determined that she was alive. By the time they got to the hospital, she was not breathing. At the hospital, Karen heard the defendant tell a nurse that Becky had gotten into a fight at a party. The defendant also told Karen that he had "roundhoused" Becky.

Linda Kimbrough drove Karen, Becky and the defendant to the hospital that evening. Linda had been awakened by Karen's boyfriend. When she arrived at Karen's trailer, she observed Karen and the defendant attempting to resuscitate Becky. Linda noticed that Becky sounded as though she was choking on something. Linda heard the defendant say at the hospital that he had "backhanded" and "roundkicked" Becky.

Linda Thornton was the Supervising Emergency Room Nurse at Johnston Memorial Hospital on 11 August 1991 when Becky was brought there. She noticed that Becky was not breathing and that her blood pressure was very low. Becky was taken by helicopter to Duke Hospital. She never regained consciousness and died at 1:45 p.m. on 11 August 1991.

Dr. Karen Chancellor was the pathologist who performed the autopsy on Becky's body for the Office of the Chief Medical Examiner. Dr. Chancellor concluded from hemorrhaging in the victim's eyeballs, bruises and abrasions to the neck, and a fracture to the hyoid bone, that the cause of the victim's death had been manual strangulation.

During the course of the trial, other evidence was presented tending to show that on several occasions the defendant had attacked Becky and seriously injured her. There was also evidence that the defendant had been charged with assault on at least two prior occasions.

[1] By an assignment of error, the defendant contends that he is entitled to a new trial because the prosecutor misstated the definition of the phrase "reasonable doubt" and thereby violated his due process rights. The defendant contends that the prosecutor's argument to the jury included a definition of "reasonable doubt" similar to definitions which have been held to be error when given as a part of a trial court's jury instructions. He argues that this denied him due process and that he is entitled to a new trial as a result.

The first of two prosecutors addressed the jury during closing arguments as follows:

> Before we go any further, though, let me speak with you about something you're going to have to deal with in the jury room, and that's your decision standard. In the State of North Carolina, it's called beyond a reasonable doubt. Let me read you what the Supreme Court of this state has had to say about it. It said:
>
> "A reasonable doubt is not a vain, imaginary, or fanciful doubt, but it is a sane, rational doubt. Where it is said the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it must be fully satisfied or entirely convinced or satisfied to a moral certainty. Now, a reasonable doubt is an honest, substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony, or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him."
>
> All this is saying is that your decision must be based on common sense and reason. In other words, you use your common sense in deciding whether or not there is a reason, something you can identify, to doubt that the defendant is guilty. Now, the other language that you may hear emphasized, and which you, in fact, heard in the definition, includes "fully satisfied," "entirely satisfied," or "satisfied to a moral certainty." I tell you that none of this language, none of it at all, raises the State's burden of proof beyond a reasonable doubt. It just doesn't do it. These words do not mean that you must be satisfied beyond all doubt, beyond any doubt, or beyond a shadow of a doubt. Again, I remind you that your doubt must arise out of common sense and be based on a reason, something you can identify.
>
> And when you think about it, the standard of beyond a reasonable doubt makes common sense, because to require the State to prove anything to you beyond all doubt, any doubt, or shadow of a doubt would be well nigh impossible.

. . . .

> Now, about being fully satisfied or entirely convinced or satisfied to a moral certainty, simply means, again using your common sense in evaluating the evidence, you have no reason to doubt the defendant is guilty. Now, a moral certainty is simply one based on our own innate sense of what is right or wrong, because to be sure it would be wrong to convict someone if you have reason to believe they were not guilty.

Assuming *arguendo* that the definition of "reasonable doubt" given by the prosecutor contained error, the defendant is still entitled to no relief.

Both the Supreme Court of the United States and this Court have held that a *jury instruction* defining "reasonable doubt" which requires an improperly high degree of doubt for acquittal offends due process. *Victor v. Nebraska*, --- U.S. ---, 127 L. Ed. 2d 583 (1994); *Sullivan v. Louisiana*, --- U.S. ---, 124 L. Ed. 2d 182 (1993); *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990); *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993), *judgment vacated*, --- U.S. ---, 128 L. Ed. 2d 42 (1994); *State v. Bryant*, 334 N.C. 333, 432 S.E. 2d 291 (1993), *judgment vacated*, --- U.S. ---, 128 L. Ed. 2d 42 (1994); *State v. Montgomery*, 331 N.C. 559, 41 S.E.2d 742 (1993). However, such cases only dealt with definitions given by the trial court to the jury. They are not controlling here, where the statements complained of were made by the prosecutor during jury arguments.

The trial court did not err by failing to intervene during the prosecutor's argument in the present case. The record indicates that prior to the closing arguments of counsel, the trial court stated to the jury that "[a]t the conclusion of these arguments, I will instruct you on the law in this case, and then you will be taken to the jury room to begin your deliberations." Additionally, the second prosecutor and both defense attorneys specifically stated during their jury arguments that the jury must take the law from the instructions of the trial court. Further, at the conclusion of the arguments of counsel, the trial court gave proper instructions on all aspects of the case, including the definition of "reasonable doubt." Specifically, the trial court instructed as follows:

> The State must prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is a doubt

> based on reason and common sense arising out of some or all of the evidence that has been presented, or a 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.

This was a correct statement of the law by the trial court. *State v. Hudson*, 331 N.C. 122, 140, 415 S.E.2d 732, 742 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 136 (1993); N.C.P.I.—Crim. 101.10 (1974); *see Victor*, --- U.S. at ---, 127 L. Ed. 2d at 590.

We have assumed *arguendo* for purposes of this case that the prosecutor's definition of "reasonable doubt" complained of by the defendant was erroneous to the extent that it required an improperly high degree of doubt for acquittal. Nevertheless, we conclude that the trial court did not err in failing to immediately correct the prosecutor's erroneous definition where, as here, the trial court followed the complained-of argument of the prosecutor with proper instructions correctly defining the term "reasonable doubt." In this context, any error of the prosecutor in defining the term "reasonable doubt" could not have denied the defendant due process and did not require a new trial. *See State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 470 (1988); *State v. Gladden*, 315 N.C. 398, 426, 340 S.E.2d 673, 690-91, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986); *State v. Oliver*, 309 N.C. 326, 359, 307 S.E. 2d 304, 325 (1983); *State v. Harris*, 290 N.C. 681, 695-96, 228 S.E.2d 437, 445 (1976); *see also Darden v. Wainwright*, 477 U.S. 168, 91 L. Ed. 2d 144 (standard to be applied to prosecutorial misconduct), *reh'g denied*, 478 U.S. 1036, 92 L. Ed. 2d 774 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L. Ed. 2d 431 (1974) (same); *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, --- (1994) (same). This assignment of error is overruled.

[2] By his next assignment of error, the defendant contends that the trial court erred in preventing his counsel from asking jurors questions, solely because the trial court had previously asked the same or similar questions. The defendant contends that this violated N.C.G.S. § 15A-1214(c) and entitles him to a new trial. Though we conclude that the trial court erred in this regard, we also conclude that the defendant has not suffered any resulting prejudice.

The trial court announced at the beginning of jury selection that it would not permit counsel for either side to ask any question of a prospective juror that the juror had been asked previously

and had answered. Even though the defendant did not object, this assignment of error is reviewable. When a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial. *See State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925).

The statute applicable to the jury *voir dire* in the present case provides:

> 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). The defendant contends that the trial court's ruling prohibited him from taking advantage of the right expressly given by this statute and constituted error. We agree.

This Court has held that "[t]his statutory right to *voir dire* examination serves a double purpose, first, to determine whether a basis for challenge for cause exists, and second, to enable counsel to intelligently exercise peremptory challenges." *State v. Soyars*, 332 N.C. 47, 56, 418 S.E.2d 480, 486 (1992). The extent and manner of that inquiry, however, rests within the sound discretion of the trial court. *Id.* "Therefore, defendant must show prejudice, as well as a clear abuse of discretion, to establish reversible error." *State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994).

The trial court's ruling in this case was contrary to the language and intent of the statute. N.C.G.S. § 15A-1214 prohibits the trial court from preventing the prosecution or defense from asking a question of a prospective juror *merely* because the question has been previously asked by the court. The statute does not, however, entitle either the prosecution or the defense to ask improper or repetitious questions; nor does it prohibit the trial court, in its discretion, from sustaining objections to such questions. The trial court is expected to exercise its discretion in determining whether

to permit such questions. The trial court in this case, however, ruled from the outset that no questions would be allowed if they had been previously asked of and answered by the juror in question. We conclude that the trial court erred in this regard since its ruling had the effect of preventing the defendant from asking questions *solely* because jurors had previously been asked the same questions. This ruling was contrary to N.C.G.S. § 15A-1214(c).

Having determined the trial court's action to have been contrary to the statute, we must next determine its prejudicial effect, if any, on the defendant's trial. Because the defendant was not foreclosed from obtaining any information he sought, we conclude that the statutory violation in this case was not so prejudicial as to require a new trial.

> The trial court's error in this case
>
> 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).

State v. Conner, 335 N.C. 618, 630, 440 S.E.2d 826, 833 (1994). After reviewing the entire transcript of the selection of the jury, we are unable to identify, and defendant has failed to point out, any possible prejudice resulting from the trial court's ruling. The transcript reveals that only once was counsel specifically prevented from asking a question of a potential juror. The defendant was not allowed to ask a juror, "Do you understand it's the prosecutor's burden to prove the defendant guilty, and they must do that beyond a reasonable doubt?" Five questions later, the juror was asked, "Would you hold the prosecutor to his burden of proving every element of the offense beyond a reasonable doubt?" The juror answered "Yes, sir." Nothing in the record tends to show that a different result might have been reached at trial, absent the trial court's ruling which is the subject of this assignment of error. Therefore, we conclude that it did not prejudice the defendant. *Conner*, 335 N.C. at 630, 440 S.E.2d at 833; N.C.G.S. § 15A-1443(a) (1988).

The only questions prohibited by the trial court's ruling were ones previously asked and answered. The action of the trial court did not deprive the defendant of his right to complete information about each prospective juror concerning her or his fitness and competency to serve as a juror. The record indicates that on many occasions, counsel were allowed to ask jurors questions substantially similar to, or completely repetitious of, questions previously asked the same jurors by the trial court. For these reasons, we conclude that the defendant has failed to demonstrate that the trial court's error resulted in prejudice entitling him to a new trial. This assignment of error is overruled.

Having carefully reviewed the record and each of defendant's assignments of error, we hold that defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. LARRY RAY GODWIN

No. 195A92

(Filed 17 June 1994)

1. Criminal Law § 106 (NCI4th)— murder—discovery—list of State's witnesses

The trial court did not err in a first-degree murder prosecution by denying defendant's request for a list of the State's witnesses prior to jury selection. *State v. Covington*, 317 N.C. 127, did not alter the long-standing rule that a defendant has no right to pretrial discovery of potential State's witnesses but at most recognized that during jury selection the trial court has the discretion to order either side to furnish the other with a list of witnesses.

Am Jur 2d, Depositions and Discovery §§ 428 et seq.

2. Criminal Law § 113 (NCI4th)— first-degree murder—discovery—statement not known to State

The trial court did not err in a first-degree murder prosecution by admitting testimony regarding a statement made by defendant to a coworker where defendant had made a mo-

tion for discovery under N.C.G.S. § 15A-903, the statement had not been furnished to defendant, the trial court conducted an extensive *voir dire*, and the witness admitted that he had not made the specific statement in question prior to his testimony. The State cannot reasonably be expected to relate a statement to defendant of which it has no knowledge.

Am Jur 2d, Depositions and Discovery § 443.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

3. Criminal Law § 109 (NCI4th)— first-degree murder—reciprocal discovery—no error

The trial court did not err in a first-degree murder prosecution by ordering reciprocal discovery by defendant within two weeks after the State met its discovery deadline where the State sought to obtain from defendant any psychiatric evidence which defendant intended to offer. N.C.G.S. § 15A-905(b) requires defendant to produce psychiatric evidence if he intends to use such evidence and sets no time limitation by which defendant must furnish the State with discovery. Defendant has made no showing that the time set by the trial court was unreasonable, defendant still had flexibility in determining his trial strategy and in assessing what evidence he would actually introduce, and any evidence obtained after the deadline would be available as long as defendant complied with the continuing duty to disclose.

Am Jur 2d, Depositions and Discovery §§ 462 et seq.

4. Jury § 120 (NCI4th)— first-degree murder—jury selection—list of improper questions—no error

The trial court did not err in a first-degree murder prosecution by furnishing a list of "improper questions" to both parties during jury selection and directing that none of those questions be asked. The list was not submitted on appeal, and defendant has shown neither prejudice nor clear abuse of discretion.

Am Jur 2d, Jury §§ 201, 202.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by

Duke, J., at the 2 December 1991 Criminal Session of Superior Court, Pitt County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 3 May 1993. Heard in the Supreme Court 16 November 1993.

Michael F. Easley, Attorney General, by William B. Crumpler, Associate Attorney General, for the State.

Jeffery B. Foster for defendant-appellant.

FRYE, Justice.

Defendant was tried capitally on indictments charging him with the first-degree murder of his former wife, Mamie Paulette Brock; armed robbery; first-degree kidnapping; conspiracy to commit first-degree murder; conspiracy to commit kidnapping; and conspiracy to commit armed robbery. The jury returned verdicts finding defendant guilty of all charges. Conviction for first-degree murder was based solely on the felony-murder rule. Following the capital sentencing proceeding for the first-degree murder conviction, the trial court imposed a sentence of life imprisonment as recommended by the jury. The court arrested judgment on the armed robbery and kidnapping convictions. As to each count of conspiracy, the court sentenced defendant to the presumptive term of three years imprisonment.

In this appeal, defendant has raised fourteen assignments of error, nine of which were dismissed by this Court upon motion of the Attorney General for failure to comply with the Rules of Appellate Procedure, specifically Rules 28(a) and 28(b)(5). We shall consider the remaining five assignments of error.

Evidence presented at trial tended to show the following: after a marriage of about eighteen years, defendant and Brock divorced some seven years prior to the events in question. During the seven to eight months preceding her death, Brock and defendant resumed living together in a mobile home behind the "Hard Times Club" in Pitt County. Defendant and Brock had a strained relationship, and she had planned to move on 13 August 1990 but did not do so. However, defendant had already found another roommate, a man who worked with him named Michael Burnshausen.

Defendant was employed as a mechanic at a tire service center in Greenville. Brock was an assistant manager at a Hardee's

restaurant on East Tenth Street in Greenville. Her duties as assistant manager included making night deposits at bank depositories upon leaving work. Mary Cook, a general manager for Hardee's Food Systems was responsible for several restaurants in the Greenville area including the one at which Brock worked. On Tuesday, 14 August 1990, at approximately 10:00 a.m., Cook discovered that Brock had not arrived at work. She began making inquiries as to Brock's whereabouts and went to Brock's residence to look for her. She did not get an answer at the residence. Cook determined that the restaurant had collected around $293.00 the preceding night. She also determined that one of the bank deposit bags and a deposit slip were missing.

On 14 August 1990, Detective D.R. Best of the Greenville Police Department and a deputy from the Pitt County Sheriff's Department went to the mobile home to look for Brock. When they entered the residence they found Burnshausen hiding in a closet. As a result of talking with Burnshausen, Detective Best and the other officers, including Detective Ronald Smith of the Pitt County Sheriff's Department, went to a heavily wooded area in Beaufort County along Blount's Creek Road that was used for logging. Detective Smith turned off the road and drove down a muddy path as directed by Burnshausen.

Detective Smith stopped at the end of a path and radioed for the other officers to join him because he could go no further in his vehicle. From there, officers walked about forty-five feet to a point in the woods where they found the victim's body covered with pine straw, leaves and sticks. She had on a pair of socks, a Hardee's uniform shirt that was unbuttoned and laid open, and a white bra; she had on no pants or panties. A white blood-stained cloth covered her face.

Dr. L. Stanley Harris, a pathologist, performed the autopsy at Pitt County Memorial Hospital on 15 August 1990. Brock had four gunshot wounds; two to her face, one to the left temple area, and one to the back of her head. There were seven blunt trauma injuries over the top and back of the victim's head. Most of these injuries penetrated through the scalp to the bone, although the bone was not broken. Dr. Harris opined that these injuries would have been caused by a minimum of seven separate striking blows at different angles. Injuries to Brock's face appeared to have been inflicted by a softer implement rather than a hard one. Other blunt

traumas found on her arms and hands were consistent with defensive reactions.

On 15 August 1990, S.B.I. Agent James M. Wilson, along with other officers, found defendant at his mother's mobile home in the Blount's Creek area of Beaufort County and arrested him for Brock's murder. Defendant made a statement about Brock's death to Agent Wilson and Detective Best. After describing the domestic problems that he and Brock were having, defendant stated that he and Brock had a confrontation at Hardee's on the evening of 13 August, after which he returned to his mobile home. Burnshausen was at the mobile home. When defendant told him about the confrontation, Burnshausen suggested that they rob Brock in order to get even with her. Around 11:00 p.m., defendant and Burnshausen went to Hardee's. Burnshausen parked defendant's car where Brock could not see it, and defendant went to Brock's car and got into the back seat to wait for her to come out of the restaurant. Defendant told Burnshausen to follow them in defendant's car. Sometime around midnight, Brock came out of the Hardee's restaurant, got into her car, put the bank deposit bag on the front seat, and started out of the driveway. Defendant raised up in the back seat, which frightened Brock at first; then she became angry. She agreed to pull over and get into the passenger seat and then defendant drove down Highway 33. Burnshausen followed them.

Defendant stated that he turned on Dumpster Road, drove down the road about a quarter of a mile, and stopped. Brock saw Burnshausen pull up behind them and questioned why he was there. Defendant and Brock then began fighting inside and outside the car. Defendant stated that while they were fighting in the car, his .25 caliber gun, which he had loaned to Brock because she was uneasy about closing the restaurant, slid from under the seat. Defendant stated that he picked up the gun before getting out of the car and pointed it at Brock to scare her. They began fighting over the gun when it went off twice, striking her in the head. The gun jammed and Brock fell to the ground. Defendant ran back to the car where Burnshausen was, gave him the gun, and told him that Brock had been shot.

According to defendant, Brock then ran by the car and he ran after her. They fell in the ditch while fighting and at some point went back to the victim's car. Defendant looked around and saw Burnshausen who stated that they had "gone too far to turn

back now." Burnshausen took the gun and went to the victim. Defendant walked back to the car. He heard a shot and ran back to where Burnshausen and Brock were and found Burnshausen standing over Brock beating her in the head with some type of stick. Burnshausen stated that the victim was not dead. Defendant reached down to strangle her.

Defendant and Burnshausen decided to get rid of Brock's body. They put her in the trunk of defendant's car while she was still alive. They left the victim's car on Dumpster Road and drove defendant's car toward Washington. They drove a couple of miles along Old Blount's Creek Road and turned down an old logging road. They drove onto another path and went to a dead end where they stopped and got out of the car. Burnshausen opened the trunk and they picked the victim up and laid her on the ground at the edge of the woods while she was still breathing. Burnshausen then put a rag over her face and suffocated her. Burnshausen said that they needed to make this look like a kidnapping, robbery, rape, and murder, so they needed to leave some rape evidence. He removed the victim's panties, slacks and shoes. Defendant walked out of the woods, leaving Burnshausen with the victim.

Defendant stated that he and Burnshausen returned to the victim's car on Dumpster Road. Burnshausen drove defendant's car while defendant drove Brock's car about a mile or so and parked it on a path. They then started back towards Greenville in defendant's car, stopping at a store where Burnshausen purchased some garbage bags. On the way to Greenville, they counted and divided the money they had taken from Brock. They then went to the dumpster behind the "Hard Times Club" and put Brock's clothing, the bank deposit bag, and other things in the garbage bags and threw them in a dumpster. Both defendant and Burnshausen went to work later that day. After work, defendant went to his mother's residence where he was later arrested.

Defendant offered no evidence.

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

[1] By his first assignment of error, defendant argues that the trial court committed reversible error in denying defendant's request for a list of the State's witnesses prior to jury selection. Defendant concedes that under the case law and statutory law

of North Carolina, he has no right to pretrial discovery of potential State's witnesses. *See, e.g.*, N.C.G.S. § 15A-903 (1988); N.C.G.S. § 15A-904 (1988); *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980); *State v. Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977). Nevertheless, he contends that under *State v. Covington*, 317 N.C. 127, 343 S.E.2d 524 (1986), he was entitled to receive a list of the State's witnesses prior to jury selection. In *Covington*, the trial judge, after a hearing on defendant's motion, required the State to furnish to the defendant the names of its witnesses prior to jury selection. Defendant's contention on appeal was that the trial court erred by not granting a continuance of the trial upon the defendant's first learning of the names and addresses of the State's witnesses. In rejecting this contention, we acknowledged the "long-standing rule in North Carolina that a criminal defendant does not have the right to discover in advance of trial the names and addresses of the State's prospective witnesses." *Id.* at 130, 343 S.E.2d at 526. Contrary to defendant's argument, *Covington* did not alter this long-standing rule but at most recognized that during jury selection the trial court has discretion to order either side to furnish the other with a list of witnesses. *See State v. Smith*, 320 N.C. 404, 414, 358 S.E.2d 329, 334-35 (1987) (trial court did not err or abuse its discretion in requiring defendant to furnish list of witnesses prior to jury selection); *but see State v. Smith*, 291 N.C. 505, 523-524, 231 S.E.2d 663, 675 (1977) (trial judges should not encourage what the legislature specifically rejected by requiring the State to furnish advance list of witnesses to defendants). We conclude that defendant had no *right* to a list of the State's witnesses, and defendant has not shown specific prejudice so as to constitute an abuse of discretion by the trial court in denying his request.

[2] Defendant next argues that, because the State violated the discovery rules of N.C.G.S. § 15A-903(a), the trial court abused its discretion in admitting testimony regarding a statement made by him to a coworker. Prior to trial, defendant made a motion for discovery under N.C.G.S. § 15A-903 which deals with disclosure of evidence by the State.

The State called Horace Wiley during its case-in-chief. Wiley testified that he received a telephone call from defendant after defendant's arrest for the murder of Brock. In response to the State's question, "Did he [defendant] say anything about Michael Bernshausen?", Wiley replied, "That Mike didn't do it, he [defend-

ant] did it." Defendant objected to this testimony and made a motion to strike. The trial court overruled the objection and denied the motion to strike. After the State concluded its direct examination of Wiley, court was recessed for the evening. At that time, defendant requested copies of any statements that he had made to any officers. The State complied with this request.

When the trial resumed the next day, the defense made a motion to strike "all reference to [Wiley's] testimony from the trial of the case." At the hearing on the motion, defendant argued that the State failed to comply with his prior discovery motion under N.C.G.S. § 15A-903(a), by not providing the substance of all statements made by him resulting in the admission of damaging, surprise testimony. The State argued that Wiley had not made this statement prior to testifying and that the substance of this statement was consistent with other statements made by defendant provided in discovery. Called by the defense to testify at the hearing, Wiley indicated that he had not previously related this specific statement to the State. The trial court denied the motion to strike.

> Upon motion of a defendant, a trial court must order the prosecutor to permit a defendant to inspect and copy any relevant written or recorded statements in the State's control that were made by a defendant. N.C.G.S. § 15A-903(a)(1) (1983). Further, N.C.G.S. § 15A-903(a)(2) provides that upon motion, the trial court must order the prosecutor to divulge any oral statements made by the defendant that are relevant to the case. When a party fails to comply with the order, the trial court may grant a continuance or a recess, prohibit the violating party from introducing the non-disclosed evidence, or enter any other appropriate order. N.C.G.S. § 15A-910 (1983). Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court's discretion[,] *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983), including whether to admit or exclude evidence not disclosed in accordance with a discovery order. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978).

State v. Weeks, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988).

The trial court conducted an extensive *voir dire* on defendant's motion. At that hearing, the State contended that it was not aware of this specific statement prior to Wiley's testimony. Upon question-

ing by defense counsel, Wiley admitted that he had not made the specific statement in question prior to his testimony. N.C.G.S. § 15A-903(a) only requires that the State divulge the substance of those statements made by defendant, "the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial . . . ." N.C.G.S. § 15A-903(a)(2) (1988). The State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand. Under these circumstances, we find that the State did not violate the discovery rules of N.C.G.S. § 15A-903(a); thus, the trial court did not err in allowing this testimony.

[3] By his third assignment of error, defendant argues that the trial court exceeded its authority under N.C.G.S. § 15A-905 in ordering reciprocal discovery by defendant within two weeks after the State met its discovery deadline. The trial court ordered the prosecution to provide discovery to defendant on or before 12 July 1991. The trial court also ordered reciprocal discovery by defendant to the State within two weeks after the State met its deadline. Specifically, the State sought to obtain from defendant any psychiatric evidence which defendant intended to offer in the case. Defendant concedes that N.C.G.S. § 15A-905(b) requires him to produce psychiatric evidence if he intends to use such evidence at the guilt/innocence phase or the sentencing phase of trial but argues that the court should not have placed a two week limitation on the time for compliance with the order when trial was approximately four months away.

N.C.G.S. § 15A-905(b) sets no time limitation by which a defendant must furnish the State with discovery, and defendant has made no showing that the time set by the trial court was unreasonable. Further, under the statute, defendant was only obligated to disclose evidence which it "intended" to use at trial by the end of the two week period set by the trial judge's order. N.C.G.S. § 15A-905(b) (1988). Defendant still had flexibility in determining his trial strategy and in assessing what evidence he would actually introduce. Also, under N.C.G.S. § 15A-907 there is a continuing duty to disclose such evidence discovered prior to or during trial. Thus, any evidence defendant obtained after the reciprocal discovery deadline was also available for his use as long as he complied with section 15A-907. The trial court did not exceed its authority; therefore, this assignment of error is rejected.

Defendant next argues that his first three assignments of error cumulatively demonstrate that he is entitled to a new trial. These assignments of error have been rejected above, likewise, this argument merits no relief.

[4] By his final assignment of error, defendant argues that the trial judge erred in furnishing a list of questions entitled "Improper Jury Questions" to both parties during jury selection. The judge directed that none of those questions be asked. It is well settled that the extent and manner of inquiry during jury selection is within the sound discretion of the trial court. "Therefore, defendant must show prejudice, as well as a clear abuse of discretion, to establish reversible error." *State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994) (citations omitted). Defendant in this case has shown neither prejudice nor clear abuse of discretion. Moreover, defendant makes it difficult for us to consider the "List of Improper Questions," when he has not submitted the list to this Court. For these reasons, this assignment of error must be rejected.

NO ERROR.

STATE OF NORTH CAROLINA v. BERNARDINO ZUNIGA

No. 156A85(2)

(Filed 17 June 1994)

1. Constitutional Law § 166 (NCI4th); Criminal Law § 956 (NCI4th) — state collateral review — retroactivity of federal constitutional rules

The test set forth in *Teague v. Lane*, 489 U.S. 288 (1989), is adopted as the test of retroactivity for new federal constitutional rules of criminal procedure on state collateral review.

Am Jur 2d, Constitutional Law §§ 634 et seq.

Supreme Court's views as to what constitutes an ex post facto law prohibited by Federal Constitution. 53 L. Ed. 2d 1146.

2. Criminal Law § 1352 (NCI4th)— retroactivity of McKoy decision

The decision of *McKoy v. North Carolina*, 494 U.S. 433 (1990), which invalidated the unanimity requirement for finding mitigating circumstances in a capital sentencing proceeding, is to be applied retroactively on state post-conviction review to capital cases which became final before *McKoy* was decided because the rule set forth in *McKoy* is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding within the meaning of the second *Teague* exception.

Am Jur 2d, Criminal Law §§ 598, 599.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

3. Criminal Law § 1352 (NCI4th)— McKoy error—new capital sentencing hearing

A defendant whose conviction became final before the *McKoy* decision was rendered is entitled to a new capital sentencing hearing where he was sentenced to death under jury instructions violative of *McKoy*; defendant objected to these instructions at trial and assigned them as error on direct review; and the error cannot be considered harmless because five of the mitigating circumstances rejected by the jury were supported by credible evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty. 1 ALR3d 1461.

Justice MEYER concurring in part and dissenting in part.

On writ of certiorari issued to the Superior Court, Davidson County, on 9 January 1992 following the superior court's denial of defendant's motion for appropriate relief on 30 July 1991, W. Douglas Albright, J., presiding. Heard in the Supreme Court 12 January 1993.

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

Robin E. Hudson for defendant-appellant.

Stephen T. Smith, and Katherine E. Jean for defendant-appellant.

Tharrington, Smith & Hargrove, by Roger W. Smith; and Steptoe & Johnson, by William T. Hassler, on behalf of the Government of Mexico, amicus curiae.

Patterson, Harkavy, Lawrence, Van Noppen & Okun, by Maxine Eichner and Melinda Lawrence; Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr.; Louis D. Bilionis; and Ferguson, Stein, Watt, Wallas, Adkins & Gresham, by Adam Stein, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

EXUM, Chief Justice.

The question in this case is whether *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), which invalidated the then-existing unanimity requirement of our capital sentencing scheme, should be applied retroactively to capital cases which, like defendant's, became final before *McKoy* was decided. Adopting the retroactivity standard announced in *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989), we hold that *McKoy* must be applied retroactively to such cases. Because defendant was sentenced to death under jury instructions violative of *McKoy*, and because the error cannot be considered harmless, we now vacate his death sentence and remand for resentencing.

I.

In 1985, defendant was convicted of the first-degree rape and first-degree murder of April Lee Sweet. He was sentenced to life imprisonment for the rape and, in a separate capital sentencing proceeding, to death for the murder. At the capital sentencing proceeding, the judge instructed the jury that it could not consider, in deciding whether to impose the death penalty, any mitigating circumstance that it did not unanimously find. Defendant objected to this instruction and assigned it as error upon his direct appeal to this Court. At that time, we considered such an instruction valid, *see State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983); therefore, we affirmed the conviction and sentences. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (1987). On November 16, 1987, the United States Supreme Court denied defendant's petition for writ of certiorari, 484 U.S. 959, 98 L. Ed. 2d 384.

Defendant thereafter filed a motion for appropriate relief in the Superior Court of Davidson County, again alleging that his death sentence was unconstitutionally imposed because of the

unanimity instruction. During the pendency of that proceeding, the United States Supreme Court decided *McKoy*. Relying on *Teague*, the Superior Court refused to give *McKoy* retroactive application and denied defendant's motion for appropriate relief.

We granted certiorari to consider the retroactivity question. Because this question is dispositive, we need not address defendant's other assignments of error.

II.

In recent years, the United States Supreme Court has completely revamped its retroactivity standards for new rules of federal constitutional criminal procedure. Dissatisfied with the inconsistent results and unfairness produced by the case-by-case approach of *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601 (1965), the Court adopted the bright-line approach long suggested by Justice Harlan: "that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to cases on collateral review." *Teague*, 489 U.S. at 302-303, 103 L. Ed. 2d at 350-51. The Court adopted this approach in two stages.

First, in *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987), the Court held that new rules of criminal procedure must be applied retroactively "to all cases, state or federal, pending on direct review or not yet final."[1] The rationale for this rule was succinctly stated by Justice Harlan: " 'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all.' " *Id.* at 323, 93 L. Ed. 2d at 658.

Then, in *Teague*, a non-capital case, the Court held that new rules of criminal procedure may not be applied retroactively in federal habeas corpus proceedings unless they fall within one of two narrow exceptions. 489 U.S. at 310, 103 L. Ed. 2d at 356. Under the first exception, a new rule will be applied retroactively if it "place[s] an entire category of primary conduct beyond the

1. A "final" case is one in which "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321, 93 L. Ed. 2d at 657, n.6.

reach of the criminal law," or "prohibit[s] the imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer v. Smith*, 497 U.S. 227, 241, 111 L. Ed. 2d 193, 211 (1990). Under the second exception, a new rule will be applied retroactively if it is a " 'watershed rule[ ] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495, 108 L. Ed. 2d 415, 429 (1990) (quoting *Teague*, 489 U.S. at 311, 103 L. Ed. 2d at 356). The Court extended *Teague* to embrace the capital sentencing context in *Penry v. Lynaugh*, 492 U.S. 302, 314, 106 L. Ed. 2d 256, 275 (1989).

As stated by Justice O'Connor, the *Teague* rule was premised primarily on finality concerns:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. . . . "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include assignment of final competence to determine legality." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-51 (1962) (emphasis omitted). . . . "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."

489 U.S. at 309, 103 L. Ed. 2d at 355 (quoting *Mackey v. United States*, 401 U.S. 667, 28 L. Ed. 2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).

By its terms, *Teague* is applicable only in federal habeas corpus proceedings. Defendant's *amici*, the North Carolina Academy of Trial Lawyers (The Academy), cite *State v. Rivens*, 299 N.C. 385, 261 S.E.2d 867 (1980), for the proposition that under North Carolina law all new rules, whether state or federal, are presumed to operate retroactively unless there is a compelling reason to make them prospective only. The Academy urges us to ignore *Teague* and instead apply *Rivens* because the case at bar is before us on writ of certiorari from a state post-conviction proceeding.

We decline to follow the Academy's suggestion. Though *Rivens* correctly states the retroactivity standard applicable to new *state* rules, our courts have always adverted to then-existing federal retroactivity standards when applying new federal constitutional rules. *See, e.g., State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *vacated and remanded*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987); *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977); *State v. Swann*, 275 N.C. 644, 170 S.E.2d 611 (1969); *State v. Fox*, 274 N.C. 277, 163 S.E.2d 492 (1968); *State v. Bullock*, 268 N.C. 560, 151 S.E.2d 9 (1966); *State v. Mills*, 268 N.C. 142, 150 S.E.2d 13 (1966); *State v. Hager*, 12 N.C. App. 90, 182 S.E.2d 588 (1971); *Yarborough v. State*, 6 N.C. App. 663, 171 S.E.2d 65 (1969); *State v. Branch*, 1 N.C. App. 279, 161 S.E.2d 492 (1968).

[1] We see no reason to chart a new course now. Presuming retroactivity for new federal constitutional rules would put us in conflict with the Fourth Circuit—where the general rule under *Teague* is nonretroactivity—undoubtedly resulting in confusion and conflicting results. Therefore, joining a number of other states, we hereby adopt *Teague* as the test of retroactivity for new federal constitutional rules of criminal procedure on state collateral review. *See, e.g., Daniels v. State*, 561 N.E.2d 487 (Ind. 1990); *Brewer v. State*, 444 N.W.2d 77 (Iowa 1989); *Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992), *cert. denied*, --- U.S. ---, 124 L. Ed. 2d 684 (1993); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, *judgment vacated on other grounds*, 498 U.S. 964, 112 L. Ed. 2d 409 (1990); *contra Cowell v. Leapley*, 458 N.W.2d 514 (S.D. 1990).

III.

[2] Defendant's conviction became final on November 16, 1987, when the United States Supreme Court denied his petition for writ of certiorari. *McKoy* was not decided until 1990. 494 U.S. 433, 108 L. Ed. 2d 369. Therefore, under *Teague* we must now decide whether *McKoy* should apply retroactively to defendant's case.

The Fourth Circuit has already addressed the retroactivity of *McKoy* to cases on collateral review. In *Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, --- U.S. ---, 121 L. Ed. 2d 445 (1992), the court assumed without deciding that *McKoy* was a new rule but held that it nevertheless fell within the second *Teague* exception. As the court stated:

> We find that the rules set out in *Mills* and *McKoy* are "bedrock procedural elements" and are "implicit in the concept of ordered liberty." The procedures they struck down have been described as "arbitrary" and "capricious." Those procedures did not provide for the "fundamental respect for humanity underlying the Eighth Amendment." *Woodson* [*v. North Carolina*], 428 U.S. [280,] 304, [49 L. Ed. 2d 944, 961 (1976)]. Given the history of the Eighth Amendment jurisprudence and the constitutional requirement of individualized sentencing, we believe that a rule striking down an arbitrary unanimity requirement has the same "primacy and centrality" of *Gideon* [*v. Wainwright*]. Therefore, we hold that the *Mills* and *McKoy* rules fall within the second *Teague* exception and should be applied retroactively.

961 F.2d at 456. *But see Wilcher v. Hargett*, 978 F.2d 872 (5th Cir. 1992), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 63 (1993). We find this analysis persuasive and therefore hold that *McKoy* is applicable retroactively to final cases on state post-conviction review.

[3] The jury instructions in defendant's capital sentencing proceeding were violative of *McKoy*. Because defendant objected to these instructions at trial and assigned them as error on direct review, there is no issue of waiver.[2] We must grant defendant a new sentencing hearing unless we are satisfied beyond a reasonable doubt that the error was harmless. *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). This Court has refused to hold *McKoy* error harmless where we have found "credible evidence supporting at least one submitted, but unfound mitigating circumstance." *State v. Robinson*, 330 N.C. 1, 34, 409 S.E.2d 288, 307 (1991). In the case at bar, five of the submitted mitigating circumstances were rejected by the jury, though supported by credible evidence. Therefore, we cannot find the *McKoy* error harmless; we must grant defendant a new capital sentencing proceeding.

IV.

Finding under *Teague* that *McKoy* must be applied retroactively to cases on state collateral review, and that the *McKoy* error in defendant's capital sentencing proceeding was not harmless, we

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2. We leave for another day the question whether defendants sentenced under the unanimity instruction who did *not* assign the instruction as error on direct review waived their right to assert the *McKoy* issue in post-conviction proceedings.

reverse the trial court's denial of defendant's motion for appropriate relief, vacate defendant's death sentence and remand for a new sentencing proceeding.

DEATH SENTENCE VACATED. REMANDED FOR NEW SENTENCING PROCEEDING.

Justice MEYER concurring in part and dissenting in part.

I agree that the proper test to be used to determine if the rule established by the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), should be applied retroactively is the test set forth in *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989). However, I do not believe that the rule set forth in *McKoy* satisfies the second narrow exception of *Teague*, which would require retroactive relief of *McKoy* error on collateral review.

"Under Teague, new rules may be applied . . . only if they come within 'one of two narrow exceptions.' " *Sawyer v. Smith*, 497 U.S. 227, 241, 111 L. Ed. 2d 193, 211 (1990) (quoting *Saffle v. Parks*, 494 U.S. 484, 486, 108 L. Ed. 2d 415, 423 (1990)). "The second Teague exception applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Id.* at 241-42, 108 L. Ed. 2d at 211 (quoting *Saffle v. Parks*, 494 U.S. at 495, 108 L. Ed. 2d at 429).

Unlike the majority, I am not persuaded by the analysis of the Fourth Circuit in *Williams v. Dixon*, 961 F.2d 448, *cert. denied*, --- U.S. ---, 121 L. Ed. 2d 445 (1992). In *Williams*, the court found that the rule set out in *McKoy* was a " 'bedrock procedural element[ ],' " *id.* (quoting *Sawyer v. Smith*, 497 U.S. at 242, 111 L. Ed. 2d at 211), "implicit in the concept of ordered liberty," *id.* at 456, in part because the procedure had been described by the United States Supreme Court as " 'arbitrary or capricious,' " *id.* (quoting *McKoy v. North Carolina*, 494 U.S. at 454, 108 L. Ed. 2d at 387 (Kennedy, J., concurring)), and did not provide the " 'fundamental respect for humanity underlying the Eighth Amendment,' " *id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961 (1976)).

The United States Supreme Court in determining the case of *Caldwell v. Mississippi*, found prejudicial error in a prosecutor's comments which led a jury to the false belief that the responsibility

for determining the appropriateness of the defendant's capital sentencing rests elsewhere. 472 U.S. 320, 328-29, 86 L. Ed. 2d 231, 239 (1985). One member of the Court noted that such prosecutorial error created an "unacceptable risk that 'the death penalty [may have been] meted out *arbitrarily* or *capriciously*.'" *Id.* at 343, 86 L. Ed. 2d at 248-49 (O'Conner, J., concurring in part and dissenting in part) (quoting *California v. Ramos*, 463 U.S. 992, 999, 77 L. Ed. 2d 1171, 1179 (1983)) (emphasis added). The Court held that *Caldwell* error might produce "substantial unreliability as well as bias in favor of death sentences." *Id.* at 330, 86 L. Ed. 2d at 240. In spite of this language, the United States Supreme Court determined that *Caldwell* would not be applied retroactively to cases on collateral review, specifically finding that it was a "new rule" that did not satisfy the second exception of *Teague*. *Sawyer v. Smith*, 497 U.S. 227, 245, 111 L. Ed. 2d 193, 213 (1990).

Just as the rule set forth in *Caldwell* was not applied retroactively, neither should the rule set forth in *McKoy* be applied retroactively. I do not believe that retroactive application of the *McKoy* rule is a prerequisite to "fundamental fairness" of the type that comes within *Teague's* second exception. *See Wilcher v. Hargett*, 978 F.2d 872 (1992) (determining that the *McKoy* rule was a new rule that would not be applied retroactively under the Supreme Court rules as set forth in *Teague*), *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 63 (1993).

Justice Harlan first set forth the language used in *Teague* in his separate opinion concurring in part and dissenting in part in *Mackey v. United States*, 401 U.S. 667, 675, 28 L. Ed. 2d 404, 410 (1971). In *Mackey*, Justice Harlan noted that he believed that a new rule that should be applied retroactively would be one such as the right to counsel, which is now "a necessary condition precedent to any conviction for a serious crime." *Id.* at 694, 28 L. Ed. 2d at 421 (Harlan, J., concurring in part and dissenting in part).

Finally, I am persuaded that *McKoy* error cannot at the same time be both subject to harmless error analysis (as we have held numerous times) and its retroactive effect be necessary to "the fundamental fairness of the criminal proceeding." I note that this Court has found the failure to follow *McKoy* to be harmless error on five occasions: *State v. Price*, 334 N.C. 615, 433 S.E.2d 746 (1993); *State v. Allen*, 331 N.C. 746, 417 S.E.2d 227, *cert. denied*,

--- U.S. ---, 122 L. Ed. 2d 775 (1992), *reh'g denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993); *State v. Hunt*, 330 N.C. 501, 411 S.E. 2d 806, *cert. denied*, --- U.S. ---, 120 L. Ed. 2d 913 (1992); *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 174, *reh'g denied*, --- U.S. ---, 116 L. Ed. 2d 648 (1991); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991). Thus, it is clear that jury instructions free of *McKoy* error are not "a necessary condition precedent to any conviction for a serious crime." *See Mackey*, 401 U.S. at 694, 28 L. Ed. 2d at 421 (Harlan, J., concurring in part and dissenting in part). I believe that it is inconsistent to find that a right is so fundamental to the accuracy of the criminal proceeding as to require it to be applied retroactively but also find that a violation of this right is subject to "harmless error" analysis.

I would affirm the decision of Judge Albright, refusing to give *McKoy* retroactive relief and denying defendant's motion for appropriate relief.

STATE OF NORTH CAROLINA v. HUBERT McINTOSH

No. 204A93

(Filed 17 June 1994)

1. Evidence and Witnesses § 2636 (NCI4th)— attorney's statement to deputy—authorization by defendant—no violation of attorney-client privilege

Where the uncontroverted evidence in a murder case tended to show that defendant consulted with an attorney solely in order to facilitate defendant's safe surrender to the authorities, the attorney-client privilege was not violated by the attorney's statement to a deputy sheriff that the defendant had "come into his office to turn himself in, in reference to a shooting," since that portion of defendant's communication was not intended to be confidential because it was given to the attorney for the purpose of conveying the information contained therein to the law enforcement authorities to whom the defendant wanted to surrender.

Am Jur 2d, Witnesses §§ 185-190.

Attorney-client privilege as affected by its assertion as to communications, or transmission of evidence, relating to crime already committed. 16 ALR3d 1029.

2. **Constitutional Law § 290 (NCI4th)— attorney's statements to deputy—attorney-client privilege not violated—no ineffective assistance of counsel**

An attorney's statement to a deputy sheriff that defendant had come into his office to turn himself in for a shooting did not constitute ineffective assistance of counsel where defendant consulted the attorney for the sole purpose of defendant's safe surrender to the authorities, and the attorney's statement to the deputy was made by direct authorization of the defendant and did not violate the attorney-client privilege.

Am Jur 2d, Criminal Law §§ 752, 985-987.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR4th 942.

When is attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel—Supreme Court cases. 83 L. Ed 2d 1112.

3. **Evidence and Witnesses § 1218 (NCI4th)— inculpatory statements—fruit of attorney's statement to deputy—admissibility**

The trial court did not err by admitting defendant's inculpatory statements in a murder case even if they were the fruit of an attorney's statement to a deputy sheriff that defendant had come into his office to turn himself in for a shooting where defendant consulted the attorney for the sole purpose of his safe surrender to the authorities, the attorney did exactly what defendant requested, and no confidential information was disclosed. Furthermore, it was not error for the trial court to admit defendant's statements even if they disclosed the substance of the attorney's remark to the deputy.

Am Jur 2d, Evidence §§ 543 et seq.

Admissibility of pretrial confession of criminal case—Supreme Court cases. 22 L. Ed 2d 872.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Hight, J., on 5 June 1992, in the Superior Court,

Hoke County, sentencing the defendant to life imprisonment for first-degree murder. Heard in the Supreme Court on 16 March 1994.

Michael F. Easley, Attorney General, by Thomas J. Ziko, Special Deputy Attorney General, for the State.

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

MITCHELL, Justice.

The defendant, Hubert McIntosh, was indicted for first-degree murder by the Hoke County Grand Jury on 23 March 1992. He was tried noncapitally at the 9 February 1993 Criminal Session of Superior Court, Hoke County. The jury found the defendant guilty of first-degree murder, and the trial court sentenced him to the mandatory term of 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).

Prior to trial, the defendant moved to suppress certain testimony of Bobbie Burns McNeil, a licensed attorney-at-law, and certain testimony of Hoke County Deputy Sheriff Greg Beard. The defendant contended that such evidence was the product of violations to the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, Article I, Sections 18, 19 and 23 of the Constitution of North Carolina, N.C.G.S. § 8-54 and Chapter 15A of the North Carolina General Statutes. We do not agree.

During a hearing on the defendant's motion, Deputy Beard testified that at approximately 3:00 p.m. on 4 October 1991 a secretary in the Hoke County Sheriff's Office informed him that she had received a telephone call. The caller had stated that "they needed an officer around at the McNeil Hostetler office in reference to someone there—about a shooting." After receiving that information, Deputy Beard drove to the law offices of Hostetler & McNeil.

When Beard arrived at the law offices, he met Bobby Burns McNeil, attorney-at-law, and another man in an open area in the front office. McNeil "indicated that this gentlemen had come to his office to turn himself in, in reference to a shooting . . . ." McNeil gestured toward the defendant who was seated on a couch

next to the door. The defendant stated that he had a gun in his car and that he wanted to turn it over to Beard. McNeil then told the defendant, "Do whatever it is that you want to do." The defendant then got up and went outside.

Once outside, the defendant directed the deputy to his car and pointed to a gun and a holster on the floorboard. Deputy Beard picked up the gun and asked the defendant to take a seat in his patrol car. Deputy Beard then asked the defendant where the shooting had taken place. The defendant stated that it was behind a business named the "Hitching Post." Beard then asked the defendant about the condition of the victim. The defendant indicated that "he had shot her six times and that she wasn't going anywhere."

As Beard drove with the defendant toward the Hitching Post, Beard advised the defendant of his constitutional rights. At that time the defendant stated that he did not want to answer any questions until his lawyer was present. Without further questioning, however, the defendant then stated "that there was no reason for [Beard] to drive as fast as [he] was driving. He had shot her six times and she was not going anywhere."

Once they arrived at the Hitching Post, the defendant directed the deputy to the victim's mobile home nearby. Deputy Beard went to the home and discovered that all of the doors were locked. Beard forced his way in, and found the body of the female victim, Jessie McBryde. He then returned to his patrol car and placed handcuffs on the defendant.

Counsel for the defendant cross-examined Beard regarding his notes of his conversation with Mr. McNeil. Beard testified that his report regarding the call to the secretary stated only "that Mr. McNeil had a subject in his office that wanted to turn himself in to the Sheriff's Department" and made no reference to the shooting. Responding directly to a question by the defendant's counsel, Beard also testified that his notes showed that, "Mr. McNeil told [Deputy Beard] that [the man in his office] had shot a lady and wanted to turn himself in, and that he didn't want anybody to hurt the gentleman."

After considering the arguments of counsel, the trial court found: that at no time prior to the discovery of the gun had Beard been told not to question the defendant out of the presence of

a lawyer; that no action by Beard was coercive; that the defendant was not in custody at the time the statements at issue were made to Beard; that the defendant, after consulting with his attorney, made statements to law enforcement agencies but that he was under no compulsion at any time to make any statements; and that any questions regarding the location of the shooting were necessary to provide emergency assistance to the victim. The trial court denied the motion to suppress evidence of statements that the defendant had made to Deputy Beard. However, the trial court did order that no evidence concerning McNeil's statements to Deputy Beard be introduced at trial. Thereafter, a jury was selected and the defendant's case was called for trial.

The defendant's arguments on appeal make a full recitation of the evidence presented at trial unnecessary. The evidence at trial tended to show that the victim, Jessie McBryde, and the defendant, Hubert McIntosh, had been dating each other for six to eight months. A week or two before the victim's death, her sister heard the victim tell the defendant, "stay away from me, leave me alone."

On 3 October 1991, Ray McBryde, the victim's son, was on leave from the United States Marine Corps and was staying in his mother's mobile home. He knew that his mother and the defendant had been dating, but she had asked him in September or early October not to let the defendant enter her residence. On 3 October, the day before the victim's body was found, the defendant came to the victim's home after she had left for work. The victim's son was at home and the defendant spoke to him. The victim's son testified that the defendant told him to tell his mother to stop playing games because "he would kill her and get away with it." The victim's son further testified that the defendant stated that "he ain't got time to go to jail over no woman." The defendant then told the victim's son and the victim's daughter, who was also present, that they "had come close to not having a mother." The defendant said that he would have shot her if he had his gun. The victim's son told the defendant to leave and the defendant did so.

Mack Dockery testified that he had been friends with the defendant for thirty years. He saw the defendant at the defendant's sister's house on 4 October 1991, at approximately 1:45 p.m. The defendant left the house at approximately 2:00 p.m. The defendant

returned approximately forty-five minutes later, gave his sister his house key and car keys and stated, "I just shot Jessie." The defendant then asked another friend, Larry McPhaul, to drive him to his lawyer's office. Dockery knew that the defendant's lawyer was Bobbie McNeil. McPhaul, Dockery and the defendant went in the defendant's car to McNeil's office. On the way, the defendant stated that "he did what he had to do," and said that the victim had advanced towards him with a weapon. Dockery and McPhaul remained in the car while the defendant entered McNeil's office. While they were waiting there, they noticed a pistol lying on the passenger's side floorboard of the car.

About ten minutes after they arrived at McNeil's office, a deputy sheriff drove up. The deputy went into McNeil's office and returned about five minutes later with the defendant. The defendant and the deputy approached the defendant's car, and the defendant gave the gun on the floorboard to the deputy. The deputy asked McPhaul and Dockery whether they had been with the defendant, and they answered that they had just driven him downtown. The deputy and the defendant left in the deputy's patrol car.

Deputy Sheriff Beard testified that he went to the law offices of McNeil & Hostetler in Raeford, North Carolina at approximately 3:00 p.m. on 4 October 1991. He walked into the office and saw McNeil and the defendant in the foyer. The defendant was seated on a couch. Deputy Beard, who was dressed in plain clothes, identified himself and had a brief conversation with McNeil. At the end of their conversation, the defendant stood up and stated that he had a gun that he wanted to turn over to Beard. Beard and the defendant left the office and approached the passenger's side of the defendant's car. The defendant retrieved a .357-caliber handgun from the passenger side floorboard. It was loaded with six rounds of ammunition.

Deputy Beard told the defendant to take a seat in his patrol car. He then asked the defendant where the shooting had taken place, and the defendant indicated that it had occurred behind the Hitching Post. Beard asked the defendant the condition of the victim, and the defendant stated that he had shot her six times and that she was not going anywhere. Beard then activated his siren and blue light and drove toward the Hitching Post. Beard advised the defendant of his constitutional rights, and the defendant indicated that he understood them. The defendant then com-

mented that there was no need for Beard to speed and repeated that he had shot the victim six times and that she was not going anywhere.

When Beard and the defendant reached the Hitching Post, the defendant directed Beard to turn onto a dirt road beside that establishment. The defendant then directed Beard into a mobile home park where the victim's mobile home was located. Beard approached the mobile home and found both doors locked. He broke the lock on the front door and entered the mobile home. He found the body of the victim lying on the floor between the kitchen and a bedroom; the victim was dead. Beard then went outside and handcuffed the defendant. A later autopsy revealed that the victim had died from multiple gunshot wounds.

By an assignment of error, the defendant contends that the trial court erred by failing to suppress his statements which were made as a result of a violation of his attorney-client privilege and of his constitutional right to effective assistance of counsel. We disagree.

The defendant contends that his inculpatory statements were made to Deputy Beard as the direct result of unauthorized disclosure by his counsel of privileged attorney-client communications. It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed. *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 438 (1993); *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990); *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1973); *Fuller v. Knights of Pythias*, 129 N.C. 318, 40 S.E. 65 (1901). However, the attorney-client privilege "depends on the assumption that full and frank communication will be fostered by the assurance of confidentiality, and the justification for granting the privilege ceases when the client does not appear to have been desirous of secrecy." *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

> A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although

> litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981).

> But the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, *or that they were made for the purpose of being conveyed by the attorney to others*, they are stripped of the idea of a confidential disclosure and are not privileged.

Dobais v. White, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (emphasis added) (citations omitted).

[1] Uncontroverted evidence in this case tended to show that the defendant consulted with McNeil *solely* in order to facilitate the defendant's safe surrender. Therefore, the defendant necessarily authorized McNeil to inform law enforcement authorities that the defendant had "come into his office to turn himself in, in reference to a shooting." Consequently, that portion of the defendant's communication was not intended to be confidential, because it was given to McNeil for the purpose of conveying the information contained therein to the law enforcement authorities to whom the defendant wanted to surrender. If the defendant wanted the benefit of McNeil's representation of him during his surrender, *i.e.* safe transfer into custody of the sheriff, either the defendant or McNeil had to tell Deputy Beard why the defendant should be placed into custody. Therefore, that information was not privileged and McNeil did not violate the attorney-client privilege.

We note here that the trial court allowed the defendant's pretrial motion with regard to statements by McNeil to Deputy Beard and held that the State could not introduce evidence of those statements at trial. In any event, since we have concluded that the information given Deputy Beard by McNeil did not violate the attorney-client privilege, introduction of evidence of McNeil's remarks by either the State or the defendant would not have been error.

The defendant next contends in support of his assignment of error that his own inculpatory statements to Beard were a direct result of the coercive effect of McNeil's violation of the attorney-client privilege. As we have concluded that McNeil did not violate the attorney-client privilege by any unauthorized disclosure of privileged information, we further conclude that this argument is without merit.

[2] Next, the defendant contends that McNeil's unauthorized disclosure of privileged information constituted *per se* ineffective assistance of counsel. Because we have determined that McNeil's statements to Deputy Beard were made by direct authorization of the defendant and did not violate the attorney-client privilege, this argument must fail. The defendant retained McNeil for the sole purpose of the defendant's safe surrender to the authorities for the crime that he had committed. At the time that McNeil had contacted the police and insured that his client had surrendered safely to the authorities, McNeil had properly and completely fulfilled his obligations to his client.

[3] The defendant further contends that McNeil's disclosure violated his right to due process. In *United States v. Schnell*, 775 F.2d 559, 565 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098, 89 L. Ed. 2d 898 (1986), the United States Court of Appeals for the Fourth Circuit held that when an attorney discloses confidential information to the prosecution, such action is "fundamentally unfair and inherently prejudicial." Because McNeil, in doing exactly what his client requested, did not disclose any confidential information, the trial court did not err in the present case by admitting the defendant's inculpatory statements even if they were the fruit of McNeil's statements to Deputy Beard.

Finally, the defendant argues that there was no way to admit his own statements to Deputy Beard into evidence without revealing to the jury the substance of McNeil's remarks. Assuming *arguendo* that this is correct, we nevertheless find no error. As we have previously determined that all statements made by McNeil to Beard were fully authorized by the defendant and did not constitute a breach of the attorney-client privilege or any other right of the defendant, it was not error for the trial court to allow evidence of the defendant's statements to be admitted even if they did reveal the substance of McNeil's remarks.

The defendant's assignment of error is without merit. Therefore, we hold that the defendant received a fair trial free of prejudicial error.

NO ERROR.

PENNY LYNN HILL, FOR HERSELF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED v. LOUIS BECHTEL, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF THE GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES, JOHN HAMRICK, IN HIS OFFICIAL CAPACITY AS THE CHAIRMAN OF THE BOARD OF THE DEPARTMENT OF SOCIAL SERVICES OF GUILFORD COUNTY, A CORPORATION, AND THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 303PA92

(Filed 17 June 1994)

Social Services and Public Welfare § 8 (NCI4th)— food stamps—eligibility for expedited service—notification of refusal

The trial court erred by granting summary judgment for defendants in a class action in which plaintiff claimed that an applicant for food stamp assistance must be notified in writing when the applicant is not eligible for expedited assistance. The regulatory scheme governing expedited processing and the agency conference to resolve differences which arise over the applicant's eligibility are designed to provide prompt assistance to those who are particularly destitute financially; to effect these goals and to provide meaningful access to the corrective procedures which the regulations make available, the regulations must contemplate that all applicants be informed promptly of a determination of ineligibility for expedited service. Whether or not an applicant requests expedited service is irrelevant to the legal effect of the eligibility determination. However, there is nothing in the Food Stamp Act or the regulations which requires expressly or by implication that notification to applicants be in writing; oral notification is sufficient.

Am Jur 2d, Welfare Laws §§ 53 et seq.

Construction and application of Food Stamp Act of 1964 (7 USCS §§ 2011 et seq.) establishing food stamp program. 13 ALR Fed. 369.

Eligibility for food stamps under Food Stamp Act of 1964 (7 USCS §§ 2011 et seq.). 118 ALR Fed. 473.

On defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals reversing summary judgment for defendants entered 3 October 1990 by Judge I. Beverly Lake, Jr., at the 1 October 1990 Civil Session of Superior Court, Guilford County. Heard in the Supreme Court 13 May 1993.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for plaintiff-appellee.

Jonathan V. Maxwell, County Attorney, and Lynne G. Schiftan, Deputy County Attorney, for defendant-appellants Bechtel and Hamrick.

Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for defendant-appellant N.C. Dep't of Human Resources.

EXUM, Chief Justice.

This appeal presents the question whether an applicant for food stamp assistance under the Food Stamp Act of 1964, 7 U.S.C. § 2020 (1988), and certain regulations passed pursuant to the Act must be notified by the local Department of Social Services (DSS), administering the Act in a particular locality, when the local DSS determines that the applicant is not eligible for "expedited service," which significantly reduces the time for processing an application for food stamp assistance. The Superior Court after considering the parties' forecast of evidence concluded that no such notification was required and entered summary judgment for defendants. The Court of Appeals concluded that written notification was required and reversed. We conclude that at least oral notification of an applicant's ineligibility for expedited service is required. We, therefore, modify and affirm the Court of Appeals' decision.

On 18 April 1990 plaintiff Penny Lynn Hill applied for food stamps at the High Point office of the Guilford County DSS. The application form, completed by a DSS employee from answers provided by plaintiff, disclosed: Plaintiff was recently unemployed and the mother and custodian of two pre-school children. She owned no property, had only $3.00 in cash on hand; and her only income

was child support of $50 per week paid to her by her estranged husband. Her apartment rent was $139 per month.

The Food Stamp Act and regulations passed thereunder provide that households which are particularly destitute financially are entitled to receive expedited service. The provisions of the Act and regulations pertinent to this case provide that households with a gross income of less than $150 per month and liquid resources not exceeding $100, or households whose monthly gross incomes and liquid resources are less than their monthly rent (or mortgage) and utilities shall be provided coupons within five days of the date of the application. 7 U.S.C. § 2020(e)(9); 7 C.F.R. § 273.2(i) (1994). A state's application procedures must be designed "to identify households eligible for expedited service at the time the household requests assistance." 7 C.F.R. § 273.2(i)(2).

The DSS interviewer determined plaintiff's child support income disqualified her for expedited service and processed the application for standard service. The interviewer, following agency practice, did not advise plaintiff of the existence of expedited service or that the interviewer had screened plaintiff and deemed her ineligible for expedited service.

About a week later plaintiff contacted the "local legal aid office" and learned for the first time of the existence of expedited food stamp processing.

Thereafter, on 7 May 1990, plaintiff filed a class action suit against the director and chairman of the Guilford County DSS in their official capacities, claiming among other things that she was entitled to expedited service and that she and persons similarly situated were entitled to be notified when they were screened for and determined to be ineligible for such service. She prayed for injunctive and declaratory relief concomitant with her claims.

On 8 May 1990 plaintiff requested and received an "agency conference" at DSS. Following the conference, plaintiff began to receive food stamps "around May 10, 1990."

On 22 June 1990 plaintiff filed an amended class action complaint, adding the North Carolina Department of Human Resources (DHR) as a defendant. The amended complaint alleges that plaintiff's only source of income is child support,

> "which her estranged husband pays to her sporadically. While her husband promised to pay $50 a week in cash or toward the bills, he had paid only about $150 during the last several months. Between April 1 and April 18, 1990, [her] husband paid her only $25 in cash plus paid $70 towards bills. He made no further contributions during the month of April."

The amended complaint alleges further that plaintiff was eligible for expedited service when she initially applied for food stamps and that defendants were required to notify her that she had been screened for and determined ineligible for expedited service and of her right to an agency conference to contest this determination. The amended complaint seeks injunctive and declaratory relief.

Defendants, on 23 July 1990, moved to dismiss plaintiff's amended complaint for lack of subject matter jurisdiction, Rule 12(b)(1), and for failure to state a claim, Rule 12(b)(6). The motion recites: "One day after the filing of the Complaint, the Plaintiff presented different information at an agency conference held at her request which made her eligible for expedited food stamp issuance and this matter is now moot." Plaintiff, on 29 August 1990, moved for summary judgment and, on 5 September 1990, moved for class certification.

All motions came on for hearing before Judge Lake, who, upon a forecast of evidence consisting of plaintiff's affidavit and defendants' responses to plaintiff's requests for admissions and plaintiff's interrogatories, treated defendants' motion to dismiss as a motion for summary judgment. The forecast of evidence was in keeping with the facts as related above. According to plaintiff's affidavit: The DSS interviewer who processed plaintiff's food stamp application on 18 April 1990 asked plaintiff how much child support her husband was paying and plaintiff told her he was paying $50 a week. Actually he had paid only $95 from 1 April to 18 April, $70 directly to plaintiff's creditors and $25 in cash to plaintiff. He made no more payments through the month of April. The DSS interviewer never mentioned the expedited service program to plaintiff and advised plaintiff that it normally took 30 days to process a food stamp application. Plaintiff and her children subsisted on "handouts from friends and relatives" from 18 April until 10 May, during which time they mostly had toast for breakfast, peanut butter and crackers for lunch and hotdogs for supper. "There was hardly any milk at all" for the children. Plaintiff was never notified

of the outcome of the 8 May agency conference, but she began receiving food stamps "around May 10, 1990." Plaintiff's understanding was that she "received the food stamps under the regular processing standards, since by then DSS had obtained all the information necessary to approve my application."

Defendants' discovery responses showed that because of defendants' understanding of the governing regulations, food stamp applications are processed as follows: All applicants are screened for expedited processing on the date of the application. Applicants who inquire about expedited processing have the program explained and are told verbally whether they meet the criteria. Applicants who do not inquire about expedited processing are not told about the program. If they are found eligible for it, they are so informed. If found ineligible, they are not advised. All applicants are advised in writing on the application form itself that they may request a "fair hearing" if they "disagree with any action taken on [the] Food Stamp Application."

On this evidentiary showing Judge Lake granted summary judgment in favor of all defendants. The Court of Appeals reversed, holding that all food stamp applicants who were determined to be ineligible for expedited service were entitled to written notice of that determination and of their right to an agency conference on this issue. We conclude, for the reasons which follow, that all food stamp applicants must be informed at least orally, but not necessarily in writing, of the existence of the expedited service entitlement. We also conclude that when a food stamp applicant is determined to be ineligible for expedited service, whether or not the applicant requested such service, the applicant must be so advised at least verbally, but not necessarily in writing. The applicant must also be verbally advised of entitlement to the review procedures available to correct any erroneous entitlement determination.

Pursuant to the regulations passed to implement the Food Stamp Act, every application for food stamp assistance is screened when filed to determine whether the household is eligible for expedited service. 7 C.F.R. § 273.2(i)(2). This screening occurs regardless of whether the applicant requests expedited service. Applicants found ineligible for expedited service are entitled to challenge this determination at an "agency conference." 7 C.F.R. § 273.15(d) (1994). If the matter is not resolved satisfactorily

to the applicant at this conference, the applicant is entitled to a "fair hearing." *Id.*

Section 273.15(d) provides:

> (d) *Agency conferences.* (1) The State agency shall offer agency conferences to households which wish to contest a denial of expedited service under the procedures in § 273.2(i). The State agency may also offer agency conferences to households adversely affected by agency action. The State Agency shall advise households that use of an agency conference is optional and that it shall in no way delay or replace the fair hearing process. The agency conferences may be attended by the eligibility worker responsible for the agency action and shall be attended by an eligibility supervisor and/or the agency director, and by the household and/or its representative. An agency conference may lead to an informal resolution of the dispute. However, a fair hearing must be held unless the household makes a written withdrawal of its request for a hearing.
>
> (2) An agency conference for households contesting a denial of expedited service shall be scheduled within 2 working days, unless the household requests that it be scheduled later or states that it does not wish to have an agency conference.

Id. Section 273.15(a) states: "except as provided in § 271.7(f), each State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which affects the participation of the household in the Program." 7 C.F.R. § 273.15(a) (1994). Section 273.15(f) provides:

> (f) *Notification of right to request hearing.* At the time of application, each household shall be informed in writing of its right to a hearing, of the method by which a hearing may be requested, and that its case may be presented by a household member or a representative, such as a legal counsel, a relative, a friend or other spokesperson. In addition, at any time the household expresses to the State agency that it disagrees with a State agency action, it shall be reminded of the right to request a fair hearing. If there is an individual or organization available that provides free legal representation, the household shall also be informed of the availability of that service.

7 C.F.R. § 273.15(f).

The regulatory scheme governing expedited processing and the agency conference to resolve differences which arise over the applicant's eligibility is designed to provide prompt assistance to those who are particularly destitute financially. The emphasis is on quick identification of those eligible for the expedited service and quick correction of any erroneous determination of ineligibility. To effect these goals and to provide meaningful access to the corrective procedures which the regulations make available, the regulations must contemplate that all applicants be informed promptly of a determination of ineligibility for expedited service. Without such prompt information, the corrective process will not be promptly triggered; and, as in the case at bar, there will be delay which might have been avoided in the issuance of food stamps. "In our endeavor to ascertain the purpose of the statute, we should also have due regard to the rule that the spirit and reason of the law shall prevail over its letter, especially where a literal construction would work an obvious injustice." *State v. Bell*, 184 N.C. 701, 705, 115 S.E. 190, 192 (1922). Matters implied by the language of a statute must be given effect to the same extent as matters specifically expressed. *In re Wharton*, 305 N.C. 565, 574, 290 S.E.2d 688, 693 (1982); *Iredell County Bd. of Educ. v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952). We conclude, therefore, that the regulations discussed, while not expressly providing for such notice, clearly imply that all applicants for food stamp assistance be promptly notified, at least orally, when they have been determined to be ineligible for expedited service and the procedures by which this determination may be challenged.

Defendants contend that such notice is required under the regulations only when an applicant has been denied expedited service. They argue that applicants can be denied such service only if they have first requested it. Applicants who fail to request it, say defendants, are not denied the service even if they are found to be ineligible for it.

We are unpersuaded by this argument. In essence it is a distinction without a difference. First, it puts too much of a premium on food stamp applicants' knowledge of available programs. Those who know enough to request the expedited service are placed in a superior position relative to obtaining the expediting service than those who do not know. Second, such a practice runs contrary to the requirement in the Food Stamp Act itself that the state agency administering the food stamp program actively assist ap-

plicants in completing the application process. 7 U.S.C. § 2020(e)(3). Finally, whether or not an applicant requests expedited service is irrelevant to the legal effect of the eligibility determination. Every application is screened for expedited service eligibility regardless of whether it is requested. 7 C.F.R. § 273.2(i). There is no provision in the regulations for making such a request. When the State agency determines that a household is ineligible for expedited service such a determination in effect denies the household expedited service. As the Court of Appeals correctly reasoned, "[t]he plain meaning of both 'ineligible' and 'denial' is that of negative qualification." *Hill v. Bechtel*, 106 N.C. App. 675, 680, 417 S.E.2d 844, 847 (1992).

Contrary to the Court of Appeals opinion, however, we find nothing in the Food Stamp Act or the regulations which requires expressly or by implication that notification to applicants be in writing. We conclude oral notification of the ineligibility determination and the procedures for reviewing this determination is sufficient to comply with both the Act and the regulations.

Plaintiff argues that written notification is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause of the North Carolina Constitution. Because these constitutional questions were not brought forward in defendants' petition for discretionary review or plaintiff's response thereto, they are not properly before us for review and we do not address them. N.C. R. App. P. 16(b).

As modified herein the decision of the Court of Appeals is affirmed. The case is remanded to the Court of Appeals for remand to the Superior Court for such further proceedings as may be required consistent with this opinion.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. GARY KENNETH FARLOW

No. 246PA93

(Filed 17 June 1994)

1. Criminal Law § 1098, 1162 (NCI4th)— indecent liberties—minor victim—age of victim as aggravating factor

The Court of Appeals erred in holding that, because evidence of the victim's age was necessary to establish the offense of taking indecent liberties, such evidence should not have been used as proof of an aggravating factor. Where age is an element of the offense, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. The victim in the present case was eleven years old, so that age alone could not be used to aggravate the sentence for taking indecent liberties with children. However, the trial court did not find the statutory aggravating factor, but the nonstatutory factor that "his actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed" and added language which made it clear that the basis for the factor was increased vulnerability of the victim arising from defendant's bestowing gifts on him. This factor was supported by the evidence and related to the purposes of sentencing.

Am Jur 2d, Criminal Law §§ 598, 599.

2. Criminal Law §§ 1098, 1162 (NCI4th)— sexual offense—aggravating factor—age of victim—indecent liberties a joined offense

The Court of Appeals erred in its application of the Fair Sentencing Act by finding that the trial court erred in aggravating a sentence for second-degree sexual offense based on the victim's age (11), which was an element of the joined offense of indecent liberties. Although the trial court may not consider crimes joinable with the contemporaneous conviction in determining the existence of the statutory aggravating factor that a defendant has a prior conviction, the rule barring use of joinable convictions does not apply to use of a fact needed to prove an element of a contemporaneous conviction. The court could aggravate the sentence for second-degree sexual offenses with a finding concerning age, if supported by

the evidence, since age is not an element of second-degree sexual offense.

Am Jur 2d, Criminal Law §§ 598, 599.

3. **Criminal Law § 1177 (NCI4th)— indecent liberties and sexual offenses—aggravating factors—position of trust or confidence**

The trial court did not err when sentencing defendant for second-degree sexual offenses and indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit these offenses where the victim was nine years old, his father was deceased, his mother was a long-distance truck driver, the grandmother who had cared for him had died shortly before his ninth birthday, defendant befriended the victim and took him on trips and to play miniature golf, and the victim gradually spent more and more time at defendant's home and essentially lived with defendant while his mother was away. N.C.G.S. § 15A-1340.4(a)(1)n.

Am Jur 2d, Criminal Law §§ 598, 599.

4. **Criminal Law §§ 1120, 1125 (NCI4th)— indecent liberties—aggravating factors—mental and emotional injury of victim—course of conduct—evidence sufficient**

The trial court did not err when sentencing defendant for indecent liberties by finding the nonstatutory aggravating factors that the victim suffered severe mental and emotional injury in excess of that usually associated with offenses of that nature and that defendant engaged in a course or pattern of conduct extending over a period of many years, including the commission of sexual offenses against very young children.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review a unanimous decision of the Court of Appeals, 110 N.C. App. 95, 429 S.E.2d 181 (1993), reversing and remanding judgment entered by McHugh, J., on 29 August 1991 in Superior Court, Guilford County. Heard in the Supreme Court 2 February 1994.

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

Walter T. Johnson, Jr. for defendant-appellee.

PARKER, Justice.

Defendant was indicted on two counts of first-degree sexual offense and two counts of taking indecent liberties with an eleven-year-old male victim. Defendant was also indicted on two counts of first-degree sexual offense and four counts of taking indecent liberties with a nine-year-old male victim. Pursuant to a plea arrangement defendant pleaded guilty to two counts each of second-degree sexual offense and taking indecent liberties with the older victim. These offenses were consolidated for judgment. Defendant also pleaded guilty to two counts of second-degree sexual offense and four counts of taking indecent liberties with the younger victim, and these offenses were consolidated for judgment. Upon findings of factors in aggravation and mitigation the trial court imposed consecutive forty-year terms of imprisonment.

On appeal defendant contended that with respect to the offenses of taking indecent liberties against the eleven-year-old victim, the trial court erred in finding as an aggravating factor that the age of the victim made him particularly vulnerable. The Court of Appeals agreed, citing N.C.G.S. § 15A-1340.4(a)(1) and *State v. Vanstory*, 84 N.C. App. 535, 538, 353 S.E.2d 236, 238, *disc. rev. denied*, 320 N.C. 176, 358 S.E.2d 67 (1987). *State v. Farlow*, 110 N.C. App. 95, 96, 429 S.E.2d 181, 182 (1993). Defendant also contended that as to the second-degree sexual offenses committed against the same victim, the trial court erred in aggravating defendant's sentence based on the age of the victim. Again the Court of Appeals agreed, citing section 15A-1340.4(a)(1)o. *Id.* at 96, 429 S.E.2d at 182-83. For these two errors committed in imposing defendant's sentence for the crimes against the older victim, the Court of Appeals remanded for a new sentencing hearing. Before the Court of Appeals, defendant did not argue error in the trial court's finding of age as an aggravating factor in the cases involving the younger victim. The court did not address defendant's other contentions regarding either judgment.

This Court granted State's petition for writ of certiorari to review and clarify language in the Court of Appeals' decision which

suggests that the age of the victim can never be used to aggravate a conviction of taking indecent liberties with children. Specifically, the opinion states: "Evidence of the victim's young age is necessary to establish the offense of taking indecent liberties with children and therefore should not have been used as proof of an aggravating factor in this case." *Farlow*, 110 N.C. App. at 96, 429 S.E.2d at 182. We agree with the State's contention that this language is inconsistent with decisions from this Court interpreting the Fair Sentencing Act, N.C.G.S. §§ 15A-1340.1 to -1340.7.

We note at the outset that Form AOC-CR-303 showing the findings in aggravation and mitigation is not included for either judgment in the record on appeal. The transcript of the sentencing hearing shows that with respect to the consolidated judgment in cases 90CRS33403 and 33404, involving crimes against the older victim, the trial court made separate findings in aggravation and mitigation as to the second-degree sexual offenses and as to the taking of indecent liberties with children offenses. For second-degree sexual offenses in 33403 and 33404, the court found among other factors, the nonstatutory factor that "his actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed." The court also found the nonstatutory factor that "the defendant did engage in the course of [sic] pattern of criminal conduct extending over a period of many years, involving the commission of sexual offenses against very young children."

With respect to the offenses of taking indecent liberties with children in cases 33403 and 33404 the court said the following: "[T]he court finds aggravating factors pertaining to the age of the victim, making that victim particularly vulnerable and the matter of the course of criminal conduct involving sexual offenses committed over the course of [many] years against very young children pertain."

In the consolidated judgment involving cases 90CRS38965, 38961, 38963, and 38966, involving crimes against the younger victim, the trial court again found the existence of nonstatutory aggravating factors, "specifically, the age of the victim; these actions made the victim particularly vulnerable to the conduct of the defendant." The court also found the same course of conduct nonstatutory aggravating factor found in cases 33403 and 33404, but the court added that the victims were not the ones in any of the cases for which defendant was being sentenced.

[1] According to the Fair Sentencing Act, "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." N.C.G.S. § 15A-1340.4(a) (Supp. 1992). Statutory aggravating factors include that "[t]he victim was very young, or very old, or mentally or physically infirm." *Id.* § 15A-1340.4(a)(1)j.

In *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983), this Court established that even if age of the victim is an element of the offense, the trial court may still find the existence of the statutory aggravating factor if based on age of the particular victim. In *Ahearn*, the crime at issue was felonious child abuse; the applicable statute protected children less than sixteen years of age; and defendant contended the trial court erred by finding in aggravation that the victim was very young or mentally or physically infirm. Discussing the essential element of age and the statutory aggravating factor based on age, the Court said:

> The age of the victim, while an element of the offense, spans sixteen years, from birth to adolescence. The abused child may be vulnerable due to its tender age, and *vulnerability* is clearly the concern addressed by this factor [§ 15A-1340.4(a)(1)j]. [T]hat Daniel Bright was *very young* (24 months) was not an element necessary to prove felonious child abuse, and was therefore properly considered as an aggravating factor.

Id. at 603, 300 S.E.2d at 701; *see also State v. Long*, 316 N.C. 60, 65-66, 340 S.E.2d 392, 392 (1986) (reiterating principle that N.C.G.S. § 15A-1340.4(a)(1)j focuses on vulnerability attributable to age and mental or physical infirmity of the victim).

In *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985), this Court explained proper use of the statutory factor of age in aggravating a sentence for an offense whose essential elements include age:

> Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless *the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her*, as where age impedes a victim from fleeing, fending off attack, recovering

> from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act.

Id. at 525, 335 S.E.2d at 8 (emphasis added). In a subsequent case the Court noted ways in which a defendant may take advantage of the age of the victim:

> First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. In either case, the defendant's culpability is increased.

State v. Thompson, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986). Nevertheless, this language does not confine aggravation by the statutory factor of age to crimes wherein the victim is targeted because of age. *Id.* at 398, 348 S.E.2d at 801.

Reviewing the trial court's finding that the victim was very young when defendant committed the offense of taking indecent liberties with children, this Court in *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986), stated:

> From what we said in *Hines* it is apparent that the determination of vulnerability must be made in light of the crime committed. The offense of indecent liberties with a minor cannot be committed unless the victim is less than sixteen years of age. N.C.G.S. § 14-202.1 (1986). While a thirteen-year-old girl may be more vulnerable than a thirty-year-old woman to sexual assault, we cannot say that the victim's age made her any more vulnerable to the offense of indecent liberties with a minor than other victims of the offense. She was only two years younger than the maximum age used to define the offense. Because she was not for purposes of this offense "very young," defendant must receive a new sentencing hearing on his conviction for taking indecent liberties with a minor.

Id. at 112-13, 347 S.E.2d at 402.

From the language in these cases, the general rule emerges that where age is an element of the offense, as with taking indecent

liberties with children, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. If, however, the evidence shows that the victim was not more vulnerable than any other victim of the same crime would have been, the statutory aggravating factor that the victim was "very young" cannot properly be found. In the offense of taking indecent liberties with children, "children" are those under the age of sixteen years. N.C.G.S. § 14-202.1(a) (1993). Since the victim's being "very young" is not necessary to prove the offense, the offense and statutory aggravating factor are not proved by the same evidence. Moreover, findings in aggravation are not limited to those in N.C.G.S. § 15A-1340.4(a)(1), *State v. Edgerton*, 86 N.C. App. 329, 331, 357 S.E.2d 399, 401 (1987), but the trial court may make such other nonstatutory findings as are supported by the evidence and are reasonably related to the purposes of sentencing. Therefore, we hold the Court of Appeals erred in holding that because evidence of the victim's age was necessary to establish the offense of taking indecent liberties, such evidence should not have been used as proof of an aggravating factor. Further, we expressly disavow dictum to the contrary in *State v. Vanstory*, 84 N.C. App. 535, 538, 353 S.E.2d 236, 238 (1987).

In the present case the victim in cases 33403 and 33404 was eleven years old; and, nothing else appearing as in *Sumpter*, age alone could not be used to aggravate the sentence for the conviction of taking indecent liberties with children. The trial court, however, did not find the statutory aggravating factor but found a nonstatutory aggravating factor, namely, "his actions at the age of the victim in this offense made that victim particularly vulnerable to the offense committed." Moments before finding the factor, the trial court stated: "I continue to come back to the point that I see [defendant] engaged in [a] calculated[,] deliberate predatory scheme to ingratiate himself [with] these children; buy their friendship and respect and love [with] his trinkets and baubles, and then to victimize them." This language, read together with the language of the finding, makes clear that the basis for the factor was increased vulnerability of the victim arising from defendant's bestowing gifts on him. The record shows that the factor was supported by the evidence and related to the purposes of sentencing. For these reasons, we con-

clude the court did not err in aggravating defendant's sentence thereby.

Defendant assigned error to the trial court's finding the same aggravating factor with respect to cases 90CRS38965, 38961, 38963, and 38966 but made no argument based thereon to the Court of Appeals. Accordingly, this assignment of error is deemed abandoned as to those cases. N.C. R. App. P. 28(a).

[2] In the exercise of our supervisory powers, we also address an error of law not raised in the State's petition for writ of certiorari, but addressed by both parties in their briefs to this Court. Defendant contends, and the Court of Appeals agreed, that the trial court erred in aggravating his sentence for second-degree sexual offenses against the older victim based on the victim's age, which was an element of the joined offense of indecent liberties. Again we find that the lower appellate court misapplied the Fair Sentencing Act and cases construing it.

In determining existence of the statutory aggravating factor that a defendant has a prior conviction, the trial court may not consider "any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." N.C.G.S. § 15A-1340.4(a)(1)o. (Supp. 1992). However, the rule barring use of joinable convictions as an aggravating factor does not apply to use of a fact needed to prove an element of a contemporaneous conviction. *State v. Wright*, 319 N.C. 209, 214, 353 S.E.2d 214, 218 (1987); *see also State v. Miller*, 316 N.C. 273, 284, 341 S.E.2d 531, 538 (1986) ("[W]hen cases are consolidated for *judgment*, and the judge makes findings of aggravating and mitigating factors for the most serious offense for which defendant is being sentenced, the judge's failure to make findings of such factors for the lesser offenses consolidated will not constitute reversible error.").

Applying these principles, the court could aggravate the sentence for the second-degree sexual offenses with a finding concerning age, if supported by the evidence, since age is not an element of second-degree sexual offense. Moreover, if the trial court properly found the statutory aggravating age factor, the court could apply the factor to aggravate both defendant's sentence for indecent liberties and his sentence for second-degree sexual offense.

[3] Finally, in the exercise of our supervisory powers and in the interest of judicial economy, we address defendant's arguments not addressed by the Court of Appeals. Defendant contended that the trial court erred in the consolidated judgment for cases 90CRS38965, 38961, 38963, and 38966 by finding the statutory aggravating factor that "defendant took advantage of a position of trust or confidence to commit" these offenses. N.C.G.S. § 15A-1340.4(a)(1)n (Supp. 1992). We have carefully reviewed the record and find ample evidence to support this finding. The existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon defendant. *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987). Evidence in the record discloses that the victim was nine years old. His father was deceased, and his mother was a long-distance truck driver. The victim's grandfather, who had cared for the victim, died not long before the victim's ninth birthday. Defendant befriended the victim and took him on trips and to play miniature golf. Gradually, the victim spent more and more time at defendant's home and essentially lived with defendant while the victim's mother was away. Under these circumstances, defendant could clearly be said to have taken advantage of a position of trust or confidence to commit the offense. This assignment of error is without merit and is overruled.

[4] Defendant further contended that the trial court erred in cases 33403 and 33404 by finding the nonstatutory aggravating factors that the victim "suffered severe mental and emotional injury which is in excess of that usually associated with offenses of the nature [of those] adjudicat[ed] in 33403 and 33404" and "that the defendant did engage in the course [or] pattern of criminal conduct extending over a period of many years, involving the commission of sexual offenses against very young children." Again, our review of the transcript reveals ample evidence to support each of these aggravating factors. These assignments of error are without merit and are overruled.

The decision of the Court of Appeals is reversed and the cases remanded to that court for remand to Superior Court, Guilford County, for reinstatement of the judgment in cases 33403 and 33404.

NOS. 90CRS38965, 38961, 38963, AND 38966: JUDGMENT OF THE TRIAL COURT AFFIRMED.

NOS. 90CRS33403 AND 33404: REVERSED AND REMANDED.

IN RE LICENSE OF MARK T. DELK

No. 249PA93

(Filed 17 June 1994)

1. Judgments § 36 (NCI4th)— attorney discipline—show cause order from another county—jurisdiction

An order requiring an attorney to appear and show cause why he should not be disciplined was sufficient to give the Superior Court of Graham County jurisdiction even though the order was signed in Mecklenburg County. The rule that a judge may not enter an order substantially affecting a right of a party outside the county in which the case is to be heard without the consent of the parties does not apply to show cause orders. A show cause order does not substantially affect the rights of a party; so long as the controversy is to be determined in the proper county, it should not matter that an ex parte order was issued in another county.

Am Jur 2d, Judgments §§ 58 et seq.

2. Appeal and Error § 536 (NCI4th)— discipline—show cause order—Court of Appeals mandate

A contention on appeal that the Superior Court did not follow the mandate of the Court of Appeals in issuing an order that an attorney should appear and show cause why he should not be disciplined was overruled where the Superior Court issued what it considered a valid show cause order as required by the first opinion of the Court of Appeals and the Supreme Court upheld the validity of the order.

Am Jur 2d, Appeal and Error §§ 959 et seq., 989 et seq.

3. Judgments § 314 (NCI4th)— *criminal judgment against attorney*—disbarment proceeding not precluded

The superior court was not precluded from disbarring respondent where respondent was a licensed attorney, he was convicted of extortion and conspiracy to commit extortion in a trial over which Judge Hyatt presided, Judge Hyatt later entered an order disbarring respondent pursuant to a show cause order, the Court of Appeals vacated the order on jurisdictional grounds, the State Bar requested a second show cause order, Judge Hyatt refused, and defendant contended that

Judge Hyatt should have ruled on the question of disbarment when defendant was convicted and that the matter is now res judicata. The question of disbarring respondent was not part of the criminal action against the respondent and did not have to be determined when the criminal case was tried.

Am Jur 2d, Judgments §§ 614 et seq.

4. **Attorneys at Law § 67 (NCI4th)— disbarment by court—effective date—practice of State Bar and court distinguished**

Respondent, an attorney disbarred after being convicted of extortion and conspiracy to commit extortion, correctly argued that the Superior Court judge who signed an order of disbarment originally entered by another judge incorrectly found the effective date of the order to be thirty days from the first order. Although the State Bar makes the effective date 30 days from the date the order is signed so that the disbarred attorney may wind down his affairs, this is a judicial disbarment. The State Bar had no power to let the respondent keep his license for thirty days and it is clear that the judge who signed the order intended the effective date of the order to coincide with the original order.

Am Jur 2d, Attorneys at Law §§ 25 et seq.

5. **Attorneys at Law § 83, 89 (NCI4th)— disbarment—procedure—appeal of underlying criminal action**

There was no error in the procedure by which respondent-attorney was disbarred following an extortion and conspiracy conviction. Adequate notice was given to respondent to comply with due process; the court proceeded against respondent using its inherent power to discipline attorneys and was not bound by the rules of the State Bar. Moreover, although defendant argues that N.C.G.S. § 84-28(d) prohibits disbarment while the criminal charge for which the person is to be disbarred is on appeal, there was more than one order of disbarment in this case. This appeal is from a disbarment which occurred after the Court of Appeals had found no error in the respondent's conviction.

Am Jur 2d, Attorneys at Law §§ 90, 95.

Disciplinary action against attorney prior to exhaustion of appellate review of conviction 76 ALR3d 1061.

6. Attorneys at Law § 81 (NCI4th)— disbarment—conviction for extortion—records of court—findings sufficient

The trial court made adequate findings of fact and conclusions of law to support the order disbarring respondent where respondent contends that the order states no basis for the application of N.C.G.S. § 84-28 to a disbarment by a court, but the statute does not limit its penalty to cases brought by the State Bar. The court had the inherent power to disbar respondent and the finding that the records of the court disclose the conviction was sufficient to support disbarment. Finally, although respondent contends that there should have been some finding of his "actual character at the time of the hearing," the court had the power to disbar the respondent without regard to his character when the court found that the records disclosed that respondent had been convicted of the crimes.

Am Jur 2d, Attorneys at Law §§ 74-83.

7. Attorneys at Law § 71 (NCI4th)— disbarment by court—rules of civil procedure—not applicable

There was no error in respondent's disbarment by a judge following his conviction for extortion and conspiracy where respondent contended that this was a civil action which required that all of the rules of civil procedure be applied, including the filing of a complaint and issuance of a summons. The Superior Court has the inherent power to discipline members of the bar, including requiring attorneys to appear and answer charges based on the records of the court. Respondent's due process rights were protected by the show cause order notifying him of the hearing.

Am Jur 2d, Attorneys at Law §§ 90, 91, 96.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 110 N.C. App. 310, 429 S.E.2d 595 (1993), vacating a judgment entered by Allen (C. Walter), J., on 3 February 1992 in Superior Court, Graham County. Heard in the Supreme Court 14 March 1994.

This is an appeal by the North Carolina State Bar from a decision by the Court of Appeals which vacated an order disbarring the respondent. The respondent, at that time a licensed attorney practicing in North Carolina, was convicted of extortion and con-

spiracy to commit extortion in a trial over which Judge Hyatt presided. The court did not enter an order of professional discipline at that time. The Court of Appeals found no error in the trial in an unpublished opinion. *State v. Sellers and Delk*, 99 N.C. App. 775, 395 S.E.2d 164 (1990).

On 3 May 1990, at the request of the North Carolina State Bar, Judge Hyatt, a resident judge of 30B District which does not include Graham County, issued a show cause order to the respondent requiring him to appear in Graham County on 25 May 1990 and show cause why he should not be disciplined. Judge Hyatt was not in Graham County and was not assigned to hold court in Graham County at the time the order was issued. On 25 May 1990, Judge Hyatt entered an order disbarring Delk. The Court of Appeals vacated the order of disbarment on the ground that the show cause order was a nullity because it was issued out of term and the court did not have jurisdiction to enter the order disbarring the respondent. *In re Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991).

The North Carolina State Bar asked Judge Hyatt to issue a second order requiring the respondent to show cause why he should not be disciplined. Judge Hyatt refused to issue such an order.

On 28 October 1991, at the request of the North Carolina State Bar, Judge James U. Downs, Jr., the Senior Resident Judge for 30A Judicial District which includes Graham County, issued a show cause order to the respondent requiring him to appear in Graham County on 2 December 1991 and show cause why he should not be disciplined. Judge Downs was holding court in Mecklenburg County at the time he signed the show cause order. Judge Downs was assigned to hold court in Graham County on 2 December 1991. On that date, he recused himself but ordered that the 28 October 1991 show cause order remain in effect and that the hearing on it would be held on 3 February 1992. On 7 December 1991, Judge Downs, while in Macon County, signed a show cause order *nunc pro tunc* to 2 December 1991. On 3 February 1992, Judge C. Walter Allen signed an order disbarring the respondent.

The Court of Appeals, following its decision in the previous case, held that the show cause order issued by Judge Downs was a nullity. It held that he could not revive an order which was void *ab initio* by ordering that it remain in effect and the order entered *nunc pro tunc* was a nullity because it was signed out of the county. The Court of Appeals held that the superior court

never gained jurisdiction over the respondent. It vacated the order disbarring the respondent.

A. Root Edmonson for petitioner-appellant, the North Carolina State Bar.

Mark T. Delk, respondent-appellee, pro se.

WEBB, Justice.

[1] The first question posed by this appeal is whether the show cause order signed by Judge Downs in Mecklenburg County is sufficient to give the Superior Court, Graham County, jurisdiction to enter a judgment in Graham County. We believe this is a question of first impression.

The respondent, relying on several cases, *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984); *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954); *Shepard v. Leonard*, 223 N.C. 110, 25 S.E.2d 445 (1943); *Ward v. Agrilo*, 194 N.C. 321, 139 S.E. 451 (1927); *Bisanar v. Suttlemyre*, 193 N.C. 711, 138 S.E. 1 (1927); *Gaster v. Thomas*, 188 N.C. 246, 124 S.E. 609 (1924); and *State v. Ray*, 97 N.C. 510, 1 S.E. 876 (1887), says "except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending." *Shepard v. Leonard*, 223 N.C. 110, 114, 25 S.E.2d 445, 448 (quoting *Biasnar v. Suttlemyre*, 193 N.C. 711, 712, 138 S.E. 1, 1).

None of the cases cited by the respondent involve the issuance of a show cause order. In each case a superior court judge either entered an order which determined the case, required some action by a party, or affected some right of a party. This is the first time, so far as we can determine, that a litigant has attempted to implicate, in regard to a show cause order, the rule that a judge, without the consent of the parties, may not make an order substantially affecting a right of a party unless he is in the county in which the case is to be heard. We hold that the rule upon which the respondent relies does not apply to show cause orders.

A show cause order does not substantially affect the rights of a party. It does require the person cited to appear and protect his rights or risk losing them. So long as the controversy is to be determined in the proper county, it should not matter that an

ex parte show cause order was issued in another county. The party to whom the order is directed does not have the right to be present when the order is signed. No right of his is violated when a show cause order is signed in a county other than the county in which the matter is to be heard. We decline to extend the rule to apply to this situation. We believe it would exalt form over substance to do so.

The respondent brings forward several assignments of error which were not discussed by the Court of Appeals. He says first that Judge Downs as a senior resident judge has no more authority than any other superior court judge. Our decision in this case does not depend on Judge Downs being the senior resident superior court judge. This assignment of error is overruled.

[2] The respondent next contends that after the Court of Appeals vacated the order of Judge Hyatt and remanded for further proceedings, the superior court did not follow the mandate of the Court of Appeals. He contends this voided the action taken in the superior court. On remand, the superior court issued what it considered to be a valid show cause order as required by the first opinion of the Court of Appeals. We have upheld the validity of the order. The respondent does not say in what way the court otherwise did not follow the mandate of the Court of Appeals and we do not find any such way. This assignment of error is overruled.

[3] The respondent contends that the actions of Judge Hyatt in declining to order the respondent disbarred when he was convicted in June 1989 and later refusing to issue an order requiring him to show cause why he should not be disbarred are *res judicata* as to the issues in this case and the court could not disbar him. He bases this argument on the language of two cases, *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E.2d 909 (1955) and *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983), which say:

> It is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action. The bar of the judgment in such cases extends not only to matters actually determined but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action.

Gaither Corp. v. Skinner, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (citations omitted). The respondent says Judge Hyatt could and should have ruled on the question of disbarment when the defendant was convicted in June 1989 and refused to do so. He says that matter is now *res judicata* and he cannot be disbarred by the court.

Assuming a criminal case could be the basis for *res judicata* or collateral estoppel, the respondent has given the doctrine an overbroad interpretation. The language upon which the respondent relies was used in the context of requiring parties to litigate the whole claim in one action. The question of disbarring the respondent was not a part of the criminal action against the respondent and did not have to be determined when the criminal case was tried. It could be determined at a later time. This prevents the matter from being *res judicata*. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973). This assignment of error is overruled.

[4] The respondent next contends Judge Allen, in the order of disbarment, incorrectly found the effective date of the order of disbarment entered by Judge Hyatt. Judge Allen made 25 June 1990 the effective date of the order he signed based on the effective date of the order signed by Judge Hyatt. The effective date of the order might become important in calculating the time when the respondent is eligible to apply for readmission to the bar.

We believe the respondent is correct in this contention. The order of Judge Hyatt was signed on 25 May 1990. It contains no provision making its effective date 25 June 1990. The State Bar argues that it has a practice of making the effective date of a disbarment order thirty days from the date the order is signed. This is done to let the disbarred attorney wind down his affairs. For this reason, says the State Bar, the respondent would have kept his license until 25 June 1990 although the order of disbarment was signed on 25 May 1990.

The difficulty with the State Bar's argument is that this is a judicial disbarment. When Judge Hyatt issued the order disbarring the respondent, the State Bar had no power to let the respondent keep his license for thirty days. It is clear from reading the order of Judge Allen that he intended the effective date of the order he signed to coincide with the order of Judge Hyatt. On remand, we order that the order signed by Judge Allen be amended to make 25 May 1990 its effective date.

[5] The respondent next assigns error to the procedure by which he was disbarred. He says the State Bar violated its own rules when it asked the court to disbar him. In this state there are two methods by which an attorney may be disbarred. One method is statutory under which the State Bar proceeds against an attorney. The other method is one in which the court exercises its inherent power to discipline attorneys. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *McMichael v. Proctor*, 243 N.C. 479, 91 S.E.2d 231 (1956). In this case, the court proceeded against the respondent using its inherent power to discipline attorneys. It was not bound by the rules of the State Bar. Adequate notice was given to the respondent to comply with due process.

The respondent argues under this assignment of error that N.C.G.S. § 84-28(d) prohibits disbarment while the criminal charge for which a person is to be disbarred is on appeal. He says this rule was violated when he was disbarred by Judge Hyatt. This appeal is from the disbarment by Judge Allen which occurred after the Court of Appeals had found no error in the respondent's conviction. This assignment of error is overruled.

[6] Under his next assignment of error, the respondent contends the court did not make adequate findings of fact and conclusions of law to support the order of disbarment. The court found

> that the records of this Court disclose that Mark T. Delk, then an Attorney at Law . . . was convicted on June 15, 1989 of a criminal charge of extortion . . . and a criminal charge of conspiracy . . . which are criminal offenses demonstrating unfitness to practice law and act as an officer of this Court; and concluding that conviction of said charges is grounds for discipline pursuant to N.C. Gen. Stat. Section 84-28(b)(1).

The court then ordered that the respondent be disbarred.

The respondent says the findings of fact do not support the order disbarring him. He argues that the order states no basis for the application of N.C.G.S. § 84-28 to a disbarment by a court. He contends this section of the statutes applies only to disbarment proceedings brought by the State Bar. N.C.G.S. § 84-28 provides for disbarment for the conviction of a criminal offense showing professional unfitness. It does not limit this penalty to cases brought by the State Bar. If the court was not given the power to disbar the respondent by N.C.G.S. § 84-28, it had the inherent power

to disbar him for the conviction of the two felonies. *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938).

The respondent contends that there was not a finding that he was convicted of any crime but that the order only says "the records of this Court disclose" that he was convicted. If a court finds that the records of the court disclose a person has been convicted of a crime showing he is unfit to practice law, this is a sufficient finding of fact to support disbarment.

The respondent finally contends that there should have been some finding of his "actual character at the time of the hearing." When the court found that the records disclosed the respondent had been convicted of the crimes, it had the power to disbar the respondent without regard to his character. This assignment of error is overruled.

[7] In his last assignment of error, the respondent contends that this is a civil action which required that all the rules of civil procedure be applied, including the filing of a complaint and the issuance of a summons. He contends the failure of the court to follow its own rules deprived him of due process of law.

The superior court has the inherent power to discipline members of the bar. It can require attorneys to appear and answer charges based on records of the court. There is not a plaintiff in such a proceeding and a complaint does not have to be filed. The show cause order notified the respondent of the nature, date, time and place of the hearing. This protected the respondent's due process rights. *See In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978). This assignment of error is overruled.

For the reasons given in this opinion, we reverse the Court of Appeals and remand for remand to superior court for the reinstatement of Judge Allen's order with the amendment we have mandated.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. WILLIAM MAURICE FARRIS

No. 320PA93

(Filed 17 June 1994)

Criminal Law § 1442 (NCI4th)— probation revocation—credit for time served on special probation

Defendant was entitled under N.C.G.S. § 15-196.1 to credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated, and the trial court erred by reducing his activated sentence by the ninety-day term he served instead of giving him credit for the time served. N.C.G.S. § 15A-135(a) does not govern credit for time served when a trial court revokes probation and activates a suspended sentence, and N.C.G.S. § 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as a result of the charge.

Am Jur 2d, Criminal Law §§ 547 et seq., 578, 621.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation. 99 ALR3d 781.

Defendant's right to credit for time spent in halfway house rehabilitation center, or other restrictive environment as condition of probation. 24 ALR4th 789.

Justice MEYER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 111 N.C. App. 254, 431 S.E.2d 803 (1993), remanding a judgment entered by Burroughs, J., at the 22 May 1992 Criminal Session of Superior Court, Mecklenburg County. Heard in the Supreme Court 14 March 1994.

Michael F. Easley, Attorney General, by Timothy D. Nifong, Assistant Attorney General, for the State-appellant.

Isabel Scott Day, Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

PARKER, Justice.

The issue raised on this appeal is whether the Court of Appeals erred in holding that defendant was entitled to credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated. On 29 May 1990 defendant was indicted for possession with intent to sell or deliver cocaine and sale of cocaine. On 27 July 1990, pursuant to a plea arrangement, defendant pleaded guilty to these and other charges then pending against him. On 30 July 1990 the trial court sentenced defendant to a term of imprisonment of seven years for the sale of cocaine. The sentence was suspended for five years, during which time defendant was subject to supervised probation. Probation was to begin when he was paroled or otherwise released from incarceration for other charges for which he was separately sentenced under his plea arrangement. During the five-year suspension, in addition to both monetary and regular conditions of probation, defendant was subject to special conditions which included that he submit to warrantless searches of his person, vehicle, and premises for controlled substances and supply breath, urine, or blood specimens for controlled substance analysis. Additional special conditions of probation included that defendant be assigned to the Intensive Probation Supervision Program for a period of not less than six months and abide by curfew as established by the intensive team.

Defendant began serving his probationary sentence on or about 20 December 1990. On 31 May 1991, after a probation violation hearing, the trial court placed defendant on special probation pursuant to N.C.G.S. § 15A-1351 with an active sentence of ninety days. Except for modification in the monetary conditions, the special conditions remained in force. After defendant served this sentence, two additional probation violation reports were filed against him. After another hearing, on 22 May 1992 the trial court (i) found defendant had violated the conditions of his probation and revoked his probationary sentence, (ii) activated his seven-year suspended sentence and reduced it by ninety days, and (iii) imposed a term of imprisonment of six years and nine months.

On appeal defendant contended the trial court erred in reducing his sentence by the ninety-day term he served instead of giving him credit for the time served. The Court of Appeals agreed and remanded for amendment of the judgment to grant a credit. *State v.*

Farris, 111 N.C. App. 254, 256, 431 S.E.2d 803, 805 (1993). This Court granted State's petition for discretionary review, 334 N.C. 624, 435 S.E.2d 344 (1993); and for reasons which follow, we affirm the decision of the lower appellate court.

The applicable statutes provide as follows:

> The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement[,] in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole and probation revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C.G.S. § 15-196.1 (1983).

> (a) **(Effective until March 1, 1994)** The judge may sentence a defendant convicted of an offense for which the maximum penalty does not exceed 10 years to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated

local confinement or treatment facility. The total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth [of] the maximum penalty allowed by law for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The period of probation, including the period of imprisonment required for special probation, may not exceed five years. The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

. . . .

(g) Credit.—Credit towards a sentence [of] imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes.

N.C.G.S. § 15A-1351 (Supp. 1993) (effective until Jan. 1, 1995).

Before this Court, State argues that confinement for which credit is due under section 15-196.1 does not include confinement that is a part of the sentence itself. State argues further that under section 15A-1351(a), a term of imprisonment imposed as a condition of special probation is just like any other probationary condition, is part of the sentence, and differs only from other conditions in that a defendant is given little, if any, opportunity to circumvent it. Moreover, to say that confinement credit is due for a term of imprisonment served under special probation is to say, without a reasonable legal basis, that there is more than one class of probationary conditions under North Carolina law. We do not find these arguments persuasive.

Section 15A-1351(a) addresses giving credit for time served in one specific situation, when a trial court is engaged in imposing a sentence of special probation. In that instance, the court may elect to credit time already served by a defendant to either a suspended sentence or any imprisonment required for special probation. By its plain language this part of the statute simply has no application to sentencing upon probation revocation. Instead,

section 15-196.1, referenced within section 15A-1351 as Article 19A of Chapter 15, must control.

The Court of Appeals reasoned that no language in section 15-196.1 requires that credit be given only for pretrial confinement. *Farris*, 111 N.C. App. at 256, 431 S.E.2d at 804. In addition, the statute includes examples of posttrial incarceration for which credit must be given. *Id.* at 256, 431 S.E.2d at 804-05. Further,

> a literal reading of the statute supports defendant's contention that credit is required for the ninety-day sentence he served because it came "as a result of" the "charge[s]" originated against defendant, which charges "culminated in the sentence [of six years and nine months]." Thus, a defendant who has served, pursuant to special probation, an active sentence, is entitled to credit for that time on any sentence imposed upon revocation of probation.

Id. at 256, 431 S.E.2d at 805. We approve the careful reasoning of the Court of Appeals. The language of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge. For this reason, and because section 15A-1351(a) does not govern credit for time served when a trial court revokes probation and activates a suspended sentence, we hold the Court of Appeals did not err in concluding defendant must be given credit for the ninety-day sentence he served.

AFFIRMED.

Justice MEYER dissenting.

Pursuant to defendant's plea arrangement, the trial court imposed a sentence of seven years but suspended the sentence for five years subject to certain probation conditions. Defendant violated the conditions of his probation, and on 31 May 1991, he was placed on special probation with an active sentence of ninety days. Defendant served these ninety days. After serving this sentence, he again violated the terms of his probation, and the trial court activated the seven-year sentence to which defendant was subject, as it had been imposed upon him as a result of his original plea arrangement.

Defendant's time of incarceration pursuant to the imposition of special probation was properly accounted for by the reduction

of his sentence by three months. This three-month reduction of sentence is not a credit for time served for the attainment of prison privileges as contemplated in N.C.G.S. § 15-196.1.

N.C.G.S. § 15-196.1 was designed to ensure that prisoners are credited with time served prior to the resolution of the State's charges, not only against the service of the sentence, but also for the purpose of attaining prison privileges. The "credit" intended to be secured by N.C.G.S. § 15-196.1 has a dual effect:

> Time creditable under this section shall reduce the minimum and maximum term of a sentence; and, irrespective of sentence, shall reduce the time required to attain privileges made available to inmates in the custody of the State Department of Correction which are dependent, in whole or in part, upon the passage of a specific length of time in custody, including parole consideration by the State Board of Paroles.

N.C.G.S. § 15-196.3 (1983). Because a defendant has spent time in custody as a result of a mere "charge," as opposed to a determination of guilt, the legislature has given him the benefit of the doubt by crediting that period of incarceration for the purpose of attaining prison privileges. If a defendant returns to custody subsequent to a period spent in special probation, this is a strong indication that he is not entitled to the dual credit enumerated in N.C.G.S. § 15-196.1, entitled "Credits against the Service of Sentences and for Attainment of Prison Privileges." That is why special probation is not listed as a source of such credit.

The periods of incarceration that a prisoner is entitled to have credited both against his sentence *and* for the attainment of prison privileges are listed in N.C.G.S. § 15-196.1. They include time spent in custody "as a result of the charge":

(1) pending trial,

(2) pending trial *de novo*,

(3) pending appeal,

(4) pending retrial,

(5) pending a parole hearing, and

(6) pending a probation revocation hearing.

See N.C.G.S. § 15-196.1 (1983). All of these periods occur prior to a final resolution of charges against the prisoner. The majority adds a new source of credit to this list, that is, "credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated."

This added source of credit occurs not so much "as a result of the charge" as required by statute, but as a part of the resolution of the charges, that is, the sentence imposed. The situations listed in N.C.G.S. § 15-196.1 appear to encompass periods of incarceration endured by a defendant *pending* the final resolution of the State's grievance against him. A period of incarceration pursuant to special probation appears to be the payment of the penalty imposed *subsequent* to the resolution of the State's case. I do not believe the legislature intended that time served as a condition of special probation be treated as those periods of custody listed in N.C.G.S. § 15-196.1, which speaks in terms of periods of incarceration spent "as a result of" a "charge." Special probation is a period of incarceration spent *pursuant to a conviction.*

My reading of the applicable statutory sections indicates that the legislature meant to differentiate between time served pursuant to special probation and "time a defendant has spent . . . as a result of the charge that culminated in the sentence." N.C.G.S. § 15-196.1. In the statute governing the imposition of special probation, trial courts are directed that they "may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation." *See* N.C.G.S. § 15A-1351(a) (1988). This directive indicates to me that a period of special probation was not meant to be included as one of the enumerated situations listed by the legislature. Instead, a period of special probation is a period of custody to which those enumerated situations might apply.

In summary, a reduction in sentence for time served on the special probation portion of a split sentence and a "credit" pursuant to N.C.G.S. § 15-196.1 are two entirely different matters. Although a defendant may be entitled to a reduction in the length of his sentence for the amount of time served in a period of special probation, he should not receive a "credit" in the dual nature contemplated by N.C.G.S. § 15-196.1, that is, that time should not serve as credit towards the attainment of prison privileges.

I believe the trial court reached the correct result. Accordingly, I vote to reverse the Court of Appeals.

STATE OF NORTH CAROLINA v. EDWARD LONNIE McCARROLL AND CYNTHIA MARIE WATKINS

No. 172PA93

(Filed 17 June 1994)

1. **Evidence and Witnesses § 132 (NCI4th)— sexual offenses—false accusation by victim—exclusion of evidence—harmless error**

Assuming that the trial court in a prosecution for rape and other sexual offenses allegedly committed by a mother and her boyfriend against the mother's daughter erred by excluding under Rule 412 testimony by the victim's brother tending to show that the victim had falsely stated that she had had oral sex with her brother, this error was harmless beyond a reasonable doubt where the brother's denial that any sexual activity had occurred with his sister was equivocal at best; the jury could not have placed much credence in the brother's testimony; and the outcome of the trial would not have been affected by this evidence in light of the strong evidence against defendants, particularly a letter written by the mother which strongly corroborated the State's case. N.C.G.S. § 8C-1, Rule 412.

Am Jur 2d, Rape §§ 55 et seq.

2. **Evidence and Witnesses § 2973 (NCI4th)— cross-examination of one defendant about previous affair—harmless error**

In a prosecution of defendants for various sexual offenses involving the female defendant's daughter, the trial court erred in allowing the State to cross-examine the female defendant as to whether she had an affair with a man who the victim said had previously molested her because this evidence was not probative of the witness' truthfulness or untruthfulness and was not relevant to any element of the crimes for which she was being tried. However, this error was not prejudicial since all the evidence showed that the defendants were living

together although they were not married, and it is unlikely that the jury would be any more prejudiced by learning of an affair in which the female defendant had engaged several years previously. N.C.G.S. § 8C-1, Rules 404(b), 608(b).

Am Jur 2d, Witnesses §§ 563 et seq.

Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed 564.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed 497.

Attacking or supporting credibility of witness by evidence in form of opinion or reputation, under Rule 608(a) of Federal Rules of Evidence. 52 ALR Fed 440.

3. Criminal Law § 734 (NCI4th)— instructions—reference to prosecutrix as victim—no plain error

The trial court's reference to the prosecutrix as the victim throughout the charge was not an expression of opinion by the court that defendant was guilty and did not constitute plain error.

Am Jur 2d, Trial §§ 657 et seq.

4. Criminal Law § 1133 (NCI4th)— crime against nature—sexual activity by substitute parent—aggravating factor—inducement of others—sufficient evidence

A letter written by the female defendant to the male defendant and her minor daughter was sufficient evidence to support the trial court's finding as an aggravating factor for crime against nature and sexual activity by a substitute parent that the female defendant induced others to participate in the commission of the offenses.

Am Jur 2d, Criminal Law §§ 598, 599.

5. Criminal Law § 904 (NCI4th); Rape and Allied Sexual Offenses § 132 (NCI4th)— indecent liberties—disjunctive instruction

The trial court did not deny defendant the right to a unanimous verdict by instructing the jury that it could find her guilty of indecent liberties based on any "immoral, improper or indecent touching or act by the defendant upon the

child or an inducement by the defendant of an immoral or indecent touching by the child." Even though there may have been evidence of touching or other acts by defendant which would not be considered "immoral, improper or indecent," there was plenary evidence of illegal touching by defendant to support her conviction; the trial court properly instructed the jury as to how to consider the evidence; and it will be assumed that the jury followed the court's instructions.

Am Jur 2d, Criminal Law § 892; Rape §§ 108 et seq.; Trial §§ 1112 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 109 N.C. App. 574, 428 S.E.2d 229 (1993), setting aside multiple judgments entered against the defendants by Fullwood, J., at the 21 May 1991 Criminal Session of Superior Court, New Hanover County and awarding the defendants new trials. Heard in the Supreme Court 15 March 1994.

Each defendant was charged with a crime against nature, first degree rape, taking indecent liberties with a minor, felony child abuse and sexual activity by a substitute parent. The offenses and the defendants were joined for trial.

The evidence showed that the defendant Watkins had three children, a thirteen-year-old daughter (hereinafter "the prosecuting witness"), an eleven-year-old daughter, and an eight-year-old son. The defendant Watkins' divorced husband had custody of the children, but Watkins had the children with her every other weekend. The two defendants lived together.

In August 1990, the defendants began to involve the prosecuting witness in their sexual relations. The prosecuting witness testified that during one weekend visit the defendants inquired as to whether she would like to have sex with them. They indicated that it would be "teaching you for when you [get] older." The prosecuting witness testified that from August to October 1990, she participated in numerous sexual acts with the defendants including fellatio, cunnilingus and vaginal intercourse. The encounters with the defendant McCarroll occurred in the defendant Watkins' presence and in her absence.

The prosecuting witness' younger brother testified that on one occasion he saw McCarroll follow his sister into the bathroom. He testified he heard only whispers from the bathroom and the two came out thirty minutes later. The brother informed his father of what he had seen. The father then confronted the prosecuting witness who confirmed what her brother had told him.

The Sheriff's Department of New Hanover County began an investigation of the matter. During the investigation, deputy sheriffs searched the mobile home of the defendants. They found, among other things, a note written by the defendant Watkins which said:

> Hi Babe and [Prosecuting Witness].
>
> I love you both very much. So don't please—So don't think I am jealous when I say this[.] Please use the rubbers each and every time whether you like them or not. Have good time and I'll be home sometime after 2:00 a.m. Okay. Remember what I said. Babe if you ain't finished when I get home finish on me. And remember tonight you don't have anyone else to watch the other two kids so be quiet and listen for yourself. Be careful hugs and ever more kisses. Love ya Always Cindy.

Each defendant testified that no sexual activity took place between either of them and the prosecuting witness. The defendant Watkins testified the note was intended to scare the prosecuting witness in order to prevent her from becoming too active sexually and was not meant to encourage sexual activity between the defendant McCarroll and the prosecuting witness.

The defendants were found guilty of all the charges against them except first degree rape, for which each was found not guilty. Each defendant appealed from the imposition of prison sentences. The Court of Appeals granted a new trial on the ground that the defendants were not allowed to offer evidence that the prosecuting witness had falsely accused another person of sexual activity with her. We granted a petition by the State for discretionary review.

Michael F. Easley, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State-appellant.

Nora Henry Hargrove for defendant-appellee Edward Lonnie McCarroll.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellee Cynthia Marie Watkins.

WEBB, Justice.

[1] The first question brought to the Court by this appeal is whether it was error to exclude testimony pursuant to N.C.G.S. § 8C-1, Rule 412, which evidence would have tended to show that the prosecuting witness was not truthful when she said she had a sexual encounter with someone other than the two defendants. Rule 412 makes irrelevant certain previous sexual activity of a complainant in a rape or sex offense case. *See State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980).

The Court of Appeals has held that Rule 412 does not prevent evidence that a complainant has falsely accused a person of sexual activity because a false accusation is not sexual activity. Such evidence is relevant because it tends to impeach the witness. *State v. Anthony*, 89 N.C. App. 93, 365 S.E.2d 195 (1988); *State v. Durham*, 74 N.C. App. 159, 327 S.E.2d 920 (1985); *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

In this case, the court conducted an in camera hearing pursuant to the provisions of Rule 412. The prosecuting witness testified that her brother had engaged in oral sex with her. Her brother denied that any such activity had occurred. The superior court refused to allow this testimony to be heard by the jury. The Court of Appeals held that the proffered testimony was not evidence of previous sexual activity. It tended to impeach the witness and it should not have been excluded pursuant to Rule 412. The Court of Appeals held this was error requiring a new trial.

Assuming it was error to exclude this evidence, we are satisfied it was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443 (1988). The denial of the prosecuting witness' brother that any sexual activity occurred with his sister was equivocal at best. When the brother was being examined, he at first said he did not know what the question meant when he was asked if any sexual acts occurred between his sister and him. He was then asked a series of questions as to whether his sister had ever touched him in one of his private places and whether he had asked her to perform any type of sexual activity on him. He answered "no" to these questions, but then said he did not understand the nature of the questions. He said he did not know what oral sex was. He testified that he did not know what his penis was and then began crying when the defendant McCarroll's attorney accused him of not being

honest in answering this question. After the brother had regained his composure, he testified that his sister had never touched his penis.

We do not believe the jury could have placed much credence in the testimony of the brother. If they did not, it would have left before them the testimony of the prosecuting witness that she had had a sexual experience with someone other than the defendants, which should have been excluded under Rule 412. This might run afoul of N.C.G.S. § 8C-1, Rule 403. In light of the strong evidence against the defendants, particularly the letter written by the defendant Watkins which comprised a strong corroboration of the whole case of the State, we are satisfied that the equivocal testimony of the prosecuting witness' brother would not have affected the outcome.

[2] The next question posed by this appeal deals with questions propounded by the State on cross-examination of the defendant Watkins. The prosecuting witness testified that she had been sexually abused on another occasion when she was living with her family in Kansas. The State questioned the defendant Watkins on cross-examination as to her relation to the man who her daughter said had molested her. The following colloquy occurred.

Q. He was actually a boyfriend of yours, is that correct?

MR. TISE: Objection.

MR. BONEY: Objection.

COURT: Well, overruled.

Q. You can answer.

A. A boyfriend?

Q. Yes.

A. No. A fling, yes.

Q. By "fling" you mean you had an affair with him?

A. Yes.

MR. BONEY: Objection.

MR. TISE: Objection.

COURT: Well, sustained.

Q. Ms. Watkins, I believe the word you used was a "fling" is that correct?

MR. BONEY: Objection.

MR. TISE: Objection.

COURT: Overruled.

A. Yes, ma'am.

MR. BONEY: Move to strike that answer.

COURT: Denied.

Q. Can you define what you mean when you say a "fling," that Ellis was a fling?

MR. BONEY: Objection.

MR. TISE: Objection.

COURT: Overruled.

A. Just that I needed comforting and things went farther than they should have.

MR. TISE: Move to strike.

MR. BONEY: Move to strike.

COURT: Motion denied.

We agree with the Court of Appeals that it was error to allow this cross-examination. It was not probative of the witness' truthfulness or untruthfulness and was not relevant to any element of the crimes for which she was being tried. *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). N.C.G.S. § 8C-1, Rule 404(b) and Rule 608(b) (1992). We also hold, however, that this was not prejudicial error. All the evidence showed the defendants were living together although they were not married. It is not likely that the jury, under these circumstances, would be any more prejudiced by learning of an affair in which Watkins had engaged several years previously.

[3] The defendant Watkins brings forward three assignments of error which were not addressed by the Court of Appeals. She says first that the trial court erred in referring to the prosecuting witness as the "victim" throughout the charge to the jury. She contends that this was an expression of an opinion by the court

that she was guilty. She concedes that no objection to this reference was made at the trial and it must be examined as 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. Gibbs*, 335 N.C. 1, 37, 436 S.E.2d 321, 341 (1993) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). There is no intimation that the court expressed an opinion on the evidence other than as argued in this assignment of error. The judge properly placed the burden of proof on the State. We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done. This assignment of error is overruled.

[4] The defendant Watkins next says it was error for the court to find as an aggravating factor, for the enhancement of the sentences imposed in the crime against nature and sexual activity by a substitute parent cases, that she induced others to participate in the commission of the offenses. She says there was not sufficient evidence to support these findings.

We hold that there was sufficient evidence to support this finding. The letter written by the defendant is evidence from which the court could have made such a finding. *See State v. Lloyd*, 89 N.C. App. 630, 366 S.E.2d 912 (1988). This assignment of error is overruled.

[5] In her last assignment of error, defendant Watkins argues that the court in its charge denied her the right to a unanimous verdict by the jury on the charges of indecent liberties and child abuse. She bases this argument on the court's charge that the jury could find her guilty of indecent liberties based on any "immoral, improper or indecent touching or act by the defendant upon the child or an inducement by the defendant of an immoral or indecent touching by the child." For child abuse, the court charged that the jury could base its verdict on either fellatio by defendant McCarroll or cunnilingus by either of the defendants.

The defendant Watkins says that by not requiring the jury to agree on the specific acts upon which they rested their verdict, her right to a unanimous jury verdict has been violated. The defendant Watkins concedes that we have held that a jury need not be unanimous as to which of several sex acts it finds to support a conviction for indecent liberties. *State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990). She says, however, that in this case there

was so much evidence of touching or other acts by the defendants which would not be considered "immoral, improper or indecent," that some of the jurors could have based their verdicts on acts which were not illegal. There was plenary evidence of illegal touching by the defendants to support the convictions. The court properly instructed the jury as to how to consider the evidence. We must assume that the jury followed the court's instruction and based its verdicts on evidence which supports the convictions. This assignment of error is overruled.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for remand to superior court for the reinstatement of the judgments.

REVERSED AND REMANDED.

PAUL BRANTLEY AND WIFE, TAMMY LYNN BRANTLEY v. JOHNNY RAY STARLING AND S. K. BOWLING, INC.

No. 359PA93

(Filed 17 June 1994)

1. **Insurance § 530 (NCI4th) — underinsured motorist coverage — reduction for workers' compensation**

The trial court erred in an underinsured motorist case involving workers' compensation by not allowing the insurer to reduce the amount of UIM coverage by the workers' compensation benefits paid to plaintiff where the same insurer provided both coverages. The facts of this case fall squarely within *Manning v. Fletcher*, 324 N.C. 513. Although plaintiffs argue that *Manning* does not control because the truck involved was not a business vehicle, application of *Manning* does not turn on a factual finding that the vehicle involved was a "business vehicle." *Manning* addresses the situation where an employer has insurance coverage for its employees both under a workers' compensation policy and under a business auto policy. N.C.G.S. § 20-279.21(e).

Am Jur 2d, Automobile Insurance § 322.

Uninsured motorist coverage; validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1369.

2. Insurance § 530 (NCI4th)— underinsured motorist coverage—workers' compensation—exclusionary clause

A provision in an underinsured motorist policy stating that the policy did not apply to the direct or indirect benefit of any insurer under any workers' compensation law did not preclude a reduction in UIM coverage by the amount of workers' compensation benefits paid to plaintiff where the UIM coverage in the policy was not applied to the benefit of the insurer under any workers' compensation law. This situation is exactly what is provided for by statute in N.C.G.S. § 20-279.21(e) and in another section of the policy. Read together, the two policy provisions express the determination that recovery of workers' compensation benefits will not be affected by UIM coverage, but that recovery of UIM benefits will be affected by workers' compensation benefits

Am Jur 2d, Automobile Insurance § 322.

Uninsured motorist coverage; validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1369.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 111 N.C. App. 669, 433 S.E.2d 1 (1993), reversing and remanding a judgment entered by Hobgood, J., in the Superior Court, Wilson County, on 1 October 1991. Heard in the Supreme Court 17 March 1994.

Michael R. Birzon for plaintiff-appellants.

Broughton, Wilkins, Webb & Jernigan, by Charles P. Wilkins, for unnamed defendant-appellee N.C. Farm Bureau Insurance Company.

FRYE, Justice.

This appeal presents the question whether an underinsured motorist coverage carrier under a business automobile policy is entitled to reduce its coverage by the amount of workers' compensation benefits which the same insurer paid to an injured worker. For reasons different from those stated by the Court of

Appeals, we conclude that underinsured motorist coverage may be reduced by workers' compensation benefits and we therefore affirm the Court of Appeals' decision.

On 5 October 1989, plaintiff Paul Brantley, an employee of S.K. Bowling, Inc., was injured when the truck in which he was riding was struck by a car driven by defendant, Johnny Ray Starling. The truck in which Mr. Brantley was riding was titled individually in the name of Samuel King Bowling and was one of four trucks listed in a business automobile insurance policy issued to Mr. Bowling. On 20 March 1991, plaintiffs brought this action to recover damages for the injuries Mr. Brantley sustained from the accident and for loss of consortium. Plaintiffs amended their complaint to include a claim for workers' compensation and a prayer for a declaratory judgment with respect to the construction of certain provisions contained in Mr. Bowling's business automobile policy.

Pursuant to N.C.G.S. § 20-279.21(b)(4), North Carolina Farm Bureau Mutual Insurance Company [hereinafter Farm Bureau] answered plaintiffs' complaint as an unnamed defendant. Farm Bureau was the only insurance company involved in this matter, providing the workers' compensation insurance policy for S.K. Bowling, Inc., a general liability policy for defendant Johnny Ray Starling, and the underinsured motorist (UIM) coverage in the business automobile policy covering the truck in which plaintiff was riding.

After plaintiffs filed this action, defendants agreed to pay the limits of the coverage provided by the various policies, a sum of $100,000. On behalf of defendant Johnny Ray Starling, Farm Bureau paid plaintiffs the limit of the $25,000 general liability policy, plus interest and costs. Pursuant to the UIM provision contained in the business automobile policy of Samuel K. Bowling, Farm Bureau was entitled to reduce the $100,000 underinsured motorist limit by the $25,000 paid under the general liability policy. Additionally, Farm Bureau paid plaintiffs $69,763.44 in workers' compensation benefits.

Farm Bureau contended that it was entitled to offset its UIM coverage amount of $100,000 by the amount of workers' compensation benefits paid to Mr. Brantley, in addition to the $25,000 paid on behalf of defendant Starling. Farm Bureau relied on a provision in the business automobile policy reducing the amount payable under UIM coverage by amounts payable under workers' compensa-

tion. Plaintiffs opposed such a reduction, relying on a different provision in the UIM policy which stated that the UIM coverage would not apply to the direct or indirect benefit of a workers' compensation insurer. The trial court made the following findings and conclusions, labeled "Conclusions of Law":

> 1. The vehicle in which Plaintiff was riding at the time of this collision was titled in the name of Samuel K. Bowling.
>
> 2. The underinsured motorist coverage available pursuant to policy number BAP 2025063, issued by North Carolina Farm Bureau Mutual Insurance Company is available to Plaintiff pursuant to a policy issued in the name of Samuel K. Bowling as an individual.
>
> 3. The language of that policy does exclude the underinsured motorist coverage from any workers' compensation lien asserted as the result of workers' compensation benefits paid to Plaintiff through a policy issued to S.K. Bowling, Inc., Plaintiff's corporate employer.
>
> 4. The underinsured motorist carrier is not entitled to reduce the underinsured motorist coverage available to Plaintiff by workers' compensation benefits paid to Plaintiff by S.K. Bowling, Inc., the corporate employer.

The trial court ordered that Farm Bureau was not permitted to reduce the $75,000 in UIM coverage available to plaintiffs by the workers' compensation benefits paid to Mr. Brantley. The Court of Appeals reversed, stating that this case was controlled by *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 517 (1989).

[1] Plaintiffs argue that *Manning* does not control because the truck involved in this accident was not a "business vehicle." We conclude that, under a proper application of *Manning*, whether defendant's truck is a business vehicle is not determinative.

In *Manning*, plaintiff was injured in an automobile accident during the course and scope of his employment. He and his wife brought suit against defendant Fletcher. Fletcher had liability insurance with State Farm Insurance Company in the amount of $25,000, and plaintiff's employer had a business auto policy with Farm Bureau which insured against liability in the amount of $100,000 per person. The business auto policy also included UIM coverage

in an amount of $100,000. The policy contained a limit of liability provision virtually identical to that which is involved in the present case. In addition, Farm Bureau provided plaintiff's employer with workers' compensation insurance covering its employees, including plaintiff. Plaintiff received $59,000 in workers' compensation benefits from Farm Bureau.

This Court examined the statutory basis for the limitation of liability provision, which is found in N.C.G.S. § 20-279.21(e):

> Such motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

N.C.G.S. § 20-279.21(e) (1993). We held that "N.C.G.S. § 20-279.21(e) permits an insurance carrier to reduce the underinsured motorist coverage liability in a business auto insurance policy by amounts paid to the insured as workers' compensation benefits." *Manning*, 324 N.C. at 518, 379 S.E.2d at 857.

Application of *Manning* does not, as plaintiffs contend, turn on a factual finding that the vehicle involved was a "business vehicle." *Manning* addresses the situation where an employer has insurance coverage for its employees both under a worker's compensation policy and under a business automobile policy. Under *Manning*, the insurance carrier is permitted to limit its liability under multiple policies issued to an employer by reducing UIM benefits payable under the business automobile policy to an injured employee by the amount of workers' compensation benefits paid to the employee. In the instant case, the defendant-employer obtained two such policies providing coverage for his employees, including plaintiff.

Plaintiffs base their argument on the following facts: that the truck involved in the collision is titled in the name of Samuel King Bowling, individually; the corporation does not own the truck; and the named insured in the policy covering the truck is Samuel K. Bowling, not the corporate employer. The trial court found that "[t]he 1973 Ford truck in which Plaintiff was riding at the time of this collision was titled in the name of Samuel K. Bowling and further, the corporate employer, S.K. Bowling, Inc., had no owner-

ship interest in the same." Applicability of *Manning* does not turn on title or ownership of the vehicle, but on the inclusion of the vehicle in a business automobile insurance policy for an employer who also provides workers' compensation coverage for its employees. The trial court also included in its findings that the business automobile policy was issued to Samuel K. Bowling, individually, but made no findings regarding the source of payment of the premiums for the policy. However, there was uncontroverted evidence, from the deposition testimony of Mr. Bowling, that S.K. Bowling, Inc. paid the premiums for the business automobile policy. It is uncontested that S.K. Bowling, Inc., paid the premiums for the workers' compensation policy. This is therefore a case in which the employer provided both UIM coverage and workers' compensation coverage for its employees. The facts of this case accordingly fall squarely within the scope of the specific problem addressed by *Manning*.

Inherent in plaintiffs' argument is the notion that, in order to have amounts payable under UIM coverage reduced by amounts paid under workers' compensation coverage, section 20-279.21(e) and the policy provision require that the same entity provide both coverages. Neither the language of the statute nor the policy provision includes such a requirement. Without reference to the source of the coverages, the statute states that a motor vehicle liability policy need not insure against loss covered by workers' compensation. N.C.G.S. § 20-279.21(e). In like fashion, the policy provision at issue here states that amounts payable under UIM coverage are to be reduced by sums paid or payable under workers' compensation.

We noted in *Manning* that the statute addresses the situation where an injured party would otherwise recover both workers' compensation and UIM benefits for the same injury. *Manning*, 324 N.C. at 516, 379 S.E.2d at 856. In such a situation the statute allows a reduction in payments under the UIM coverage commensurate with workers' compensation payments. *Id.* at 517, 379 S.E.2d at 856. This Court's interpretation of section 20-279.21(e) in *Manning* did not include nor rely upon a requirement that the same entities provide both the UIM and the workers' compensation coverage. Under the particular facts of *Manning*, the two coverages were provided by the same entity—the employer—and thus the decision in *Manning* was supported by the public policy of relieving the employer of the burden of paying double premiums. We con-

cluded, however, that "[w]hatever the cost of [the coverage], we can perceive no conflict between the limit of liability provision in Farm Bureau's liability policy with plaintiff's employer and N.C.G.S. § 20-279.21(e)." *Id.* at 518, 379 S.E.2d at 857. Thus, a limit of liability provision such as that addressed in *Manning* and in the present case, is allowed by statute and does not require that the same entity provide both the UIM and the workers' compensation coverage.

[2] The present case presents an additional issue, not addressed by the Court of Appeals, involving interpretation of policy language in two arguably conflicting provisions. The business automobile policy involved here provides:

> C. EXCLUSIONS
>
> This coverage does not apply to:
>
> . . .
>
> 2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.

The policy also provides:

> D. LIMIT OF INSURANCE
>
> 2. Any amount payable under this coverage shall be reduced by:
>
> a. All sums paid or payable under any workers' compensation, disability benefits or similar law exclusive of non-occupational disability benefits.

Plaintiffs argue that Section C.2. of the policy should be construed against the insurer and that "there is no question that the reduction of UIM coverage by the amount of workers' compensation paid [plaintiff] in the present case would benefit Farm Bureau, which is both the UIM carrier in this matter and the workers' compensation carrier." Plaintiffs therefore contend that the trial court was correct in concluding that Farm Bureau was not entitled to reduce the UIM coverage by workers' compensation benefits paid to plaintiff. We find that a proper interpretation of the policy as a whole yields a different result.

First, the UIM coverage in this business automobile policy has not been applied to the benefit of Farm Bureau as an "insurer or self-insurer under any workers' compensation, disability benefits

or similar law." As the workers' compensation insurer, Farm Bureau has paid the full workers' compensation benefits. The argument that Farm Bureau has benefitted rests on the fact that Farm Bureau is both the workers' compensation insurer and the insurer for the policy providing the UIM coverage. However, this situation is exactly what is provided for by statute in N.C.G.S. § 20-279.21(e), and in turn by section D.2. of this policy. As we stated in *Manning*, the statute was meant to include "the situation in which the injured party, as an insured under the uninsured coverage of a liability policy, might otherwise receive workers' compensation benefits as well as uninsured coverage payments for the same injury." *Manning*, 324 N.C. at 516-517, 379 S.E.2d at 856.

Further, consideration of the policy as a whole indicates that plaintiffs' interpretation of this provision is not what was intended. Under plaintiffs' argument, Sections C.2. and D.2.a. would be mutually exclusive provisions. Read together, these provisions address first, the fact that the existence of benefits under this UIM coverage are not to effect an employee's right to compensation under the Workers' Compensation Act, and secondly, that after an employee has received workers' compensation benefits to which he is entitled, that sum will be deducted from the UIM coverage. The two provisions express the determination that recovery of workers' compensation benefits will not be affected by UIM coverage, but that recovery of UIM benefits will be affected by workers' compensation benefits.

These two provisions are analogous to provisions of the Workers' Compensation Act addressing liability of third parties. Section 97-10.2 provides that the right to workers' compensation benefits "shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer." N.C.G.S. § 97-10.2 (1991). Section 97-10.2(e) provides that those benefits may be deducted from any amount of damages the employee obtains from a third party. N.C.G.S. § 97-10.2(e) (1991).

We thus conclude that provision C.2. in this policy does not preclude a reduction in UIM coverage by the amount of workers' compensation benefits paid to plaintiff. Inasmuch as we have also found that the facts of this case fall within the scope of our decision in *Manning*, we also conclude that the trial court erred by not allowing Farm Bureau to reduce the amount of UIM coverage by the workers' compensation benefits paid to plaintiff. For the reasons stated herein, different from those stated by the Court of Appeals,

the decision of the Court of Appeals reversing and remanding the order of the trial court is affirmed.

AFFIRMED.

BONITA HARRIS SMITH v. OLLEN BRUTON SMITH

No. 388A93

(Filed 17 June 1994)

Divorce and Separation § 155 (NCI4th)— equitable distribution—post-separation appreciation of marital property—active or passive—ultimate findings required

While it is not necessary for the trial court in an equitable distribution proceeding to quantify the post-separation increase in the value of each marital asset as active or passive, the trial court must make ultimate findings of fact as to whether the total post-separation appreciation in the value of marital property is active or passive. Requiring trial courts to make ultimate findings of fact as to the character of such post-separation appreciation will effectuate meaningful appellate review by informing appellate judges as to how distributional factors were used.

Am Jur 2d, Divorce and Separation §§ 915 et seq.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

Appeal by defendant 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. 460, 433 S.E.2d 196 (1993), affirming in part, vacating in part, and remanding a judgment entered 5 April 1991 by Brown, J., in District Court, Mecklenburg County. Defendant's petition for discretionary review was denied 4 November 1993. Heard in the Supreme Court 18 March 1994.

Robinson, Bradshaw & Hinson, P.A., by Martin L. Brackett, Jr., Mark W. Merritt, and John B. Garver, III, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., John S. Arrowood, and W. Terry Sherrill, for defendant-appellant.

FRYE, Justice.

In this appeal based solely on the issue raised by the dissenting opinion in the Court of Appeals, defendant contends that the Court of Appeals erred in holding that it was not essential for the trial court to characterize as active or passive the increase in the post-separation value of marital assets in this equitable distribution case. We agree. Accordingly, we reverse that portion of the Court of Appeals' decision and remand for further proceedings.

The circumstances giving rise to this case are as follows: Plaintiff and defendant were married on 6 June 1972, separated 24 June 1988, and granted an absolute divorce on 5 February 1990. An equitable distribution trial was conducted during several non-jury civil terms of District Court, Mecklenburg County in November and December of 1990. On 5 April 1991, a Judgment of Equitable Distribution was entered.

The judgment shows that the trial court determined the net value of the marital property as of the date of separation to be $44,183,807; that an equal division of the marital property was not equitable; and that an unequal division awarding defendant sixty-nine percent (69%) and plaintiff thirty-one percent (31%) of the net value of the marital property was equitable. The court divided the marital property in accordance with the parties' stipulations and preferences and granted to plaintiff her share of the marital estate primarily in the form of a distributive award. The court determined that plaintiff was entitled to a distributive award in the amount of $13,696,980, which is thirty-one percent of $44,183,807 minus the total of the proceeds in two bank accounts awarded her. The court further found that defendant was entitled to credits totaling $575,268 for certain post-separation expenditures made by him, including his expenditure of funds to purchase a residence for plaintiff. These deductions reduced the amount of plaintiff's distributive award to $13,115,461.

The trial court then calculated the post-separation appreciation/depreciation in the value of each item of marital property and determined that there was a net overall appreciation in the value of the marital estate of $6,546,805. The trial court proceeded to award plaintiff thirty-one percent of that net increase, or an additional $2,029,509. Plaintiff thus received an equitable distribution judgment of $15,151,220, payable in a lump sum of $2,144,971 on

or before 14 June 1991 and monthly installments in the amount of $157,725 per month for ten years, with the first payment being due on or before 1 July 1991.

Both plaintiff and defendant appealed to the Court of Appeals. The trial court, on motion of defendant, granted a stay of its judgment pending the outcome of appeal. The Court of Appeals affirmed that part of the trial judgment addressing the classification and valuation of property. It found reversible error in the trial court's failure to consider defendant's receipt of dividend income of $240,162 after the date of separation as a factor in determining an equitable distribution. The Court of Appeals further found reversible error in the trial court's calculation and treatment of the post-separation appreciation of the marital property, including the credit given defendant for his discharge of the second mortgage on the marital home. Thus, the Court of Appeals vacated that part of the judgment addressing distribution of the marital property and remanded the case to the trial court for redetermination of what constitutes an equitable distribution of the marital property and entry of a new judgment consistent with its opinion. This portion of the Court of Appeals' decision is not before us and thus stands undisturbed.

The Court of Appeals also held, with Judge Greene dissenting, that the trial court was not required to specifically characterize as active or passive the increase in the post-separation value of marital assets. As to this issue only, we now reverse.

This issue appears to be one of first impression for this Court. No specific authority exists which requires the trial court to make specialized findings with regard to post-separation appreciation. However, both our statutory scheme and case law are instructive on this issue and require resolution of it in favor of defendant's position.

N.C.G.S. § 50-20 sets forth the procedure for the distribution of marital property upon divorce. N.C.G.S. § 50-20(c) provides that

> there shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

. . . .

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of the distribution; and

(12) Any other factor which the court finds to be just and proper.

N.C.G.S. § 50-20(c) (1993).

"Marital property is to be valued as of the date of the parties' separation. G.S. 50-21(b). This valuation date is used to determine the equitable distribution share of each party." *Mishler v. Mishler*, 90 N.C. App. 72, 77, 367 S.E.2d 385, 388, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). "The post-separation appreciation of marital property is itself neither marital nor separate property. Such appreciation must instead be treated as a distributional factor under Section 50-20(c)(11a) or (12) . . . ." *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988).

> Rather than distributing the sums representing the [post-separation] appreciation, the trial court must consider the existence of this appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.

Gum v. Gum, 107 N.C. App. 734, 738, 421 S.E.2d 788, 790 (1992). Thus, there is plenary statutory and case law support for the proposition that the post-separation appreciation of marital assets must be considered by the court when making an equitable distribution.

This Court has stated in *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), that "the legislature . . . clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. 50-20, but guided always by the public policy expressed therein favoring an equal division." The trial court, however, must make written findings of fact that support the determination that marital property has been equitably divided. N.C.G.S. § 50-20(j) (1993).

> We do not imply that a trial court must make exhaustive findings regarding the evidence presented at the hearing; rather "the trial court should be guided by the same rules applicable

to actions for alimony *pendente lite*, *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E.2d 138 (1971), and to actions for child support, *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985), thus limiting the findings of fact to *ultimate*, rather than evidentiary facts." *Patton v. Patton*, 318 N.C. at 406-07, 348 S.E.2d at 595.

Armstrong v. Armstrong, 322 N.C. 396, 405-06, 368 S.E.2d 595, 600 (1988) (quoting *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (emphasis added).

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts.

. . . .

An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts . . . ."

Peoples, 10 N.C. App. 402, 409, 179 S.E.2d 138, 142 (1971) (quoting *Woodard v. Mordecai*, 234 N.C. 463, 470, 472, 67 S.E.2d 639, 644, 645 (1951) (citations omitted).

In the instant case, the trial court determined the increase or decrease in value of each item of marital property occurring after the parties' separation and set forth these findings in the record. The court found that the "net" post-separation appreciation of marital property equalled $6,546,805, and awarded thirty-one percent of this net increase to plaintiff. We agree with the Court of Appeals below that "it is certainly appropriate, and indeed desirable, for the trial court in determining an equitable distribution to take into consideration whether the post-separation appreciation of the marital property is passive appreciation, or resulted from the efforts of one or both of the spouses, ..." *Smith v. Smith*, 111 N.C. App. 460, 506-07, 433 S.E.2d 196, 224, *disc. rev. denied*, 335 N.C. 177, 438 S.E.2d 202 (1993). We now hold that the trial court must make a written finding of the character of such post-separation appreciation.

Plaintiff argues that such a requirement would burden the trial court and would neither assist it in exercising its discretion

nor assist with appellate review. Under N.C.G.S. § 50-20, trial courts are already required to distinguish between active and passive appreciation in the value of an asset occurring during marriage and before the date of separation in order to classify property as either marital or separate. In the context of characterization of post-separation appreciation as in the instant case, we do not go so far as to require that the trial court undertake to quantify the post-separation increase on each marital asset as active or passive but the trial court must make ultimate findings of fact regarding the character of the total post-separation appreciation. *See Armstrong*, 322 N.C. 396, 368 S.E.2d 595. We disagree with plaintiff and the Court of Appeals that this would impose an arduous burden on the trial courts.

Additionally, we conclude that requiring trial courts to make ultimate findings of fact as to whether post-separation appreciation is active or passive will effectuate meaningful appellate review by informing appellate judges as to how distributional factors were used. In the instant case, the trial court specifically stated in its conclusions that it had "considered all distributional factors raised by the evidence," however, this conclusion does not provide an appellate court with the information necessary for appellate review. *See Armstrong*, 322 N.C. 396, 368 S.E.2d 595.

For the foregoing reasons, that portion of the decision of the Court of Appeals holding that "the court is not required to make specific findings of fact classifying the [post-separation] appreciation as either passive or active" is reversed. The remainder of the COA decision is not before us and remains undisturbed. The case is therefore remanded for further proceedings.

Pursuant to Rules 2 and 37 of the North Carolina Rules of Appellate Procedure, plaintiff has made a motion for modification and reinstatement of the trial court's judgment. That motion is hereby denied.

REVERSED IN PART AND REMANDED.

WILLIAM H. JONES, IV, PATRICIA P. JONES, AND WILLIAM H. JONES, III, PLAINTIFFS v. TRESSA E. SHOJI; DEFENDANT, AND THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF FAYETTEVILLE, NORTH CAROLINA, INC.; DEFENDANT-APPELLEE AND THE MOST REVEREND F. JOSEPH GOSSMAN, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA AND HIS SUCCESSORS IN OFFICE; AND THE ROMAN CATHOLIC DIOCESE OF RALEIGH, NORTH CAROLINA, DEFENDANTS-CROSS-CLAIMANTS, APPELLANTS

No. 225A93

(Filed 17 June 1994)

Indemnity § 7 (NCI4th)— joint venture—day care program—accident in van—crossclaim

The trial court properly denied a crossclaim by defendant Church where the YMCA and the Catholic Diocese of Raleigh entered into a joint venture by written contract to operate a day care program; the contract provided that the Church was to provide access to the Church grounds and vans; the contract required the Church to carry insurance on the vans for the YMCA and that the YMCA would maintain $1,000,000 liability coverage; one of the vans was involved in an accident; plaintiffs settled and Aetna, the insurer of the van, paid the settlement funds, which did not exhaust the policy limits; and the Church crossclaimed against the YMCA for indemnity or contribution. The evidence supports the finding that the Church was required to maintain liability insurance on the vans for the joint venture in that the specific language that the Church would insure the vans controls the general language addressing the YMCA's responsibility for obtaining liability insurance; the parties' procured liability policies of which only the Church's covered liability for the vans; the Church listed an after-school employee as the driver of the vans; and the contract specifically states that the van insurance was maintained for the joint venture. Because the insurance proceeds were joint venture property and were sufficient to cover plaintiffs' claims, the Church is not entitled to indemnity or contribution.

Am Jur 2d, Indemnity §§ 28 et seq.

Appeal of right by defendant Church pursuant to N.C.G.S. § 7A-30(2) of a decision by a divided panel of the Court of Appeals, 110 N.C. App. 48, 428 S.E.2d 865 (1993), affirming an order denying

a crossclaim by one of the defendants entered on 7 February 1992 by Hudson, J., in Superior Court, Cumberland County. On 1 July 1993 this Court allowed discretionary review of an additional issue. Heard in the Supreme Court 15 November 1993.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Nigle B. Barrow, Jr. and Michael W. Mitchell, for defendant-cross-claimants appellants (Bishop and Church).

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for defendant-appellee (YMCA).

WHICHARD, Justice.

In 1986 the Young Men's Christian Association [hereinafter "the YMCA"] and the Most Reverend F. Joseph Gossman and the Roman Catholic Diocese of Raleigh, North Carolina, through the Good Shepherd Catholic Church of Hope Mills, North Carolina [hereinafter collectively "the Church"], entered into a joint venture by written contract to operate an after school day care program. The contract recited the responsibilities of the parties, which included that the YMCA was to develop the after school programs and the Church was to provide access to the church grounds and vans. The contract also stated that the Church "shall carry insurance on their van and the parish member's van for the YMCA" and that "[t]he YMCA shall maintain liability coverage of $1,000,000."

The contract expired by its terms on 31 December 1986, but the parties continued to follow the agreement until 12 October 1987. On that date Tressa Shoji, an after school employee, drove a van full of children enrolled in the after school program to a park. The Church had provided the van. On Shoji's return trip, she took her eyes off the road, swerved to avoid a sign, and struck an automobile driven by plaintiff William H. Jones, IV. Jones was injured in the accident; he and his parents brought this action against Shoji alleging active negligence, and against the YMCA and the Church alleging imputed negligence based on defendant Shoji's agency relationship with the YMCA and the Church. Plaintiffs settled and then dismissed their claims against defendants and executed releases as to all defendants. Aetna, insurer of the van, paid the settlement funds, which did not exhaust the policy limit. Based on the payment of the settlement funds, the Church crossclaimed against the YMCA for indemnity or contribution. On

7 February 1992 the trial court denied the Church's crossclaim. The Church appealed to the Court of Appeals, and the majority there affirmed the trial court, holding that the Church was not entitled to indemnity or contribution from the YMCA because the settlement funds were assets of the joint venture. *Jones v. Shoji*, 110 N.C. App. 48, 428 S.E.2d 865 (1993). Judge Greene dissented, and the Church exercised its right to appeal pursuant to the dissent.

For the reasons given herein, we now affirm the Court of Appeals. As to the additional issue brought forward by the Church on discretionary review, we conclude that discretionary review was improvidently allowed.

The trial court found that the contract required the Church to maintain insurance for the vans for the YMCA and that Aetna carried the primary coverage on the vans. The court also found that plaintiffs' complaint alleged a joint venture between the Church and the YMCA. The court concluded that as joint venturers the Church and the YMCA were derivatively negligent for the acts of the joint venture employee, defendant Shoji. The court further concluded that the Church was not entitled to contribution or indemnity from the YMCA.

The Church does not dispute the existence of a joint venture between the parties. We therefore must determine whether the evidence supported the trial court's finding that the Church maintained the liability insurance for the vans for its co-venturer, the YMCA. We then must determine whether the Church was entitled to indemnity or contribution from the YMCA as a matter of law.

The evidence supports the trial court's finding that the Church was required to maintain liability insurance on the vans, from which the settlement was paid, for the joint venture. The language of the contract between the parties provided that the Church would carry insurance on the vans "for the YMCA." Thus, the contract expressly stated that the Church would insure the vans. The determinative factor is whether the Church was required to carry both collision and liability insurance on the vans given that the contract also stated that the YMCA would maintain $1,000,000 in liability insurance.

The principle that the specific controls the general, often employed in statutory construction, informs our interpretation of

this language. *See Smith v. Mitchell*, 301 N.C. 58, 67, 269 S.E.2d 608, 614 (1980) (applying principle to interpretation of preemptive covenant in deed). The provisions for the van insurance and the liability insurance are the only ones in the agreement that address insurance. The specific language that the Church would insure the vans controls the general language addressing the YMCA's responsibility for obtaining liability insurance. It exempts the van insurance, both collision and liability, from the YMCA's responsibility. Had the parties intended otherwise, logic suggests that they would have included language indicating that the liability insurance on the vans would be purchased separately by the YMCA, while the Church would maintain only collision insurance on the vans.

The parties' actions in following the contract indicate that our interpretation implements their intent. The trial court had the policies before it as evidence, as well as the deposition of an insurance agent who interpreted the coverage of the YMCA's liability policy. The deposition was submitted by agreement of the parties as evidence. Both the Church and the YMCA carried liability insurance; however, only the Church's insurance covered liability for the vans. The YMCA's policy covered liability in other areas involved in the joint venture. In addition to general liability coverage for such areas as property damage, independent contractors, operations on the Church's premises, and professional liability coverage, the YMCA's policy covered non-owned automobiles, *i.e.*, those not owned but used by the YMCA. According to the insurance agent, however, this coverage would only become operative if the non-owned automobile was not covered by another policy. Because the Church carried liability coverage on the vans, the YMCA's automobile liability insurance did not apply to the vans. Aetna, which paid the settlement, was the primary carrier for the vans. The parties' actions in procuring these types of policies support the trial court's interpretation that their intent was for the Church to maintain liability insurance on the vans for the joint venture. As Chief Justice Stacy stated in *Cole v. Fibre Co.*, 200 N.C. 484, 487, 157 S.E. 857, 858 (1931):

> The general rule is, that where, from the language employed in a contract, a question of doubtful meaning arises, and it appears that the parties themselves have interpreted their contract, practically or otherwise, the courts will ordinarily follow such interpretation, for it is to be presumed that the

> parties to a contract know best what was meant by its terms, and are least liable to be mistaken as to its purpose and intent.

See also Peaseley v. Coke Co., 282 N.C. 585, 601, 194 S.E.2d 133, 144 (1973) ("The best evidence of the intention of the parties to a contract is the practical interpretation given to their contracts by the parties while engaged in their performance.").

The trial court also had before it evidence that the Church listed defendant Shoji as an operator of the vans and that Shoji was an insured driver, which further supports the finding that the Church maintained the insurance for the joint venture. Finally, we note that the language of the contract specifically states that the van insurance was "for the YMCA." This language indicates that the van insurance was maintained for the joint venture. Based on the foregoing, we conclude that the evidence supported the trial court's finding that the liability insurance on the vans was maintained by the Church as one of its responsibilities under the joint venture.

As to whether the Church is entitled to indemnity or contribution from the YMCA, we have stated, "A joint [venture] is in the nature of a kind of partnership, and although a partnership and a joint [venture] are distinct relationships, they are governed by substantially the same rules." *Pike v. Trust Co.*, 274 N.C. 1, 9, 161 S.E.2d 453, 460 (1968). The Court of Appeals correctly looked to partnership law, codified in the Uniform Partnership Act [hereinafter "UPA"], for guidance in resolving this issue.

Section 59-38(a) of the UPA provides: "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property." N.C.G.S § 59-38(a) (1989). This principle holds true for property bought on account of a joint venture. We have recognized previously that parties to a contract may allocate the risk of loss by agreeing that one party shall maintain insurance in order to save harmless the other party from liability. *See Casualty Co. v. Waller*, 233 N.C. 536, 537-38, 64 S.E.2d 826, 827-28 (1951). As discussed *supra*, the Church maintained the liability insurance on the vans for the joint venture; the settlement proceeds from the insurance therefore were property of the joint venture. Because the insurance proceeds were joint venture property and were sufficient to cover plaintiffs' claims, the Church is not entitled to indemnity or contribution. Section 59-48(2) of the UPA provides:

"The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property." N.C.G.S. § 59-48(2) (1989). This law applies as well to a joint venture. Here, the Church has incurred no "personal liabilities" and has made no "personal payments"; rather, the joint venture incurred the liabilities and the insurance maintained for its protection covered the settlement payment. Thus, the Church is not entitled to indemnity from the YMCA.

Similarly, the Church is not entitled to contribution from the YMCA. To be entitled to contribution, the Church would have to show that it paid more than its pro rata share in the settlement. *See* N.C.G.S. § 1B-1(b) (1983) ("The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share."). The Church paid nothing of its own; therefore, it did not pay more than its pro rata share and is not entitled to contribution.

Accordingly, on the issue presented by virtue of the dissent in the Court of Appeals, the decision of the Court of Appeals is affirmed. As to the issue presented on discretionary review, we hold that discretionary review was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 170, STAFFORD G. BULLOCK, RESPONDENT

No. 340A93

(Filed 17 June 1994)

Judges, Justices, and Magistrates § 36 (NCI4th)— district court judge—hearing of motions after recusal—investigation of living arrangements—no conduct prejudicial to administration of justice—no willful misconduct in office

A district court judge was not guilty of conduct prejudicial to the administration of justice or willful misconduct in office

where the judge declared a mistrial and recused himself in a domestic relations case on the ground that he could not believe any testimony by the defendant and could not give defendant a fair and impartial hearing; the judge testified as a witness for the plaintiff in a hearing before another judge; and when motions in the case came on for hearing before the judge, he denied defendant's motion to recuse himself on the ground of judicial economy, set aside his previous order that he could not give defendant a fair trial, and heard the motions. Nor was the judge guilty of misconduct prejudicial to the administration of justice or willful misconduct in office when he investigated defendant's living arrangements to assist him in his determination of visitation with a minor child not represented by counsel.

Am Jur 2d, Judges § 19.

Disqualification of judge on ground of being a witness in the case. 22 ALR3d 1198.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, entered 4 August 1993, that Judge Stafford G. Bullock, then a Judge of the General Court of Justice, District Court Division, Tenth Judicial District of the State of North Carolina, be censured for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of Canons 2A, 3A(4), and 3C(1)(a) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 15 March 1994.

William N. Farrell, Jr., Senior Deputy Attorney General, Special Counsel for the Judicial Standards Commission.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, for respondent-appellant.

ORDER REJECTING CENSURE.

After reviewing the evidence adduced at the hearing before the Commission, this Court concludes that respondent's conduct that is in question may be described as follows.

On 14 December 1990, respondent presided over the domestic session of District Court, Wake County, where a hearing was conducted in the case *Itenson v. Itenson*, Wake County file number

90CVD6978. During the course of the hearing, respondent announced in open court that he was declaring a mistrial and recusing himself from the case. At that time, respondent stated that he recused himself because he could not believe any testimony from the defendant in the *Itenson* case, and that he could not give the defendant the fair and impartial hearing to which the defendant was entitled.

Respondent entered an order to that effect on 9 January 1991, stating in the order "[t]hat Defendant is entitled to a fair and impartial hearing and this Court has lost its impartiality because it cannot believe any statements made by the Defendant to this Court" and "[t]hat this Court cannot believe any testimony from the Defendant and shall declare a mistrial and must recuse itself from hearing this matter and any further matters between the parties." Respondent's order concluded that "the Court declares a mistrial on its own motion," and respondent "recuse[d] himself from hearing this matter and any other further matters between the parties."

On 18 December 1991, the *Itenson* case was again calendared for the hearing of new motions. Respondent was presiding over this domestic session of District Court, Wake County. When these motions came on for hearing, the defendant orally moved that respondent recuse himself. In support of his motion, the defendant reminded respondent that he had previously recused himself because of his inability to be fair and impartial to the defendant. The defendant also noted that respondent had himself testified as a witness for the plaintiff in the *Itenson* case in May of 1991 before Judge Joyce A. Hamilton.

Respondent denied the defendant's oral motion, and in his 24 February 1992 order, he found:

> That there exists an increasing number of cases in Wake County, like this one, that come on to be heard repeatedly and frequently. It may be more efficient if the same evidence and information need not be repeated for each judge hearing the matter. In an effort to improve judicial economy, certain frequently-heard cases should be heard by one judge on all matters. . . .
>
> . . . [I]n order to determine if this improves efficiency, the Chief District Court Judge will exercise exclusive jurisdiction over this case, . . . and all matters presented will be heard by the Chief District Court Judge, exclusively.

Respondent concluded as a matter of law that defendant's motion to recuse should be denied and set aside his previous order. Pursuant to this resumption of jurisdiction over the *Itenson* case, respondent presided over the 18 December 1991 hearing, as well as subsequent hearings on 20 April 1992 and in October 1992.

Following the 20 April 1992 hearing in the *Itenson* case, respondent initiated inquiries concerning the content of an affidavit filed by the plaintiff in the case. The plaintiff filed the affidavit on 11 May 1992 and delivered it to respondent's chambers or office in his absence. Through this affidavit, the plaintiff asked the court to verify the defendant's representations at the 20 April 1992 hearing concerning his living arrangements, which were relevant to respondent's consideration of the issue of out-of-state child visitation. Respondent contacted Howard Cosier, the defendant's landlord, and also contacted the defendant, who had no knowledge of the affidavit until informed by respondent of its existence. As a result of these investigations, respondent gained knowledge of disputed evidentiary facts concerning the *Itenson* case. Subsequently, in a 2 June 1992 order, respondent found as fact that "[i]t has become obvious to the Court, after receiving an affidavit from the plaintiff and telephone conversation with the defendant and Howard J. Cosier, that the [defendant's] lease arrangement does not meet the Courts [sic] expectation."

For these actions, the Commission concluded as a matter of law that respondent's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Commission recommends that respondent be censured by this Court.

When the recommendations of the Judicial Standards Commission are reviewed, "[i]ts recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either." *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977).

After careful consideration, we conclude that respondent's conduct was not so egregious as to amount to conduct prejudicial to the administration of justice within the meaning of N.C.G.S. § 7A-376.

In so holding, we do not address the question of whether respondent violated specific provisions of the North Carolina Code of Judicial Conduct. Although helpful in understanding the statutory and constitutional prohibitions on judicial behavior, the question of whether a judge has violated codes of judicial conduct is not determinative of the central issue of whether his conduct was prejudicial to the administration of justice. *In the Matter of Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976).

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."

Id. at 305, 226 S.E.2d at 9 (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 235 (1974)). In the present case, the defendant in the *Itenson* case made an oral motion that respondent recuse himself, which was denied in open court. Respondent supported the denial of the motion with a written order filed several weeks after the denial of the motion, citing, *inter alia*, considerations of judicial economy as the reasons for the denial of the motion. This order also set aside respondent's previous order in which he stated that he would be unable to grant the defendant a fair and impartial trial.

Without addressing the question of whether respondent should have recused himself, we hold that respondent's conduct associated with these rulings and the manner in which they were conducted were not such that they would be, to an objective observer, prejudicial to the public esteem of the judicial office.

The same can be said for respondent's investigation of the defendant's lease arrangements. The record indicates that respondent's purpose in communicating with the defendant and his landlord was to assist him in his determinations on the question of visitation arrangements concerning a minor child not represented by counsel. Again, we reach no conclusion with regard to whether his actions were well advised or constituted a violation of the Code of Judicial Conduct. We simply hold that these actions do not rise to the level of those instances of conduct that we have previously determined to be prejudicial to the administration of justice. *See,*

e.g., *In re Cornelius*, 335 N.C. 198, 436 S.E.2d 836 (1993) (giving legal advice to an individual with regard to her discharge from employment, intervening on her behalf, and conveying the impression that the discharged individual had special influence with the judge); *In re Hair*, 335 N.C. 150, 436 S.E.2d 128 (1993) (comments that could reasonably be interpreted as threats of professional reprisal against members of the district attorney's office and an attorney practicing before the district court); *In re Hair*, 324 N.C. 324, 377 S.E.2d 749 (1989) (multiple instances of misconduct, including an inappropriate advance upon a female detective, making what could be construed as threats to attorneys, and changing verdicts upon *ex parte* communications with defendants); *In re Crutchfield*, 289 N.C. 597, 223 S.E.2d 822 (1975) (signing judgments granting limited driving privileges upon *ex parte* communications with counsel without giving the State an opportunity to be heard).

Having held that respondent's conduct was not prejudicial to the administration of justice, we further hold that respondent's actions do not amount to willful misconduct in office. "Wilful misconduct in office of necessity is *conduct prejudicial to the administration of justice that brings the judicial office into disrepute.*" *Nowell*, 293 N.C. at 248, 237 S.E.2d at 255.

Now, therefore, pursuant to N.C.G.S. § 7A-376, § 7A-377(a), and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that the recommendation of the Commission that Judge Stafford G. Bullock be censured be and it is hereby rejected.

Chief Justice Exum did not participate in the consideration or decision of this matter.

By order of the Court in conference this the 17th day of June, 1994.

Parker, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of June 1994.

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

Marvea J. Francis
Assistant Clerk

STATE OF NORTH CAROLINA v. CHRISTOPHER LAMONT ARRINGTON

No. 508A93

(Filed 17 June 1994)

Homicide § 349 (NCI4th)— noncapital first-degree murder—refusal to charge on second-degree murder—provocation—no error

There was no error in a noncapital first-degree murder prosecution where the trial court did not charge the jury on second-degree murder but there was evidence supporting each and every element of first-degree murder. While defendant contends that there was evidence of provocation by the deceased in that the deceased threw his coat, beeper, and Walkman to the ground before defendant shot him, the evidence also showed that defendant was across the street when these actions occurred and that the victim was walking, with his back to defendant, putting on Chapstick, when defendant shot him in the back of the head at point-blank range. While deliberation means that the intent to kill was carried out in a cool state of blood, it does not connote an absence of passion or emotion; if the design to kill was formed with premeditation and deliberation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.

Am Jur 2d, Homicide § 526.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brown, J., at the 13 September 1993 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 May 1994.

Michael F. Easley, Attorney General, by Elizabeth Rouse Mosley, Assistant Attorney General, for the State.

Glennie M. Matthewson, II, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first-degree murder in a noncapital trial. The single question on appeal is whether the trial court erroneously failed to instruct the jury on second-degree murder. We find no error.

The State's evidence tended to show that on 20 February 1993 at approximately 6:35 p.m., law enforcement officers found the body of Nathaniel Williams lying face-upward on the sidewalk at 616 Arlington Street in Rocky Mount. A rescue worker who arrived on the scene testified that the victim had no pulse or respiration and had a hole in the back of his head.

Dr. Robert Zipf, an expert in forensic pathology, performed an autopsy on the victim and testified that he died as a result of injuries to the brain from a gunshot wound to the back of the head. Dr. Zipf testified that due to the existence of gunpowder residue on the back of Williams' head, it was his opinion that the gun had been fired within an inch or less of Williams' scalp.

Roberta Williams, a resident of Arlington Street who knew both Nathaniel Williams and defendant, testified that she witnessed defendant and Nathaniel Williams arguing on three separate occasions on the day of the shooting. During the third argument, which occurred at approximately 5:45 p.m. near a store on Arlington Street, she was standing near Nathaniel Williams when she saw him throw his coat, beeper and Walkman to the ground. Williams testified that defendant was across the street from Nathaniel Williams at the time. She further testified that just prior to being shot, Nathaniel Williams was walking behind her putting on Chapstick.

Milton Brinkley, first cousin to defendant, testified that he saw defendant on the day of the shooting with a sawed-off .22 caliber rifle. Brinkley further testified that defendant told him at approximately 5:30 p.m. that day that he was going to shoot Nathaniel Williams in the head, and that defendant shot the rifle two times into the yard, played basketball for a few minutes, and left.

Telly Kelly, who also lived in Rocky Mount, an acquaintance of both Nathaniel Williams and defendant, testified that defendant came to his house on the day of the shooting and borrowed his loaded, sawed-off .22 caliber rifle. Later that day he saw defendant shoot Nathaniel Williams, when his back was to defendant, in the back of the head at point-blank range.

Defendant presented no evidence.

Defendant contends the trial court erred in failing to instruct the jury on second-degree murder and only charging on possible verdicts of guilty of first-degree murder or not guilty. 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). An instruction on the lesser included offense is not required if the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any of these elements. *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990).

First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being. 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 defendant formed the specific intent to kill the victim for some length of time, however short, before the actual killing. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Deliberation means that defendant carried out the intent to kill in a cool state of blood, "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, 170, 321 S.E.2d 837, 842-43 (1984). Circumstances and actions which can be used to prove premeditation and deliberation are:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) threats and declarations of 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; and (5) evidence that the killing was done in a brutal manner.

State v. Lane, 328 N.C. 598, 609, 403 S.E.2d 267, 274 (1991).

Defendant contends that there is evidence of provocation by the deceased and consequently the State's evidence is conflicting

as to the elements of premeditation and deliberation. He points to the evidence that Nathaniel Williams threw his coat, beeper and Walkman to the ground before defendant shot him. However, the State's evidence also showed that defendant was across the street when these actions occurred. The victim was walking, with his back to defendant, putting on Chapstick, when defendant shot him in the back of the head at point-blank range. The evidence, viewed as a whole, is insufficient to negate the elements of premeditation and deliberation.

Further, while deliberation means that the intent to kill was carried out in a cool state of blood, it does not connote an absence of passion or emotion. This Court has stated that " '[i]f the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.' " *State v. Misenheimer*, 304 N.C. 108, 113-14, 282 S.E.2d 791, 795 (1981) (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E.2d 769, 773, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961)). The evidence in this case supports each and every element of first-degree murder, including premeditation and deliberation. On the day of the shooting defendant borrowed a loaded, sawed-off .22 caliber rifle, announced his intention to shoot the victim in the head, and then shot him in the back of the head at close range. Nothing in the evidence suggests anything other than a premeditated and deliberate murder. Thus, the trial court did not err in failing to instruct the jury on second-degree murder and only charging on possible verdicts of guilty of murder in the first degree or not guilty.

NO ERROR.

STATE OF NORTH CAROLINA v. JARVIS C. MASON

No. 446A93

(Filed 17 June 1994)

1. Homicide § 242 (NCI4th) — first-degree murder — sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of first-degree murder where it tended to show

that defendant and the victim were arguing over money allegedly owed to defendant by the victim; a third person handed defendant a pistol; and defendant then shot the victim in the head, killing him.

Am Jur 2d, Homicide §§ 425 et seq.

2. **Constitutional Law § 318 (NCI4th)— review under Anders v. California—belief whole appeal meritless**

An appellant's attorney should ask the appellate court to search the record for errors pursuant to *Anders v. California*, 386 U.S. 738, only if he believes the whole appeal is without merit.

Am Jur 2d, Criminal Law 752, 985-987.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR4th 582.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life in prison entered by Parker, J., at the 21 June 1993 Criminal Session of Superior Court, Onslow County, upon a jury verdict of first degree murder. Heard in the Supreme Court 10 May 1994.

The defendant was tried for first degree murder in a case in which the State did not ask for the death penalty. In the light most favorable to the State, the evidence showed that at approximately 2:20 p.m., on 5 November 1992, the defendant and Shammon Mattocks were in a field with several other persons behind Lot 109 on Market Street in Jacksonville, North Carolina. The defendant and Mr. Mattocks were arguing over a sum of money which the defendant contended Mr. Mattocks owed him. Kenneth Sidberry handed a pistol to the defendant who then shot Mr. Mattocks in the head, killing him.

The jury found the defendant guilty as charged. The defendant appealed from the imposition of a sentence of life in prison.

Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

Brian Michael Aus for the defendant-appellant.

WEBB, Justice.

[1] The defendant's only assignment of error is to the overruling of his motion to dismiss for the insufficiency of the evidence. He bases this argument on certain inconsistencies in the evidence and particularly on some evidence that the pistol may have fired accidentally. In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State. If there is a conflict in the evidence, the resolution of the conflict is for the jury. *State v. Mitchum*, 258 N.C. 337, 128 S.E.2d 665 (1962). In the light most favorable to the State, there was sufficient evidence in this case to support a conviction of first degree murder. This assignment of error is overruled.

[2] The defendant next asks us to review the record pursuant to *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), to determine whether any error occurred which would require a new trial. We said in *State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994), that generally an appellant's attorney should ask this Court to search the record for errors pursuant to *Anders* only if he believes the whole appeal is without merit. That is not the case in this appeal because the defendant has assigned error. We have examined the record nevertheless and we find no error.

NO ERROR.

DEPARTMENT OF TRANSPORTATION v. DOLPH D. OVERTON, III, AND WIFE, SUE H. OVERTON, AND CSX TRANSPORTATION, INC.

No. 426PA93

(Filed 17 June 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 111 N.C. App. 857, 433 S.E.2d 471 (1993), reversing and remanding the judgment of Farmer, J., entered on 13 February 1992 in Superior Court, Johnston County. Heard in the Supreme Court 10 May 1994.

Michael R. Easley, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General; Robert G. Webb, Special Deputy Attorney General; and John F. Maddrey, Assistant Attorney General; for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Gilbert C. Laite, III, and Charles B. Neely, Jr.; and Stephen H. Shook, Senior Counsel, CSX Transportation; for defendant-appellee CSX Transportation, Inc.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

KENNETH R. CLARK v. VELSICOL CHEMICAL CORPORATION AND FORSHAW CHEMICAL, INC.

No. 318PA93

(Filed 17 June 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 110 N.C. App. 803, 431 S.E.2d 227 (1993), affirming the dismissal of plaintiff's action entered by Fullwood, J., at the 2 September 1991 Civil Session of Superior Court, New Hanover County. Heard in the Supreme Court 9 May 1994.

Shipman & Lea, by Jennifer L. Umbaugh and Gary K. Shipman, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas; Spriggs & Hollingsworth, by Joe G. Hollingsworth, Katharine R. Latimer, Barbara A. Milnamow, and Donald W. Fowler, for defendant-appellees.

PER CURIAM.

AFFIRMED.

THOMAS O. RHYNE v. VELSICOL CHEMICAL CORPORATION AND FORSHAW CHEMICAL, INC.

No. 317PA93

(Filed 17 June 1994)

On discretionary review of an unpublished decision of the Court of Appeals reported, pursuant to Appellate Rule 30(e), at 110 N.C. App. 870, 432 S.E.2d 728 (1993). Heard in the Supreme Court on 9 May 1994.

Shipman & Lea, by Jennifer L. Umbaugh and Gary K. Shipman, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas; Spriggs & Hollingsworth, by Joe G. Hollingsworth, Katharine R. Latimer, Barbara A. Milnamow, and Donald W. Fowler, for defendant-appellee Velsicol Chemical Corporation.

PER CURIAM.

Discretionary Review Improvidently Allowed.

STATE OF NORTH CAROLINA v. MICHAEL SCOTT BEVERIDGE

No. 1A94

(Filed 17 June 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 from the decision of a divided panel of the Court of Appeals, 112 N.C. App. 688, 436 S.E.2d 912 (1993), vacating a judgment entered by Strickland, J., at the 27 July 1992 Criminal Session of Superior Court, Dare County. Heard in the Supreme Court 11 May 1994.

Michael F. Easley, Attorney General, by Anita LeVeaux Quigless, Assistant Attorney General, for the State-appellant.

Merrell, Barnes, Gladden & Rose, by Edgar L. Barnes and Randy L. Jones, for defendant-appellee.

PER CURIAM.

AFFIRMED.

BEAUFORT COUNTY SCHOOLS v. ROACH

No. 201P94

Case below: 114 N.C.App. 330

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

BEAVERS v. FEDERAL INS. CO.

No. 108P94

Case below: 113 N.C.App. 254

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

BRADSHAW v. EASTERN AIRLINES

No. 119P94

Case below: 113 N.C.App. 652

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

BUCKNER v. CITY OF ASHEVILLE

No. 92P94

Case below: 113 N.C.App. 354

Petition by plaintiff (Billy Dean Buckner) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

CHESTER v. OAKLEY

No. 172P94

Case below: 113 N.C.App. 654

Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994.

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

CHRIS v. EPSTEIN

No. 168P94

Case below: 113 N.C.App. 751

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

CLARK v. RED BIRD CAB CO.

No. 247P94

Case below: 114 N.C.App. 400

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

COHN v. WILKES REGIONAL MEDICAL CENTER

No. 107P94

Case below: 113 N.C.App. 275

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

COLLINS v. CSX TRANSPORTATION

No. 180P94

Case below: 114 N.C.App. 14

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

DELLINGER v. CITY OF CHARLOTTE

No. 187PA94

Case below: 114 N.C.App. 146

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

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

FOREMAN v. SHOLL

No. 86A94

Case below: 113 N.C.App. 283

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 16 June 1994 as to the question whether the seven-year statutory period under G.S. 1-38 had run at the time this action was instituted.

GODLEWSKI v. CLEMMONS MORAVIAN PRESCHOOL

No. 80P94

Case below: 113 N.C.App. 424

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

GUILFORD CO. DEPT. OF EMER. SERV. v. SEABOARD CHEMICAL CORP.

No. 182P94

Case below: 114 N.C.App. 1

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HAITHCOX v. FURNITURE INDUSTRIES

No. 263P94

Case below: 114 N.C.App. 504

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HARWARD v. SMITH

No. 212P94

Case below: 114 N.C.App. 263

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HOFFMAN v. MOORE REGIONAL HOSPITAL

No. 183P94

Case below: 114 N.C.App. 248

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HOLLOWAY v. DUKE UNIVERSITY

No. 161P94

Case below: 114 N.C.App. 266

Motion by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HUGUELET v. HUGUELET

No. 105P94

Case below: 113 N.C.App. 533

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

HUSSEY v. MONTGOMERY MEMORIAL HOSP.

No. 221P94

Case below: 114 N.C.App. 223

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

IN RE APPEAL OF DAVIS

No. 163P94

Case below: 113 N.C.App. 743

Motion by petitioners to dismiss petition for discretionary review dismissed 16 June 1994.

IN RE DENNIS v. DUKE POWER CO.

No. 246P94

Case below: 114 N.C.App. 272

Motion by petitioner (M-B Industries) for temporary stay allowed 6 June 1994 pending determination of M-B Industries' petition for writ of certiorari.

IN RE ESTATE OF BUCKNER

No. 203P94

Case below: 114 N.C.App. 266

Petition by appellant (Dale C. Buckner) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

IN RE ESTATE OF NEISEN

No. 185P94

Case below: 114 N.C.App. 82

Petition by claimant (Linda Johnson) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

IN RE MOSES H. CONE MEMORIAL HOSPITAL

No. 148PA94

Case below: 113 N.C.App. 562

Petition by Guilford County for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994. Petition by appellant Roger C. Cotten for discretionary review pursuant to G.S. 7A-31 dismissed 16 June 1994. Petition by appellant Roger C. Cotten for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 16 June 1994.

LAWSON v. DIXON

No. 198P94-2

Case below: Wake County

Motion by plaintiffs in nature of supersedeas, stay and mandamus denied 31 May 1994.

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

LEAK v. HOLLAR

No. 214PA94

Case below: 113 N.C.App. 836

Motion by defendant to dismiss for failure to file a timely petition denied 16 June 1994. Motion by plaintiff to convert petition for discretionary review to petition for writ of certiorari allowed 16 June 1994. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

LEDWELL v. N.C. DEPT. OF HUMAN RESOURCES

No. 233PA94

Case below: 114 N.C.App. 626

Petition by defendant for writ of supersedeas and motion for temporary stay denied 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

LISTER v. HAMPTON

No. 165P94

Case below: 113 N.C.App. 836

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

LOREMAN v. TOUCHAMERICA, INC.

No. 167P94

Case below: 113 N.C.App. 836

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

MASON v. MASON

No. 162P94

Case below: 114 N.C.App. 266

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

MATIER v. CONE MILLS CORP.

No. 217P94

Case below: 114 N.C.App. 268

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

MILLER v. POOLE

No. 159P94

Case below: 114 N.C.App. 266

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

NORTH CAROLINA RAILROAD COMPANY v. CITY OF CHARLOTTE

No. 29P94

Case below: 112 N.C.App. 762

Motion by plaintiff to dismiss the appeal for lack of substantial constitutional question allowed 16 June 1994. Petition by defendant (Norfolk Southern Railway) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

PEACOCK v. BURCH

No. 176P94

Case below: 110 N.C.App. 316

Petition by Allstate for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994.

PEELER v. TANNER

No. 98P94

Case below: 113 N.C.App. 425

Petition by intervenor (LeAnn Tanner) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

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

POTTER v. BRETAN

No. 184PA94

Case below: 114 N.C.App. 266

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

RJR TECHNICAL CO. v. PRATT

No. 104PA94

Case below: 113 N.C.App. 511

Motion by plaintiffs to dismiss appeal by intervenor plaintiffs for lack of substantial constitutional question denied 16 June 1994. Petition by intervenor plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

ROGEL v. JOHNSON

No. 213P94

Case below: 114 N.C.App. 239

Petition by defendants (Duke University and Rutgers Preparatory School) for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

SAVE OUR RIVERS, INC. v. TOWN OF HIGHLANDS

No. 166PA94

Case below: 113 N.C.App. 716

Petition by defendant (Town of Highlands) for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994. Petition by defendant (Town of Highlands) for writ of supersedeas allowed 16 June 1994. Motion by plaintiffs to dissolve temporary stay denied 16 June 1994.

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

STANLEY v. MOORE

No. 114PA94

Case below: 113 N.C.App. 523

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

STATE FARM MUT. AUTOMOBILE INS. CO. v. BRANCH

No. 219P94

Case below: 114 N.C.App. 234

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. ADAMS

No. 218P94

Case below: 114 N.C.App. 269

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. BALLEW

No. 141A94

Case below: 113 N.C.App. 674

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 16 June 1994.

STATE v. BASDEN

No. 159A94

Case below: Duplin County

Petition by defendant for writ of certiorari to review the decision of the Duplin County Superior Court denied 5 May 1994.

STATE v. BAYNES

No. 192A94

Case below: 114 N.C.App. 165

Petition by Attorney General for writ of supersedeas allowed 16 June 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 16 June 1994. Petition by Attorney General for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994.

STATE v. CANNADA

No. 227A94

Case below: 114 N.C.App. 552

Petition by plaintiff for writ of supersedeas and motion for temporary stay denied 25 May 1994.

STATE v. CONYERS

No. 174P94

Case below: 114 N.C.App. 267

Notice of appeal by defendant dismissed 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994. Petition by defendant for writ of certiorari to review the denial of motion for appropriate relief denied 16 June 1994.

STATE v. HOOVER

No. 170P94

Case below: 113 N.C.App. 837

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994.

STATE v. JONES

No. 188P94

Case below: 110 N.C.App. 169

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994.

STATE v. LAWSON

No. 142A81-3

Case below: Cabarrus County

Petition by defendant for writ of habeas corpus denied 25 May 1994. Petition by defendant for writ of certiorari to review the decision of the Cabarrus County Superior Court denied 16 June 1994.

STATE v. MARR

No. 164PA94

Case below: 113 N.C.App. 774

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 16 June 1994. Petition by defendant for writ of certiorari to review the order of the Polk County Superior Court allowed 16 June 1994.

STATE v. McCALL

No. 61P94

Case below: 113 N.C.App. 203

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. MELVIN

No. 149P94

Case below: 113 N.C.App. 656

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. MUSTAFA

No. 75P94

Case below: 113 N.C.App. 240

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 16 June 1994.

STATE v. NORRIS

No. 191P94

Case below: 114 N.C.App. 270

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. PALMER

No. 147P94

Case below: 113 N.C.App. 656

Petition by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. PATTON

No. 202P94

Case below: 114 N.C.App. 270

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. RICK

No. 226PA94

Case below: 114 N.C.App. 820

Motion by Attorney General for temporary stay allowed 23 May 1994 pending timely filing and determination of the State's petition for discretionary review.

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

STATE v. STAFFORD

No. 177P94

Case below: 114 N.C.App. 101

Petition by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. UPTON

No. 160P94

Case below: 113 N.C.App. 838

Petition by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 16 June 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

STATE v. WILLIAMS

No. 245PA93

Case below: 335 N.C. 180
110 N.C.App. 306

The order heretofore entered on 4 November 1993 denying the Attorney General's petition for discretionary review is vacated; and pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, the Court suspends its rules and allows the Attorney General's motion for reconsideration of the Attorney General's petition for discretionary review. By order of the Court in Conference, this 16th day of June, 1994.

STEWARD v. HENRY

No. 59PA94

Case below: 336 N.C. 76
113 N.C.App. 204

The order heretofore entered 7 April 1994 allowing defendant's petition for discretionary review is vacated and the parties' joint motion to withdraw petition for discretionary review is allowed 16 May 1994.

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

UNIVERSAL LEAF TOBACCO CO. v. OLDHAM

No. 121P94

Case below: 113 N.C.App. 490

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

UNIVERSITY OF NORTH CAROLINA v. SHOEMATE

No. 71P94

Case below: 113 N.C.App. 205

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

VAUGHAN v. J. P. TAYLOR CO.

No. 234P94

Case below: 114 N.C.App. 651

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

VILEISIS v. JAEGER

No. 204P94

Case below: 114 N.C.App. 271

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

WAGONER v. ELKIN CITY SCHOOLS' BD. OF EDUCATION

No. 151P94

Case below: 113 N.C.App. 579

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

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

WHISNANT v. WHISNANT

No. 173P94

Case below: 114 N.C.App. 267

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 June 1994.

PETITIONS TO REHEAR

IN RE DISMISSAL OF HUANG

No. 326A93

Case below: 336 N.C. 67

Petition by petitioner (Dr. Barney K. Huang) to rehear pursuant to Rule 31 denied 16 June 1994.

STATE OF NORTH CAROLINA v. PHILLIP LEE INGLE

No. 98A93

(Filed 29 July 1994)

1. **Homicide § 552 (NCI4th)— first-degree murder—expert testimony—inability to distinguish right and wrong—submission of second-degree murder not required**

Testimony by defendant's expert witness in a first-degree murder prosecution that defendant was in a psychotic state and was unable to distinguish between right and wrong at the time of the murder was insufficient to require the trial court to submit the lesser charge of second-degree murder where the witness never indicated that at the time of the murder defendant was unable to premeditate or deliberate his actions. The ability to distinguish between right and wrong and the ability to premeditate and deliberate are entirely different considerations, and testimony that defendant lacked the ability to engage in the *higher* function of determining the moral acceptability of his actions does not negate or call into question his ability to plan his actions and to premeditate and deliberate.

Am Jur 2d, Homicide §§ 525 et seq.

2. **Criminal Law § 15 (NCI4th)— test of insanity**

In order for a defendant to be exempt from criminal responsibility for an act by reason of insanity, he must prove to the satisfaction of the jury that at the time of the act, he was laboring under such a defect of reason caused by disease or a deficiency of the mind that he was incapable of knowing the nature and quality of his act or, if he did know the nature and quality of his act, that he was incapable of distinguishing between right and wrong in relation to the act.

Am Jur 2d, Criminal Law §§ 46 et seq.

Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.

3. **Criminal Law § 669 (NCI4th)— insanity defense—sufficient evidence of sanity—directed verdict properly denied**

In a prosecution of defendant for two first-degree murders wherein defendant's expert witness testified that defendant was in a psychotic state and was unable to distinguish between

right and wrong at the time of the crimes, there was sufficient evidence of defendant's sanity to withstand his motion for a directed verdict of not guilty by reason of insanity where there was evidence tending to show that immediately after leaving the victims' house with the female victim's pocketbook, defendant set fire to the pocketbook; he returned a short time after doing so, retrieved the pocketbook, and threw it and the murder weapon (an axe) into a nearby creek; when discussing his crime with a friend, he stated that "I wouldn't be telling you this, but I know I can trust you . . ."; he also stated, while gesturing to his daughter, that he had too much to lose and too much to live for to get caught; and his wife told defendant's expert witness that defendant had behaved normally in the period following the murders in question and preceding two other murders.

Am Jur 2d, Trial §§ 1030 et seq.

4. **Evidence and Witnesses § 318 (NCI4th)— first-degree murders—evidence of subsequent murders—admissibility to corroborate confession and show identity**

In a prosecution of defendant for the first-degree murders of an elderly couple by beating them to death with an axe handle, evidence that defendant beat another elderly couple to death with a tire iron six weeks later was relevant to corroborate defendant's confession and to assist in the determination of a number of facts in the present case, including the central fact of the identity of the victims' assailant. Even though defendant confessed to all four murders, the probative value of the evidence was not substantially outweighed by its prejudicial effect since the State was required to produce corroborative evidence beyond defendant's confession, and testimony concerning the subsequent murders under similar circumstances had substantial probative value of defendant's criminality and guilt of the murders in question.

Am Jur 2d, Homicide § 312.

5. **Evidence and Witnesses § 1346 (NCI4th)— mental capacity to waive rights and confess—sufficiency of evidence**

The evidence on voir dire did not show that defendant lacked the mental capacity to waive his rights and confess, and the trial court did not err by concluding that defendant knowingly and understandingly waived his rights and that

defendant's inculpatory statements were admissible in his murder trial, where defendant offered no evidence that tended to show that he was insane or that he did not voluntarily and understandingly waive his rights; an SBI agent testified that at the time defendant was being questioned, he responded appropriately and completely and did not appear to be under the influence of alcohol or drugs; defendant responded to the questions in a sensible manner and did not exhibit any bizarre or unusual behavior whatsoever; and during questioning, defendant chose not to answer certain questions and eventually decided on his own that he should not answer further questions without the assistance of an attorney.

Am Jur 2d, Evidence § 744.

6. Criminal Law § 445 (NCI4th)— first-degree murder—jury argument against lesser verdict—no impropriety

The prosecutor's jury argument in a first-degree murder trial that it was his preference that the jury should "throw the whole thing out of this courtroom" rather than return a verdict of second-degree murder with regard to both victims was not an impermissible statement of opinion and was not improper. There is no impropriety in a statement by the prosecution requesting that the jury return a verdict of guilty of the most serious crime charged and requesting that the jury not consider a verdict convicting defendant of the lesser crime.

Am Jur 2d, Trial § 554.

7. Criminal Law § 436 (NCI4th)— first-degree murder—jury argument against lesser verdict—comment on future crimes—fair inference based on evidence

The prosecutor's jury argument in a prosecution for two first-degree murders that he would prefer to return defendant's axe handle to him and let him work his way up to seven victims rather than for the jury to return a verdict of second-degree murder in either case was not improper speculation that defendant would commit another murder if acquitted but was based upon fair inferences drawn from the evidence where the evidence showed that defendant murdered two other people six weeks after the murders for which he was on trial; defendant spontaneously told an SBI agent that he was glad he was caught because he would probably have done it again; defendant told a friend about the murders and said that he

enjoyed watching people dying and in agony; defendant offered to kill a friend's neighbor for him, stating that all he needed was an axe handle; defendant's expert stated that a "serial killer" might repeatedly kill someone and follow the same pattern in finding and killing the victim; and the expert responded affirmatively when asked on cross-examination whether this pattern could repeat itself on a "first, second, third, fourth, fifth, sixth, seventh occasion."

Am Jur 2d, Trial § 554.

8. **Criminal Law § 1343 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—instructions not unconstitutionally vague**

The trial court's instructions on the especially heinous, atrocious, or cruel aggravating circumstance in a capital sentencing proceeding were not unconstitutionally vague.

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.

9. **Criminal Law § 1344 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—supporting evidence**

There was sufficient evidence to support submission of the aggravating circumstance that a murder was especially heinous, atrocious, or cruel since evidence that defendant attacked the elderly victim by surprise and beat his brains out of his head by repeated blows of an axe handle without the slightest provocation supported an inference that the murder was conscienceless and pitiless; evidence that defendant committed a similar set of murders just six weeks later, after a boastful discussion of his murderous capabilities with a friend, was further evidence of a lack of pity for the victim; and the facts of the case suggest a depravity of mind on the part of the defendant not easily matched by even the most egregious of slayings, as well as a level of brutality exceeding that ordinarily present in first-degree murders.

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.

10. Criminal Law § 1349 (NCI4th)— capital sentencing—evidence of mitigating circumstance—necessity for submission

Where evidence is presented by the defendant or the State in a capital sentencing proceeding that supports a statutory mitigating circumstance, N.C.G.S. § 15A-2000(b) directs that the circumstance must be submitted for the jury's consideration absent defendant's request or even over defendant's objection.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—submission supported by evidence

Evidence of defendant's criminal activity was slight enough for the submission, over defendant's objection, of the no significant history of prior criminal activity mitigating circumstance to the jury in a capital sentencing proceeding where the evidence of defendant's prior criminal activity consisted of testimony concerning his use of illegal drugs and testimony by defendant's aunt that she "took out warrants on him" for communicating threats and trespassing. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

12. Criminal Law § 460 (NCI4th)— capital sentencing—jury argument—scenario of grandson's finding of bodies—proper inferences from evidence

The prosecutor's jury argument in a capital sentencing proceeding for two murders that, in essence, speculated how the victims' seven-year-old grandson, when he became an old man of eighty-six years, would look back on the day when he "flew" into the home of his grandparents and encountered their dead bodies, finding that he could not kiss his grandparents because defendant had bludgeoned them to death, was a reasonable description of what may have taken place when the grandson entered the victims' home based upon the facts

and circumstances shown by the evidence and thus was not an argument of facts not in evidence.

Am Jur 2d, Trial §§ 632 et seq.

13. Criminal Law § 468 (NCI4th)— capital sentencing—jury argument—subsequent murders—reference to persons killed as victims

In a capital sentencing proceeding for two first-degree murders wherein two subsequent murders committed by defendant were relevant to show the heinous, atrocious, or cruel and course of conduct aggravating circumstances, the prosecutor's reference in his jury argument to the persons killed in the subsequent murders as "victims" was not misleading, prejudicial, or likely to cause the jury to return an improper sentencing recommendation against defendant for the first two murders.

Am Jur 2d, Trial §§ 497 et seq.

14. Criminal Law § 454 (NCI4th)— capital sentencing—jury argument—no improper injection of religion

The prosecutor's jury argument in a capital sentencing proceeding to the effect that when he said his prayers after the conclusion of the case, he would tell the Lord that he did his best, and that the jurors' decision should enable them to feel satisfied that they had done justice was not an improper appeal by the prosecutor for the jury to take religion into account when considering the sentence.

Am Jur 2d, Trial § 572.

15. Criminal Law § 454 (NCI4th)— capital sentencing—jury argument—no diminishment of jury's responsibility

The prosecutor's jury argument in a capital sentencing proceeding that defendant "authored and wrote his own death warrant. We're simply asking that you affix your signature as jurors and representatives of the citizens of Cleveland County" could not have improperly led the jury to believe that it was not responsible for determining the appropriateness of defendant's sentence. Rather, the argument is more properly viewed as having the opposite effect since a request that jurors affix their signatures to the verdict served to remind

them that they would decide the propriety of defendant's punishment for crimes committed by him.

Am Jur 2d, Trial § 572.

16. Criminal Law § 458 (NCI4th)— capital sentencing—possibility of parole—comment during objection—harmless error—instruction on life sentence not required

When defense counsel argued to the jury in a capital sentencing proceeding, "If you give him a life sentence, he spends the rest of his life down there," it was improper for the prosecutor to raise, by implication, the possibility of defendant's parole by his objection to "the implication that he will be there for the rest of his life," but this error was not prejudicial. Furthermore, the trial court properly declined to instruct the jury on the meaning of a life sentence.

Am Jur 2d, Trial § 575.

17. Criminal Law § 1373 (NCI4th)— first-degree murders—death sentences not disproportionate

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant, where the jury found the especially heinous, atrocious, or cruel aggravating circumstance for one murder and the course of conduct aggravating circumstance for both murders, and the evidence showed that defendant consecutively bludgeoned two elderly persons in their home with an axe handle and that the murders were committed without provocation and for no apparent motive other than defendant's pleasure in committing the crimes. Defendant's assertion that the victims were taken completely by surprise and were killed instantly, if true, constitutes an insufficient basis upon which to conclude that the sentence of death is disproportionate. Nor is the sentence of death disproportionate because of evidence of defendant's insanity at the time of the murders where the jury refused to attribute defendant's actions to an inability to appreciate the nature and quality of his actions, and the jury likewise declined to find as mitigation that defendant suffered from mental disturbance at the time of the killings.

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Downs, J., at the 8 February 1993 Criminal Session of Superior Court, Cleveland County, upon change of venue for trial from Rutherford County. Heard in the Supreme Court 9 May 1994.

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

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

MEYER, Justice.

On 14 October 1991, defendant, Phillip Lee Ingle, was indicted by a Rutherford County grand jury for the first-degree murders of William Fred Davis and Margaret Shufford Davis. On 12 November 1992, defendant's motion for change of venue due to pretrial publicity was granted by Judge Chase B. Saunders. Venue was changed to Cleveland County. The offenses were joined for trial on 8 February 1993. On 17 February 1993, the jury returned verdicts of guilty of first-degree murder on the basis of malice, premeditation, and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court, on 19 February 1993, imposed the sentence of death in both cases.

Defendant has brought forth twenty-nine assignments of error. After a careful and thorough review of the transcript, the record, the briefs, and oral arguments of counsel, we conclude that defendant received a fair trial and sentencing proceeding, free from prejudicial error.

The evidence presented at trial tended to show the following: In July 1991, William Fred Davis, sixty-eight years old, and his wife, Margaret Shufford Davis, sixty-seven years old, lived in their home in a rural area of Rutherford County. The nearest residence was a mobile home located about 150 yards from the house, which defendant had rented from the Davises in 1987.

On Sunday, 28 July 1991, Mr. and Mrs. Davis were given a ride home from church. Mrs. Davis was carrying a light-beige pocketbook with a billfold inside it. Later that day, Kathy Davis,

the Davises' daughter-in-law, spoke with Mrs. Davis and saw Mr. Davis when he stopped by her home to deliver some vegetables. Ruth Blanton, the Davises' daughter, saw her father that afternoon in a field near his home and also spoke with her mother at the Davises' home. Mrs. Blanton again stopped by the Davises' home around 6:00 p.m. to borrow a vacuum cleaner. No one was at the home, but the back door was unlocked, so she picked up the vacuum cleaner and left.

Sometime between 6:00 p.m. and 8:45 p.m., defendant was driving around the area of the victims' home. He knew the Davises from having rented a mobile home from them in 1987. He went to the Davises' house and drove his car around to the back of the house. He parked his car, took an axe handle from it, and entered the house through the unlocked back door. Mrs. Davis was in the kitchen, and defendant approached her from behind and began to beat her on the head with the axe handle until she fell to the floor. After doing this, defendant went into the den of the house, where Mr. Davis was seated in a recliner watching television. Because Mr. Davis was hard of hearing, the television was turned up to a high volume, and the evidence tended to show that he was unaware that defendant had attacked his wife in the kitchen. After moving to the den, defendant attacked Mr. Davis and beat him on the head with the axe handle. Both Mr. and Mrs. Davis died as a result of the wounds inflicted by defendant.

The autopsies of Mr. and Mrs. Davis were conducted on 30 July 1991. There were six major lacerations on the scalp and face of Mrs. Davis. An internal examination revealed contusions, hemorrhaging into the brain, and multiple skull fractures. Also present were wounds to her left elbow and right hand that could have been sustained as she tried to defend herself or that could have been the result of a fall.

An external examination of Mr. Davis showed blood and brain tissue on his head, face, and clothing. Both of his eyes had been blackened, and he had bled into the substance of his left eye. His skull bones had been thoroughly fractured and pressed inward into his brain. There were twelve lacerations on his face and scalp. His dentures were protruding from his mouth. His left little finger was almost completely torn from his hand, and his left ring finger had abrasions on it. The wounds to Mr. Davis' hand could have been sustained as Mr. Davis tried to defend himself or could have

been caused by the hand resting on the top of Mr. Davis' head as the first blows were inflicted. The examining physician testified that the nature of the injuries to both victims was consistent with having been caused by a blunt instrument such as an axe handle.

After beating the couple to death, defendant left the house, taking Mrs. Davis' pocketbook and a floral-patterned dress that belonged to her. He then went to an area about three miles away from the Davises' home, discarded the dress, and set fire to the pocketbook and its contents. Defendant then departed the area. He returned to the area some time later, picked up the pocketbook, and threw it and the axe handle into a creek. Defendant later led law enforcement officers to the spot where he disposed of these items. The pocketbook was discovered on the bank of the stream, but the axe handle was never found.

While defendant was away from the area where the pocketbook was left burning, it was spotted by a local resident, who notified the Sheriff's Department. By the time the resident and a Sheriff's deputy returned to the spot, defendant had retrieved the pocketbook. The deputy did discover the dress that had belonged to Mrs. Davis.

Items found in the pocketbook after its recovery by police and at the site where it was partially burned were identified as items that had customarily been carried by Mrs. Davis, and the pocketbook itself was identified as one that had belonged to Mrs. Davis.

A police investigation of the Davis murders did not lead to an arrest for several weeks. During that time, in mid-August of 1991, defendant visited with his friend Jeff Houser. During a conversation with Houser, defendant made the statement, "Man, I killed two people. I beat them to death." Defendant asked Houser if he needed anyone killed, and Houser jokingly responded by indicating that he did and pointed to his neighbor's house. Defendant then began to ask questions about Houser's neighbor, so Houser told defendant that he was just kidding about wanting his neighbor killed and that the neighbor was "a real big guy and they're heavily armed." Defendant responded: "That doesn't matter. . . . [T]hey'll never see me coming. All I need is an ax handle." When Houser told defendant to forget about it, defendant responded: "Well, man, I wouldn't be telling you this, but I know I can trust you . . . ."

Some weeks later, around the 10th or 12th of September 1991, defendant returned to Houser's residence suffering from a black eye. Another visitor at Houser's home, Steve White, asked defendant about the black eye, and defendant stated that he "fell and hit a door knob." White did not believe that to be the truth and told defendant so. After asking Houser if he was still having trouble with his neighbor, defendant stated, "I'll take care of him for you." Defendant said, "I'll kill his whole family. . . . I'll get a stick. . . . I'll beat them to death." Defendant went on to say, "I love to watch people dying in agony. Pain. Suffering."

At the time of this second visit to Houser's residence, defendant had recently committed another double murder in Gaston County. Defendant had broken into the rural home of an elderly couple named E.Z. and Sarah Willis and had beaten them both to death with a tire iron. Defendant's black eye had been caused when Mr. Willis hit defendant in the head with his cane.

As a result of the conversations defendant had with Houser and White, the men contacted the State Bureau of Investigation (SBI). Subsequently, defendant was questioned by law enforcement officers with regard to the Willis murders. When questioned about the Davis murders, defendant stated, "Yeah, I killed them, too."

Defendant gave a statement that detailed his involvement in both the Willis and Davis murders. He did not offer any sort of motive for the murders but stated that he did not kill the victims for sexual gratification or to steal from them.

In his defense, defendant presented evidence designed to show that at the time of the murders, he was experiencing a psychotic episode that was the result of a borderline personality disorder. Defendant also presented evidence of an extremely troubled childhood in which he had witnessed his mother overdose on drugs and attempt to commit suicide in his presence on a number of occasions. Defendant himself had attempted suicide on more than one occasion, once attempting to hang himself from a tree at age five or six. On another occasion, at age nineteen, defendant stated that he wanted to kill himself and then shot himself in the stomach with a rifle. There was also evidence that defendant had been sexually abused by an older man while a child.

Defendant had been a continuous abuser of drugs and alcohol and had been periodically admitted to various hospitals and mental institutions for problems associated with drug and alcohol abuse.

A week or two prior to the Davis murders, defendant had been involved in an argument involving his grandmother, and it was defendant's psychiatric expert's opinion that it could have been the sight of elderly people, the Davises, that triggered what the expert characterized as the psychotic episode that resulted in the murders.

Other facts will be presented as necessary for the proper resolution of the issues brought forward by defendant.

[1] In his first assignment of error, defendant contends that it was error for the trial court to refuse to submit the lesser charge of second-degree murder with regard to the killing of Mr. Davis. The trial court did submit this offense with regard to the killing of Mrs. Davis.

"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. Gibbs*, 335 N.C. 1, 52, 436 S.E.2d 321, 350 (1993), *cert. denied*, --- U.S. ---, 129 L.Ed.2d 881 (1994); *see also State v. Woodard*, 324 N.C. 227, 376 S.E.2d 753 (1989). "When no evidence supports a lesser included offense, the trial court has no duty to instruct the jury on such offenses." *State v. Tucker*, 329 N.C. 709, 721, 407 S.E.2d 805, 812-13 (1991).

"Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 96 (1989). "Only where defendant has brought forth evidence to negate the element of premeditation and deliberation, or where the evidence is equivocal as to premeditation and deliberation, is defendant entitled to an instruction on second-degree murder." *State v. Zuniga*, 320 N.C. 233, 260, 357 S.E.2d 898, 916, *cert. denied*, 484 U.S. 959, 98 L.Ed. 2d 384 (1987), *denial of post-conviction relief reversed on other grounds*, 336 N.C. 508, 444 S.E.2d 443 (1994).

Defendant contends that the testimony of his expert witness that he was in a psychotic state at the time of both murders was sufficient to negate or call into question the elements of premeditation and deliberation with regard to the murder of Mr. Davis. We disagree.

A careful review of defendant's expert's testimony reveals that the evidence presented called into question defendant's ability

to distinguish between right and wrong but never indicated that at the time of the crimes he was unable to premeditate or deliberate his actions. The psychiatrist testified that defendant's borderline personality disorder could have been the result of psychiatric trauma experienced as a child and that defendant's substance abuse was a symptom of this disorder. He further testified that the psychotic episode experienced by defendant at the time of the murders was a feature one would expect to see associated with borderline personality disorder. In addition, defendant's psychiatrist unequivocally stated that it was his opinion that at the time of the murders, defendant was unable to distinguish right from wrong and was unable to determine the nature and quality of his acts. The psychiatrist went on to testify that defendant told him that he looked in the window at the Davises, before entering the house, and after doing so, he returned to his car to retrieve an axe handle. The psychiatrist speculated that it could have been defendant's recent disagreement with his grandmother followed by the sight of elderly people that triggered defendant's psychotic episode.

Nowhere, however, is there any testimony that defendant was unable to plan his actions or that he lacked the ability to premeditate and deliberate.

The ability to distinguish between right and wrong and the ability to premeditate and deliberate are entirely different considerations. This distinction was explained by Justice Lake in *State v. Cooper*:

> For criminal responsibility it requires that the accused have, at the time of the act, the higher mental ability to distinguish between right and wrong with reference to that act. It requires less mental ability to form a purpose to do an act than to determine its moral quality. The jury, by its verdict, has conclusively established that this defendant, at the time he killed his wife and the four little children, had this higher level of mental capacity. It necessarily follows that he had the lesser, included capacity.

State v. Cooper, 286 N.C. 549, 573, 213 S.E.2d 305, 321 (1975). These principles, when applied to the present case, illustrate the weakness of defendant's argument. There was no evidence that defendant was unable to premeditate or deliberate with regard to his actions at the time of the murders. Testimony that defendant lacked the ability to engage in the *higher* function of determining

the moral acceptability of his actions, even if believed, does not negate or call into question his ability to plan his actions. Accordingly, such evidence does not justify the submission of an instruction on second-degree murder.

The trial court correctly refused to submit the charge of second-degree murder with regard to the killing of Mr. Davis. Defendant's assignment of error on these grounds is overruled.

In his next assignment of error, defendant contends that the evidence of his insanity at the time of the killings was uncontroverted, and for that reason, the trial court erred in denying defendant's motion to dismiss at the close of all the evidence or, as defendant contends, erred by not granting him the equivalent of a directed verdict. We disagree.

We note that although defendant did not specifically request a directed verdict on the issue of his insanity, it is well settled that a motion to dismiss and a motion for a directed verdict have the same effect. *State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 562, 565 (1985); *Cooper*, 286 N.C. at 568, 213 S.E.2d at 318.

"[I]n considering whether a trial court has erred in refusing to direct a verdict of not guilty by reason of insanity, we must bear in mind the rule that 'in all cases there is a presumption of sanity, and when there is other evidence to support this presumption, this is sufficient to rebut defendant's evidence of insanity . . . .'" *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E.2d 375, 382 (1987) (quoting *State v. Mize*, 315 N.C. at 290, 337 S.E.2d at 565).

[2] In North Carolina, in order for a defendant to be exempt from criminal responsibility for an act by reason of insanity, he must prove to the satisfaction of the jury that at the time of the act, he was laboring under such a defect of reason caused by disease or a deficiency of the mind that he was incapable of knowing the nature and quality of his act or, if he did know the nature and quality of his act, that he was incapable of distinguishing between right and wrong in relation to the act. *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991); *State v. Mancuso*, 321 N.C. 464, 364 S.E.2d 359 (1988); *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375; *State v. Mize*, 315 N.C. 285, 337 S.E.2d 562.

In the case of an unwitnessed crime, the question of the mental condition of a defendant at the precise time of the crime becomes especially problematic. Accordingly, courts have allowed evidence

of a defendant's actions at relevant times before and after the commission of the crime to serve as an indication of the defendant's mental condition at the time of the act. As we noted in *State v. Duncan*:

> To determine the issue as to whether the defendant was insane at the time of the alleged commission of the offense[,] evidence tending to show the mental condition of the accused both before and after the commission of the act, as well as at the time of the act charged, is competent, provided the inquiry bears such relation to the person's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto. It would be impracticable to limit the evidence to such condition at the exact time.

State v. Duncan, 244 N.C. 374, 377, 93 S.E.2d 421, 423 (1956); *see also State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305.

[3] In the present case, many details surrounding the commission of the crime serve to rebut defendant's contention that he was unable to appreciate the nature and quality of his actions at the time of the murders. Immediately after leaving the Davises' house with Mrs. Davis' pocketbook, defendant set fire to the pocketbook. He returned a short time after doing so, retrieved the pocketbook, and threw it and the murder weapon into a nearby creek. When discussing his crime with his friend Houser, he specifically stated, "Well, man, I wouldn't be telling you this, but I know I can trust you . . . ." He also stated, while gesturing to his daughter, that he had too much to lose and too much to live for to get caught. Defendant's expert testified that his wife had told him that defendant had behaved normally in the period following the Davis murders and preceding the Willis murders.

Although this evidence is not conclusive on the issue of whether defendant was insane at the time of the murders, in order for evidence of sanity to foreclose defendant's right to a directed verdict, it is sufficient if the evidence tends to controvert defendant's evidence that he was unable to distinguish between right and wrong at the time of the murders.

We hold that there was sufficient evidence of defendant's sanity to withstand his motion to dismiss made at the conclusion of the State's evidence. The trial court correctly denied the motion, and defendant's assignment of error on these grounds is overruled.

[4] In his next assignment of error, defendant contends that the trial court erred when it allowed the State to introduce evidence of the Willis murders, committed some six weeks after the crime at issue here. Defendant concedes that case law supports the trial court's conclusion that the evidence was relevant and admissible for purposes of showing defendant's state of mind, method of operation, and preparation, but argues that this evidence should nonetheless have been disallowed pursuant to Rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1992). Defendant contends that inasmuch as he had confessed to the murders in the Davis case as well as the Willis case, the testimony concerning the Willis murders added nothing to the State's case, served only to inflame the passions of the jury, and had "an *undue* tendency to suggest decision on an improper basis." *State v. Mercer*, 317 N.C. 87, 94, 343 S.E.2d 885, 889 (1986) (quoting N.C.G.S. § 8C-1, Rule 403 commentary (Supp. 1985)). We disagree.

"[A] naked extrajudicial confession, uncorroborated by other evidence, is not sufficient to support a criminal conviction." *State v. Sloan*, 316 N.C. 714, 725, 343 S.E.2d 527, 534 (1986). "According to the law of this jurisdiction, the State must at least produce corroborative evidence, independent of defendant's confession, which tends to prove the commission of the charged crime." *Id.; see also State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985) (corroboration rule relaxed in noncapital cases). Accordingly, evidence of the Willis murders aided in the corroboration of defendant's confession.

In addition, the evidence at issue here was properly admissible under Rule 404, which provides that evidence of other crimes, wrongs, or acts may be admissible in order to show "proof of motive, opportunity, intent, preparation, plan, knowledge." N.C.G.S. § 8C-1, Rule 404(b) (1992). Accordingly, evidence of the Willis murders was relevant to assist in the determination of a number of facts in the present case, including the central fact of the identity of the Davises' assailant, thus meeting the relevancy requirements of Rule 401. Rule 402 provides that relevant evidence is generally admissible, subject to certain limitations. The admissibility of this type of evidence is further limited by the provisions of Rule 403, which provides that even the admissibility of relevant evidence is subject to a determination by the trial court that the probative

value of the evidence is not substantially outweighed by its prejudicial effect.

As this Court noted in *State v. Mercer*,

> Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible under Rule 402 *unless* the judge determines that it must be excluded, for instance, because of the risk of "*unfair* prejudice."

317 N.C. at 93, 343 S.E.2d at 889. The decision whether to admit evidence subsequent to a Rule 403 analysis rests within the sound discretion of the trial court, and its ruling will not be overturned unless it is shown that the 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), *quoted in State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). Defendant has made no such showing.

The State was required to produce corroborative evidence beyond defendant's confession in order to secure a conviction of murder. Testimony concerning the Willis murders, committed under remarkably similar circumstances, had substantial probative value of defendant's criminality and guilt in the Davis murders. The record does not suggest that the prosecution presented evidence in an inflammatory manner or in a manner designed to inflame the passions of the jury. We hold that the trial court properly admitted evidence of the Willis murders; accordingly, defendant's assignment of error on these grounds is overruled.

[5] In his next assignment of error, defendant contends that the trial court erred when it denied his motion to suppress the inculpatory statement that he made to law enforcement officers subsequent to his arrest. As the basis for this assignment of error, defendant contends that at the time of the giving of the statement, he lacked the capacity to waive his rights. Defendant concedes that at the time of the motion hearing, no evidence was presented that he lacked the capacity to waive his rights at the time of the interrogation, but nonetheless requests that this Court examine the circumstances surrounding the hearing in order to determine whether the statement should have been admitted.

> 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). In the present case, defendant was given his *Miranda* warnings and initialed a written form that indicated that he understood his rights and was willing to answer questions without a lawyer. Even so, 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. Mlo, 335 N.C. 353, 363, 440 S.E.2d 98, 102 (1994) (quoting *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)), *cert. denied*, --- U.S. ---, 129 L.Ed.2d 841 (1994). In the present case, defendant contends that he did not voluntarily and understandingly give his statement because he was insane at the time of questioning and lacked the capacity to waive his rights. An examination of the record indicates that this was not so.

In accordance with the requirements of N.C.G.S. § 15A-977(f), the trial court made findings of fact and conclusions of law with regard to defendant's motion to suppress. *See* N.C.G.S. § 15A-977(f) (1988). The trial court made the following findings of fact:

> That at the time of the interrogation, the defendant appeared to be in a reasonably good and healthy physical condition, having the only apparent—the only apparent wound or disfigurement being a black eye. That he was not under the influence of any alcohol or drugs. That his mental condition at and during the time of interrogation was coherent and one

of understanding. That the answers that he gave in response to the questions asked were reasonable ones and they were responsive ones.

That there were no promises or offers of reward or inducements made by law enforcement officers for the defendant to make any statement. That there were no threats or suggested violence or show of violence by any law enforcement officers to persuade or induce the defendant to make any statement.

That when the defendant did desire to stop talking and make no further statement and request the presence of a lawyer, no further questions were asked of him. That his—that his responses to questions asked of him were logical, straight forward, sensible and were not in the category of bizarre.

These findings of fact made by the trial court are binding on appeal if supported by competent evidence. *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988). In the present case, the record indicates that these findings are fully supported by the testimony given during a *voir dire* examination of the police officer who took defendant's statement. With regard to defendant's mental condition, SBI Agent Dan Crawford testified that at the time defendant was being questioned, he responded appropriately and completely and did not appear to be under the influence of alcohol or drugs. He responded to the questions in a sensible manner and did not exhibit any bizarre or unusual behavior whatsoever. Defendant offered no evidence that tended to show that he was insane or that he did not voluntarily and understandingly waive his rights. The findings of the trial court are supported by the evidence; accordingly, we adopt them and consider them to be binding upon this Court.

"Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court and 'are fully reviewable on appeal.' " *Mlo*, 335 N.C. at 365, 440 S.E.2d at 103 (quoting *State v. Mahaley*, 332 N.C. 583, 593, 423 S.E.2d 58, 64 (1992)). The focus of our inquiry on this appeal now is whether the conclusions reached by the trial court are supported by the findings of fact. 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 trial court concluded that "the defendant was in full understanding of his constitutional right to remain silent and his

right to counsel and all other rights; and that he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers."

An examination of all of the circumstances surrounding the giving of the statement leads this Court to the same conclusion. After having been given information that defendant might have been connected with the Gaston County murders of Mr. and Mrs. Willis, Agent Crawford and Detective Phillips of the Gaston County Police travelled to defendant's residence to question him about the murders. Upon arriving at defendant's residence, they informed him of the purpose of their visit. Because they were in the presence of defendant's wife and small children, the officers asked defendant if he wanted to discuss the matters outside of his mobile home and further asked him if he would accompany them to the police facilities in Gaston County. Defendant agreed to do so and attempted to contact his employer to let his employer know that he would either be late or not present for work that day. No questions were asked of defendant until he had waived his rights, and during the time period defendant was questioned, he did not act in an unusual or bizarre manner or otherwise give any indication that he was incapable of knowingly and understandingly waiving his rights. During questioning, defendant chose not to answer certain questions and eventually decided on his own that he should not proceed any further in answering questions without the assistance of an attorney.

Given the circumstances surrounding defendant's waiver of his rights and the lack of any evidence that defendant was insane at the time of the giving of the statement, we hold that the trial court correctly concluded that defendant knowingly and understandingly waived his rights and that it properly admitted his inculpatory statements. Defendant's assignment of error on these grounds is overruled.

In his next assignment of error, defendant argues that the trial court erred when it failed to correct what defendant contends was a grossly improper closing argument by the prosecutor at the conclusion of the guilt/innocence phase of the trial.

[6] In anticipation of an instruction that the jury could find defendant guilty of second-degree murder with regard to the killing of Mrs. Davis, the prosecutor stated the following:

[MR. LEONARD (Prosecutor):] And with respect to Mrs. Davis, they say, Oh, you ought to water this thing down. You ought to go back there and trade it out somehow. You ought to find him guilty—not guilty; but I suppose they're hoping at a very minimum in her case that you'll say he's guilty of no murder—of no more than murder in the second degree.

I tell you what. With respect to either one of these people—with respect to this lady right here, with respect to Mrs. Davis, I hope you'll do this. Before you come back in this case—

MR. BURWELL [Defense Counsel]: Objection.

MR. DAVIS [Defense Counsel]: Objection.

MR. LEONARD: —and say he's guilty—

THE COURT: Wait. Wait. Wait a minute.

MR. DAVIS: He's saying I hope.

THE COURT: Well, overruled. Go ahead.

MR. LEONARD: My gosh. My gosh. No wonder we're in the mess we're in. No wonder we're in a mess.

I hope you'll say with respect to this lady right here that this man is guilty also of murder in the first degree. And before you say in the death of this woman that this defendant's guilty of murder in the second degree, before you give him that benefit—or rather than give him that benefit, I'd rather see you just—

MR. BURWELL: Objection.

MR. LEONARD: —throw the whole thing out of the courtroom.

THE COURT: Overruled.

MR. LEONARD: Just throw the whole thing out. That's how strongly we feel about this. That's my contention. I contend that both cases ought to be thrown slam out of this courtroom before you water down either one of them based on this evidence. I would rather see you do that—

MR. BURWELL: Objection.

THE COURT: Overruled.

MR. LEONARD: —and turn him loose and return his ax handle to him—

MR. BURWELL: Objection.

MR. LEONARD: —and if he wants to, let him go to work—

THE COURT: Sustained.

MR. LEONARD: —all the way to seven [future victims].

Defendant's first assignment of error with regard to this portion of the prosecutor's argument is that it was improper for the prosecutor to state that it was his preference that the jury should "throw the whole thing out of this courtroom" rather than return a verdict of second-degree murder with regard to both victims. Defendant contends that this statement amounted to an impermissible statement of opinion on the part of the prosecutor.

We perceive no impropriety in a statement by the prosecution requesting that the jury return a verdict of guilty of the most serious crime charged and requesting that the jury not consider a verdict convicting defendant of the lesser crime. The prosecutor's role is to do just that: compel the jury to convict a defendant of the charges that the prosecution has attempted to prove at trial, not charges that the prosecution contends have no applicability. "[I]t is permissible for a prosecutor to ask the jury to return the highest degree of conviction and the most severe punishment available for the offense charged." *State v. Hager*, 320 N.C. 77, 84, 357 S.E.2d 615, 619 (1987). That the prosecutor stated that it was his preference that the cases be "thrown slam out this courtroom" rather than return a verdict that he contends is clearly contrary to the evidence presented by the State merits no relief for defendant. "The prosecutor's comments in this case were proper in light of his role as a zealous advocate for convictions in criminal cases." *State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993).

[7] Defendant's next assignment of error with regard to this portion of the prosecutor's argument concerns what defendant characterizes as "an improper suggestion that defendant, if acquitted, would commit a crime." *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914. The portion of the argument referred to by defendant is that part in which the prosecutor indicated that rather than return a verdict of second-degree murder, the prosecutor would

prefer to return defendant's axe handle to him and let him work his way up to seven victims.

It is true that this Court has disapproved of such arguments in the past. In *State v. Miller*, a breaking and entering case, the prosecutor argued that

> "[the defendants] are storebreakers. Both of them. Sure, turn them loose. I could stand it myself. Personally, I could, just insofar [as] . . . I don't own any buildings. It would be . . . it would hurt me. Turn them loose they say. And if you do, buckle your knees tight and lock your houses in the evening. Get the merchant patrol in your front yard with you, German police dogs! And when they break through your defenses, ladies and gentlemen, don't cry on me down at the solicitor's office, and say 'What are you doing about it?' "

State v. Miller, 271 N.C. 646, 656, 157 S.E.2d 335, 344 (1967). In holding that this portion of the State's argument was improper, we noted that "the appealing defendants did not testify in their behalf, and they did not introduce any evidence as to their reputation for character. Yet, with no supporting evidence the solicitor defiled the characters of the defendants in his argument to the jury." *Id.* at 657, 157 S.E.2d at 344.

The particular facts of the present case, however, suggest that the comment was not merely improper speculation, but was grounded upon a substantial evidentiary basis.

After killing Mr. and Mrs. Davis, the uncontroverted evidence showed that defendant repeated his brutal crime just six weeks later. No explanation was ever given other than speculation that his "psychotic episode" could have been triggered by the sight of old people. The jury was informed that while in custody and after termination of questioning, defendant had voluntarily and spontaneously stated to SBI Agent Crawford that "I'm glad that y'all caught me. . . . I'd have probably done it again." Before defendant was apprehended, he had told a friend about the murders and said that he enjoyed watching people dying and in agony. He offered to kill his friend's neighbor for him, stating that all he needed was an axe handle. Defendant's expert explained that, although he was not familiar with the particular diagnostic criteria involved, a "serial killer" might "repeatedly kill somebody and usually [follow] the same type pattern in his finding . . . a victim and

killing the victim." This expert responded affirmatively to the prosecutor's inquiry on cross-examination whether this pattern could repeat itself on a "first, second, third, fourth, fifth, sixth, seventh occasion."

We believe the circumstances of the present case warrant the conclusion that this portion of the argument, taken in context and in light of the testimony given at trial, was based upon fair inferences drawn from the evidence and, as such, was not improper. Defendant's assignment of error on these grounds is overruled.

In his next assignment of error, defendant contends that the trial court erred when it submitted the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder of Mr. Davis was especially heinous, atrocious, or cruel.

[8] In his first argument on the submission of this factor, defendant contends that the jury instructions concerning the circumstance are unconstitutionally vague. Defendant concedes that this Court has consistently decided this question otherwise and presents no argument as a basis to depart from our earlier decisions on the matter. *See State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 139-41, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994); *State v. Fullwood*, 323 N.C. 371, 399-400, 373 S.E.2d 518, 535-36 (1988), *sentence 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). We have reviewed the instructions given for this aggravating circumstance and find them to be nearly identical to those expressly approved by this Court in the past. Defendant's assignment of error on these grounds is overruled.

[9] Defendant next contends that the evidence of the circumstances of Mr. Davis' killing did not warrant the submission of the instruction. Defendant contends that because the evidence showed that Mr. Davis was unaware of his assailant's presence and was rendered unconscious by the first blow, he did not suffer any of the physical or psychological torture that would cause his murder to be "especially" heinous, atrocious, or cruel. We disagree.

The interpretation of events posited by defendant is not the proper scenario upon which the trial court is to base its decision of whether to submit this aggravating circumstance. Rather, " '[i]n determining if there is sufficient evidence to submit an aggravating

circumstance to the jury, the trial judge 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) (quoting *State v. Huff*, 325 N.C. 1, 55, 381 S.E.2d 635, 666 (1989), *sentence 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)). "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. Gibbs*, 335 N.C. 1, 61, 436 S.E.2d 321, 356. In addition, the decision to submit the factor does not entirely center around the experience endured by the victim during the killing. As we noted in *State v. Gibbs*:

> 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.

Gibbs, 335 N.C. at 61-62, 436 S.E.2d at 356. We believe the murder in the present case easily meets the criteria outlined in several of the categories that this Court has previously identified as indicative of a murder that is especially heinous, atrocious, or cruel.

The evidence, supported by defendant's own account of the events, shows that defendant beat Mr. Davis on the head so hard that the fractures in his skull could be felt underneath his scalp. Bits of Mr. Davis' brain were on his shirt, his dentures protruded from his mouth, and there were a total of twelve lacerations on his face and head. There was blood spattered about the room and surrounding the reclining chair in which Mr. Davis' body was found.

When a murderer attacks an elderly victim by surprise and beats his brains out of his head by repeated blows of an axe handle

without the slightest sign of provocation, it may be said that there is an inference that the murder was conscienceless and pitiless. Evidence that defendant committed a similar set of murders just six weeks later, after a boastful discussion of his murderous capabilities, is further evidence of a lack of pity for defendant's victims. The facts of this case suggest a depravity of mind on the part of the killer not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeds that ordinarily present in first-degree murders. *See* N.C.P.I.—Crim. 150.10, at 18-19 (1992). We hold that there was sufficient evidence to support the submission of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Defendant's assignment of error on these grounds is overruled.

[10] In his next assignment of error, defendant contends that the trial court erred when it submitted, over his objection, the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity. Defendant acknowledges the series of cases in which this Court has held that where evidence is presented in a capital sentencing proceeding that may support a statutory mitigating circumstance, N.C.G.S. § 15A-2000(b) directs that the circumstance must be submitted for the jury's consideration absent defendant's request or even over his objection. *See State v. Gibbs*, 335 N.C. at 61, 436 S.E.2d at 352-53; *State v. Mahaley*, 332 N.C. at 597, 423 S.E.2d at 66; *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991); *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 324, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988), *on remand & sentence reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991); *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 825 (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). "Even when a defendant offers no evidence to support the existence of a mitigating circumstance, the mitigating circumstance must be submitted when the State offers or elicits evidence from which the jury could reasonably infer that the circumstance exists." *State v. Stokes*, 308 N.C. 634, 652, 304 S.E.2d 184, 195-96 (1983).

[11] Accordingly, it is this Court's duty only to review the evidence brought forth at trial in order to determine whether the submission of the circumstance was proper.

A review of the record indicates that evidence of defendant's prior criminal activity consisted principally of testimony concerning his use of illegal drugs. In addition, the State's cross-examination of defendant's aunt revealed that she "took out warrants on him" for communicating threats and trespassing. Despite the fact that some of these activities were unadjudicated crimes, it is proper for the trial court to take these activities into account in making its determination of whether to submit the (f)(1) mitigating circumstance. *State v. Noland*, 312 N.C. 1, 20-21, 320 S.E.2d 642, 654 (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), *post-conviction relief granted on other grounds sub nom. Noland v. Dixon*, 831 F. Supp. 490 (W.D. N.C. 1993); *State v. Stokes*, 308 N.C. at 653-54, 304 S.E.2d at 196.

There was sufficient evidence presented at trial to warrant the submission of the circumstance. We hold that the trial court correctly submitted the mitigating circumstance that defendant had no significant history of prior criminal activity.

Defendant's contention at trial in opposition to the submission of this mitigating circumstance was that his criminal history was in fact significant and that the judge should have so found as a matter of law and refused to submit the circumstance. We disagree.

Defendant's position loses force when we compare the present case to those in which this Court has determined whether the trial court correctly determined whether the factor should or should not have been submitted. One such case is *State v. Mahaley*, in which this Court held that the defendant was entitled to a new sentencing hearing because the trial court did not submit the (f)(1) mitigating circumstance. In that case, "[e]vidence of prior history of criminal activities was limited to that tending to show [the defendant's] use of illegal drugs and her theft of money and credit cards to support her drug habit." *Mahaley*, 332 N.C. at 597, 423 S.E.2d at 67.

In the case of *State v. Lloyd*, we held that the trial court correctly submitted the circumstance, despite defendant's objection, when the evidence showed two felony convictions and convic-

tions for seven alcohol-related misdemeanors. *Lloyd*, 321 N.C. at 312, 364 S.E.2d at 324.

In *State v. Wilson*, we held that the trial court erred in refusing to submit this mitigating circumstance when the record showed that the defendant possessed a criminal history that included a prior felony conviction for second-degree kidnapping, storage of illegal drugs in his shed, and involvement in the theft of farm equipment near the time of the murder. *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988).

It is thus clear that the evidence of criminal activity in the present case was slight enough to call for the submission of this circumstance for the jury's consideration. Defendant's assignment of error on these grounds is overruled.

In his next assignment of error, defendant alleges that the trial court erred when it refused to correct what defendant contends were improper and inflammatory portions of the prosecution's sentencing phase argument. Defendant assigns error to several portions of the argument, and we shall address them *seriatim*.

[12] Defendant's first complaint with regard to the prosecutor's argument concerns the prosecutor's depiction of what might have taken place when the Davises' grandson, Paul, discovered them dead in their home. The prosecutor engaged in a lengthy argument that, in essence, speculated how Paul, when he became an old man of eighty-six years, would look back on the day when he "flew" into the home of his grandparents and encountered their dead bodies, finding that he could not kiss his grandma and grandpa because defendant had bludgeoned them to death. Counsel for defendant made twelve objections during this portion of the argument.

Defendant argues that there is no evidence whatsoever that Paul tried to "fly into grandpa's arms" and "kiss grandpa's sweet old head" and that it was improper for the prosecutor to argue facts not in evidence.

This Court has had the opportunity to review similarly styled arguments in the past. In *State v. Syriani*, the prosecutor argued that the defendant in that case, after having killed his wife, cut short his departure from the scene of the killing in order to return and kill his daughter. The prosecutor argued that "[b]ut for a good citizen who was willing to put himself in harm's way between [the daughter] and the Defendant, we would be trying a triple murder

here today." *Syriani*, 333 N.C. at 398, 428 S.E.2d at 144. After citing the well-established rule that "[c]ounsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom," *id.*, we held that the prosecutor's "arguments, although touching upon facts not testified to, were reasonable inferences based on the evidence and were within the wide latitude properly given counsel in argument," *id.* at 398-99, 428 S.E.2d at 144.

In *State v. Kirkley*, the defendant alleged that it was error for the prosecutor to create, in oral argument, a "scenario" of each of the crimes committed by the defendant. We again stated the rule that attorneys are allowed to argue all reasonable inferences drawn from the facts and held that "there was sufficient evidence from which the prosecutor's scenarios of how each murder was committed could reasonably be inferred." *State v. Kirkley*, 308 N.C. 196, 212, 302 S.E.2d 144, 153 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). The same is true in the present case with regard to what may have occurred when Paul discovered the dead bodies of his grandparents.

The evidence showed that when the Davises' daughter, Ruth Davis Blanton, arrived at the house with her children, seven-year-old Paul entered the house ahead of her as she began to unload certain items from the car. Moments later, Paul ran from the house "screaming that everybody was dead." Mrs. Blanton then went into the house to retrieve the two-year-old, who was standing near the clearly visible body of Mrs. Davis, which was on the floor surrounded by blood. By the time Mrs. Blanton exited the house, Paul was in her car crying. Mrs. Blanton testified that her son was terrified and very upset.

Although the prosecutor's portrayal and characterization of Paul's reaction that day is too lengthy to fully reproduce here, we have reviewed the record and find that the argument was a reasonable description of what may have taken place that day when Paul entered the house. Paul was a seven-year-old child going to visit the home of his grandparents. Despite the absence of evidence of Paul's personal relationship and feelings toward his grandparents, the prosecutor's emphasis on the inherent tragedy of the episode and Paul's reaction were a reasonable extrapolation of what may have been the thoughts and actions of such a boy upon encountering

such a grisly scene. "Prosecutorial arguments 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." *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), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). It cannot be said that this argument was unsupported by the evidence or by any facts or circumstances permitting such an inference. Defendant's assignment of error on these grounds is overruled.

[13] In his next assignment of error with regard to the prosecutor's sentencing phase argument, defendant contends that references to the Willises as "victims . . . in this case" was improper because such a reference constituted use of evidence of the Willises' deaths in a manner that exceeded the purposes for which that evidence was admitted at trial.

The Willis murders, which occurred six weeks after the Davis murders, were admitted in the guilt/innocence phase of the trial for the purpose of showing defendant's state of mind, identity, and plan during the Davis murders. In the sentencing phase, however, the Willis murders became relevant with regard to other issues, including (1) defendant's depravity of mind at the time of and following the Davis murders, which was relevant for the purpose of demonstrating that the Davis murders were especially heinous, atrocious, or cruel; and (2) the aggravating circumstance that the Davis murders were part of a course of conduct that included crimes of violence against others. *See State v. Cummings*, 332 N.C. 487, 422 S.E.2d 692 (1992) (similarity of murders warrants submission of the course of conduct aggravating circumstance despite murders being twenty-six months apart). In addition, we note that the prosecutor did not specifically argue that the Willises were "victims . . . in this case" but, instead, recalled that Mr. Willis "laid a lick on the head of [defendant]" and said, "thank goodness for that. At least the victims got a lick in somewhere in this case."

Defendant acknowledges that this Court has held that if "evidence of the other deaths was properly admitted as components of the [S]tate's case, it was not error for the district attorney to refer to them in his argument before the jury." *State v. Barfield*,

298 N.C. 306, 330, 259 S.E.2d 510, 530 (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 contends, however, that by referring to the Willises in such a manner in his sentencing argument, the prosecutor somehow went beyond the limits of what may fairly be asserted in his sentencing phase arguments. We disagree.

The prosecutor's brief reference to the Willises as "victims," taken in context, cannot be said to be misleading, prejudicial, or likely to cause the jury to return an improper sentencing recommendation against defendant for the murder of the Davises. We hold that the trial court properly overruled defendant's objections to this portion of the argument, and defendant's assignment of error on these grounds is likewise overruled.

[14] In his next assignment of error with regard to the prosecutor's sentencing phase argument, defendant alleges that the prosecutor improperly injected his own religious beliefs into the argument by making such comments, over defendant's objections, as:

> MR. LEONARD: I'm going to go back to Polk County, if the Lord will let me live long enough to get there. I'm going back to Polk County and I'm going to lay my head down on my pillow tonight and I'm going to sleep a good sleep, I believe and hope. And when I lay my head down on that pillow, I'm going to say, Lord, I did my best.
>
> MR. BURWELL: Objection.
>
> THE COURT: Overruled.
>
> MR. LEONARD: I did everything I could do. I did everything I could do, and I hope I'll get a good night's sleep. See, that's my privilege. That's the luxury that I have right now because I've had my say. I've done everything I can do for the citizens of the state, the citizens of this county, the other counties and people affected. I've done everything I can do for these folks. I've done all I can do for you.
>
> MR. BURWELL: Objection.
>
> THE COURT: Overruled.
>
> MR. LEONARD: I've done all I can do. And I'll lay my head down on my pillow and when I say my prayers, that's what I'll say to the Lord and I'll have a good conscience about

> it. I'm fortunate, though, because I'm about to sit down and leave you to these gentlemen and then submit you to your obligations as jurors.
>
> When you go to bed tonight or tomorrow night, whenever it is, you do back in that jury room what you think you need to do and what you think will enable you to lay your head down on your pillow and your bed in your home here in Cleveland County and to feel satisfied that what you did was just, was justice. Coming back to justice. That's what we've wanted you to do all the way along. You've done justice all along. And as I say, we're simply asking that you extend justice to its logical conclusion.

Defendant contends that this argument amounted to an improper appeal to the jurors' religious beliefs inasmuch as it was an implication that only a sentence of death would allow them to be at peace with the Lord at the conclusion of their role in the case. As such, defendant contends, the argument violated the prohibition against the improper invocation of religious beliefs in jury argument.

This Court has in the past disapproved of prosecutorial arguments that made improper use of religious sentiment. *See, e.g., State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20 (1984) (argument that the power of public officials is ordained by God and to resist them is to resist God disapproved); *State v. Oliver*, 309 N.C. 326, 359, 307 S.E.2d 304, 326 (1983) (indicating the impropriety in arguing that the death penalty is divinely inspired). On the other hand, "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." *Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500.

The complained-of argument may more properly be characterized as a request that the jury fulfill its duty to render a verdict in accordance with the dictates of justice and was not a direct appeal by the prosecutor to take religion into account when considering the sentence. The argument does not contain the extensive references to religion, including copious readings from the Bible urging that murderers be put to death, against which we have cautioned in the past. *See, e.g., id.* (amalgamation of biblical language and statutory citation swings close to impropriety of saying the law of the State

codifies divine law). Defendant's assignment of error on these grounds is overruled.

[15] In his next assignment of error with regard to the prosecutor's sentencing argument, defendant contends that it was error for the prosecutor to argue that defendant "authored and wrote his own death warrant. We're simply asking that you affix your signature as jurors and representatives of the citizens of Cleveland County." Defendant contends that this argument improperly diminished the jury's sense of responsibility with regard to its sentencing determination. *See Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985).

In *Caldwell v. Mississippi*, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L. Ed. 2d at 239. We do not believe that this portion of the argument led the jury to believe that it was not responsible for determining the appropriateness of defendant's sentence. The argument, taken in context, is more properly viewed as having the opposite effect: requesting the jurors to affix their signatures to the verdict served to remind them that it was they who would decide the propriety of defendant's punishment for crimes committed by him. Defendant's assignment of error on these grounds is overruled.

In defendant's final contention with regard to the prosecutor's sentencing argument, he contends that the cumulative effect of each of these alleged errors warrants a new trial. Again, we disagree. Defendant's contentions, taken alone or cumulatively, are not sufficient to warrant the reversal of the outcome of his sentencing hearing. Defendant's assignments of error with regard to the prosecutor's argument are overruled.

[16] In his next assignment of error, defendant contends that he is entitled to a new sentencing hearing because the prosecutor improperly commented upon the possibility of parole during the sentencing phase.

The following exchange occurred at trial:

> [MR. BURWELL:] I submit to you it's a hard question as to which is worse. If you kill him. It's quick. It's over. If

you give him a life sentence, he spends the rest of his life down there thinking about it.

MR LEONARD: Objection, Your Honor please. The implication he will be there for the rest of his life.

MR. BURWELL: Objection.

MR. LEONARD: State versus Ross, 311 North Carolina 408—

MR. BURWELL: Your Honor—

MR. LEONARD: —Improper argument.

MR. BURWELL: Your Honor—

THE COURT: Wait just a minute. Overruled.

MR. BURWELL: Can the jury be instructed not to—

THE COURT: Overruled. Continue with your argument.

Defendant contends that because the trial court did not give a cautionary instruction with regard to the prosecutor's comment, the jury was left with the impression that defendant might be paroled if given a life sentence, thus improperly introducing the issue of parole into the sentencing proceedings. It is true that "a criminal defendant's status under the parole laws is irrelevant to a sentencing determination and, as such, cannot be considered by the jury during sentencing, whether in a capital sentencing proceeding under N.C.G.S. § 15A-2000 or in an ordinary case." *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Accordingly, it was improper for the prosecutor to raise, by implication, the possibility of defendant's parole if he had been given a life sentence. We do not find it necessary, however, to examine the effect of the trial court's overruling of the prosecutor's objection, as the issue of whether it was improper for defense counsel to argue as he did is not the issue before the Court. Instead, we look to the impact of the uncorrected statement of the prosecutor made during the course of his objection.

In order for an improper prosecutorial comment to warrant a new trial, the comment must have amounted to prejudicial error. *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (1994); *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992); *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977). In the context

of an improper prosecutorial comment, properly objected to, which does not implicate a specifically guaranteed constitutional right, the standard of review for prejudice is whether the defendant has shown that there is a reasonable possibility that had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988).

In the present case, defendant has not met this burden. The comment was relatively innocuous and came as part of the prosecutor's objection to what was arguably an improper statement made by defendant's counsel. *See State v. Boyd*, 311 N.C. 408, 425 n.1, 319 S.E.2d 189, 201 n.1 (1984) (disapproving of defense counsel's attempt to inform the jury that defendant would spend the rest of his life in prison if life sentence imposed), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985). The trial court overruled the State's objection, and defense counsel was allowed to proceed with his argument. The remark did not amount to prejudicial error; accordingly, defendant's assignment of error on these grounds is overruled.

Defendant further argues that, as a result of the prosecutor's comment, he was entitled to have the trial court instruct the jury on the meaning of a life sentence. We disagree. Such an instruction is warranted if the jury inquires about the meaning of a life sentence or the eligibility of defendant for parole. "We have not held that the jury is to be so instructed in the absence of such inquiry." *State v. Robinson*, 336 N.C. 78, 124, 443 S.E.2d 306, 329. The trial court properly declined to instruct the jury as to the meaning of a life sentence; accordingly, defendant's assignment of error on these grounds is overruled.

PROPORTIONALITY REVIEW

[17] We have reviewed the guilt-innocence phase and the sentencing phase of defendant's trial and have found no error. It is now the duty of this Court to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988).

The following aggravating circumstances were submitted to the jury with regard to the murder of Mr. William Fred Davis:

> (1) Was the murder of William Fred Davis especially heinous, atrocious or cruel? [N.C.G.S. § 15A-2000(e)(9) (1988).]
>
> . . . .
>
> (2) Was the murder of William Fred Davis part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the Defendant of other crimes of violence against another person or persons? [N.C.G.S. § 15A-2000(e)(11) (1988).]

The jury responded "yes" to each of these inquiries, thus indicating that it found each of the aggravating circumstances to exist.

The following aggravating circumstance was submitted to the jury with regard to the murder of Mrs. Margaret Davis:

> (1) Was the murder of Margaret Davis part of a course of conduct in which the Defendant engaged and did that course of conduct include the commission by the Defendant of other crimes of violence against another person or persons? [N.C.G.S. § 15A-2000(e)(11).]

The jury answered "yes" to this inquiry as well, indicating that it found the existence of this aggravating circumstance.

After a review of the record, transcripts, briefs, and oral argument of counsel, we conclude that the evidence supports the jury's finding of each of these aggravating circumstances. In addition, we conclude that the sentence of death was not imposed by the jury while under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, we undertake our final task in the review of the sentence imposed, and that is to engage in a review of the proportionality of the sentence. *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 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. McHone*, 334 N.C. 627, 646, 435 S.E.2d 296, 307 (1993) (quoting *Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829), *cert. denied*, --- U.S. ---, 128 L. Ed. 2d 220 (1994).

"The purpose of [proportionality] review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In so doing, proportionality review serves as "a check against the capricious or random imposition of the death penalty." *Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544.

This Court has thus far determined the sentence of death to be disproportionate in seven cases: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds 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).

In only two of those cases, *State v. Rogers* and *State v. Bondurant*, did the jury find that the murder was committed as part of a course of conduct including the commission of other crimes of violence against others, the aggravating circumstance found for the murders of both Mr. and Mrs. Davis. *Rogers*, 316 N.C. at 234, 341 S.E.2d at 731; *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170.

In *Rogers*, the event upon which the aggravating circumstance was based was the firing of a pistol at the victim's companion in the moments immediately following the shooting of the victim. These facts stand in stark contrast to the accompanying crimes of violence in the present case; we perceive a marked and significant difference between the consecutive bludgeoning of two elderly persons in their home and the firing of a pistol at a man standing outside of a nightclub, as was the case in *Rogers*. In addition, the facts surrounding the murder in *Rogers* militate against a comparison between the two cases. In that case, there was evidence of previous ill will including physical threats between one of the defendants and the victim's companion. There was testimony that the victim had been carrying a weapon of his own a few hours prior to the killing and that he had been " 'acting wild.' " *Rogers*, 316 N.C. at 212, 341 S.E.2d at 719. Finally, the defendants' testimony in *Rogers* was that the victim had fired the first shot.

In *State v. Bondurant*, the defendant inexplicably shot his friend in the head with a pistol after taunting the victim, saying, " 'You don't believe I'll shoot you, do you?' " *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. Immediately after shooting the victim, however, defendant directed that the victim be taken to the hospital and accompanied him there. While at the hospital, defendant spoke with police officers about the incident. In *Bondurant*, we held that the sentence of death did " 'not rise to the level of those murders in which we have approved the death sentence upon proportionality review.' " *Id.* at 693, 309 S.E.2d at 182 (quoting *State v. Jackson*, 309 N.C. at 46, 305 S.E.2d at 717). We noted that defendant did not kill the victim in the perpetration of another felony, that he did not coldly calculate the commission of the crime for a long period of time, and that it was not a torturous murder. *Id.* In addition, we found it important that "immediately after he shot the victim, [defendant] 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. The aspect of the case that supported the finding of the aggravating circumstance was apparently the fact that after shooting the victim, Bondurant "pointed the gun at [a witness] for 'two or three minutes' and asked him what he would say when they got to the hospital." *Id.* at 677, 309 S.E.2d at 173.

It is thus clear that these cases involve entirely different sorts of killings. It is fair and easy to say that the brutal and apparently unprovoked beating to death of the Davises reflects a far more egregious set of circumstances than those present in *Rogers* and *Bondurant*, or in any of the cases in which this Court has held the death penalty to be disproportionate. We find no noteworthy similarities between those cases and the present case that are advantageous to defendant.

Defendant contends that the sentence of death should be set aside because his victims were taken completely by surprise and were killed instantly. Even if we were to subscribe to the truth of this disputed assertion, when considered with the undisputed facts of this case, we find it an insufficient basis upon which to conclude that the sentence of death is disproportionate.

Defendant further contends that the sentence of death is disproportionate because of the substantial evidence of his insanity at the time of the murders. We do not adhere to the point of

view taken by defendant on this point. The jury specifically rejected the four statutory mitigating circumstances submitted to it: that "Defendant has no significant history of prior criminal activity," *see* N.C.G.S. § 15A-2000(f)(1) (1988); that the "murder was committed while the [D]efendant was under the influence of mental or emotional disturbance," *see* N.C.G.S. § 15A-2000(f)(2) (1988); that "the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," *see* N.C.G.S. § 15A-2000(f)(6) (1988); and the catchall circumstance, *see* N.C.G.S. § 15A-2000(f)(9) (1988). Of the remaining ten nonstatutory mitigating circumstances submitted, the jury found the existence of six.[1]

Simply put, the facts show a brutal murder of an elderly couple committed without provocation and for no apparent motive other than defendant's pleasure in committing the crimes. There is nothing about this case, including defendant's troubled upbringing, that leads us to the conclusion that the sentence of death is dispropor-

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1. The jury found the following nonstatutory mitigating circumstances with regard to the killing of William Fred Davis:

> (6) Whether Phillip Ingle confessed to law enforcement officers that he killed Margaret and Fred Davis?
>
> . . . .
>
> (7) Whether Phillip Ingle as a child saw his mother try to kill herself on at least one occassion [sic] by cutting her wrist?
>
> . . . .
>
> (8) Whether Phillip Ingle as a child saw his mother overdose on drugs on at least one occassion [sic]?
>
> . . . .
>
> (9) Whether Phillip Ingle as a child tried to hang himself on at least one occassion [sic]?
>
> . . . .
>
> (10) Whether Phillip Ingle as a young man attempted to commit suicide by shooting himself?
>
> . . . .
>
> (12) Whether Phillip Ingle has two daughters ages 9 and 2?

The jury found the same mitigating circumstances to exist with regard to the killing of Margaret Davis.

tionate. We have affirmed the death penalty in many cases where the defendant's background consisted of similar hardship. *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (evidence of severe and traumatic experiences as a child; grandfather committed suicide in his presence; indications of cocaine-induced psychosis), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (parents were violent and constantly drunk, beat their children frequently; evidence that defendant had a mental disorder and unstable personality as a result of experiences during formative years).

The facts of this case speak for themselves: Defendant crept into the victims' home and suddenly engaged in an incomprehensible, savage, and senseless bludgeoning with an axe handle. After he had beaten Mrs. Davis, defendant moved to the next room and similarly beat Mr. Davis to death. Upon the completion of these tasks, defendant discarded the axe handle and attempted to dispose of other items taken from the home. He later announced his deeds to an acquaintance and offered to "take care of" a troublesome neighbor and "kill his whole family."

The jury refused to attribute defendant's actions to an inability to appreciate the nature and quality of his actions at the time of the killings. The jury likewise declined to find as mitigation that defendant suffered from mental disturbance at the time of the killings. We hold that the sentence of death in this case is not disproportionate and decline to set aside the death penalty imposed.

In summary, we have carefully reviewed the transcript of this trial and sentencing proceeding as well as the record, briefs, and oral arguments of counsel. We have addressed all of defendant's assignments of error and conclude that defendant received a fair trial and capital sentencing proceeding free from prejudicial error. The convictions and the aggravating circumstances are supported by the evidence. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor and is not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.; MCDOWELL COUNTY; MICHAEL F. EASLEY, ATTORNEY GENERAL; AND PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.

No. 410PA93

(Filed 29 July 1994)

1. Utilities § 27 (NCI4th)— natural gas—expansion fund—Commission's discretion

The Utilities Commission did not act under a misapprehension of applicable law and acted pursuant to a proper interpretation of its authority and discretion under N.C.G.S. § 62-158 when it granted a petition to establish a natural gas expansion fund financed by supplier refunds to local distribution companies for the purpose of facilitating the expansion of natural gas service to areas where it would not otherwise be feasible. Although the Carolina Utility Customers Association (CUCA) contends that the word "may" in the statute indicates that the legislature intended the Commission to exercise more than "limited discretion" in determining whether to authorize establishment of the fund, the terms of the statute itself clearly indicate that there are certain limitations on the Commission's authority. The General Assembly has clearly stated that it is the policy of the state "[t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare," and the Commission is not free to exercise its discretion with regard to whether, in a general sense, this policy is wise or unwise.

Am Jur 2d, Public Utilities §§ 235 et seq.

2. Utilities § 27 (NCI4th)— natural gas expansion fund—creation—findings—benefit to service areas

A review of the record as a whole in a Utilities Commission proceeding which established a natural gas expansion fund reveals that there is substantial evidence to support the Commission's findings concerning the economic development prospects for Public Service Company's franchised but unserviced areas and the potential benefits to existing customers in unserviced areas. Although CUCA contends that economic development cannot be predicted with certainty and that bare

expressions of opinion are not sufficient, the Commission heard testimony from numerous witnesses who were knowledgeable about the economic impact of natural gas facilities on local economies; their testimony was in turn supported by written reports and studies of the matter; and these studies are replete with empirical data that demonstrates the benefits of the extension of natural gas facilities to the unserved areas at issue.

Am Jur 2d, Public Utilities §§ 235 et seq.

3. **Utilities § 27 (NCI4th)— natural gas expansion fund—creation—findings—public interest**

The Utilities Commission did not err in entering an order establishing a natural gas expansion fund where CUCA contended that the Commission lacked evidentiary support for the decision to create the fund and for the level of initial funding for the fund. The General Assembly has already determined that it is the policy of this state to facilitate the construction of facilities in and the extension of natural gas service to unserved areas and the Commission was without authority to reconsider this policy decision.

Am Jur 2d, Public Utilities §§ 235 et seq.

4. **Utilities § 286 (NCI4th)— natural gas expansion fund—creation—findings—summary and rejection of argument**

The Utilities Commission did not err in an order establishing a natural gas expansion fund by not including a summary of CUCA's argument and the Commission's rejection of that argument. CUCA's argument engrafts a requirement upon N.C.G.S. § 62-79 that does not exist.

Am Jur 2d, Public Utilities §§ 273 et seq.

5. **Utilities § 286 (NCI4th)— natural gas expansion fund—creation—findings—amount of initial funding**

The Utilities Commission did not err in an order establishing a natural gas expansion fund by not including a summary and rejection of CUCA's arguments concerning the amount of the fund or the amount of initial funding, which appears to have been reasonable and in accordance with the policy and intent of the natural gas expansion legislation. N.C.G.S. § 62-158(c).

Am Jur 2d, Public Utilities §§ 273 et seq.

6. Utilities § 210 (NCI4th)-- Utilities Commission—constitutionality of statute—authority to determine

The Utilities Commission did not have the authority to determine the constitutionality of N.C.G.S. § 62-2(9) or N.C.G.S. § 62-158 and properly declined to do so. Although N.C.G.S. § 62-60 provides that the Commission shall be deemed to exercise functions judicial in nature for certain purposes, as an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments.

Am Jur 2d, Public Utilities §§ 264 et seq.

7. Constitutional Law § 34 (NCI4th)— Utilities Commission—establishment of natural gas expansion fund—not unconstitutional delegation of authority

The natural gas expansion fund legislation is a proper delegation of legislative authority to an administrative agency because there are extensive procedural safeguards designed to ensure that the Utilities Commission carries out the expansion of natural gas facilities in a way that is consistent with the intent of the legislature and in furtherance of stated policies. This delegation of authority to the Commission meets the criteria outlined in *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683.

Am Jur 2d, Constitutional Law § 339.

8. Constitutional Law § 135 (NCI4th)— natural gas expansion fund—not an exclusive emolument

Legislation creating a natural gas expansion fund did not confer an exclusive emolument or privilege in violation of Article I, Section 32 of the North Carolina Constitution where, although residents of unserved areas would receive more benefit than other members of the public from the extension of natural gas service to their areas, the General Assembly clearly stated that the purpose of natural gas expansion is to "promote the public welfare throughout the State" and it is not difficult to see how the legislature could have concluded that expansion of natural gas facilities into previously unserved areas would be in the public interest.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 128-138, 193 et seq.

9. Constitutional Law § 49 (NCI4th)— natural gas expansion fund—funding with supplier refunds—taking without compensation—due process—standing

CUCA's contention that the Commission's transfer of supplier refunds to a natural gas expansion fund pursuant to N.C.G.S. § 62-158 amounts to an unconstitutional taking and a violation of due process was overruled because neither CUCA nor its members have an interest in the refunds sufficient to entitle them to constitutional protection from legislative action impacting upon the refunds. The very existence of supplier refunds is dependent upon the actions and rulings of the FERC and, should refunds to local distribution suppliers be mandated by FERC order, the Utilities Commission determines the eventual fate of these supplier refunds. Despite the fact that it has been the practice of the Commission to remit supplier refunds to customers of local distribution companies, past history is not determinative; until the Commission makes a decision to remit these supplier refunds to LDC customers, the interest of these customers in the refunds is nothing more than a mere expectation of receiving them.

Am Jur 2d, Constitutional Law § 190.

10. Constitutional Law § 90 (NCI4th)— natural gas expansion fund—funding with supplier refunds—equal protection—no violation

N.C.G.S. § 62-158 clearly bears a sufficient relationship to the legitimate goal of expanding natural gas facilities to unserved areas of the state to withstand a challenge that it violates the Equal Protection Clauses of the United States and North Carolina Constitutions. Expansion of natural gas facilities to unserved areas of the state is undoubtedly a legitimate governmental objective and, although CUCA contends that the use of supplier refunds means that the burden of financing the expansion fund is imposed only on existing customers while the economic benefits accrue to all North Carolina citizens, the legislation directs that the refunds be applied for a purpose that the General Assembly has determined to be for the benefit of the citizens of North Carolina, including both existing and future ratepayers.

Am Jur 2d, Constitutional Law §§ 748-751.

11. Constitutional Law § 28 (NCI4th)— natural gas expansion fund—supplier refunds—not a tax

The use of supplier refunds in establishing a natural gas expansion fund does not constitute a tax that violates the requirements of Article V, Section 2 of the North Carolina Constitution because the monies making up the supplier refunds consist of payments made pursuant to rates set by the Commission in accordance with statutorily controlled standards and the capture of the refunds is not a charge levied upon the general citizenry for the general maintenance of the government. Additionally, unless the Commission makes the decision to order the refunds to be distributed to utilities customers, the utilities customers have no property interest in the refunds and the allocation of the refunds to the expansion fund does not amount to an unconstitutional tax.

Am Jur 2d, State and Local Taxation §§ 1-9.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of an order of the North Carolina Utilities Commission establishing a natural gas expansion fund for Public Service Company of North Carolina and approving initial funding of the expansion fund pursuant to N.C.G.S. § 62-158 entered 3 June 1993 in Docket No. G-5, Sub 300. Heard in the Supreme Court 1 February 1994.

Tharrington, Smith & Hargrove, by Wade H. Hargrove, William A. Davis, II, and Marcus W. Trathen, for applicant-appellee Public Service Co.

Michael F. Easley, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, and Karen E. Long, Assistant Attorney General, for intervenor-appellee Attorney General.

Robert P. Gruber, Executive Director, Public Staff, by Gisele L. Rankin, Staff Attorney, for intervenor-appellee Public Staff; and Hunter and Evans, P.A., by Robert C. Hunter, for intervenor-appellee McDowell County.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant Carolina Utility Customers Assoc., Inc. (CUCA).

MEYER, Justice.

In this case we decide, *inter alia*, the constitutionality of that portion of N.C.G.S. § 62-158 which authorizes the Utilities Commission to order a North Carolina natural gas local distribution company to create a natural gas expansion fund and which authorizes the Commission to use supplier refunds to such local distribution companies to fund the expansion fund. We also determine whether the North Carolina Utilities Commission ("the Commission") properly ordered the creation and funding of a natural gas expansion fund by Public Service Company of North Carolina pursuant to that statute. We hold that the statute is constitutional and that the Commission properly ordered the creation of the expansion fund and the funding thereof by supplier refunds.

In 1991, the General Assembly enacted two statutory sections for the purpose of facilitating the expansion of natural gas service to areas of the state where it would otherwise be economically infeasible to provide such service. The first of these is N.C.G.S. § 62-2(9), which states that it is the policy of the state

> [t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of an expansion fund for each natural gas local distribution company to be administered under the supervision of the North Carolina Utilities Commission.

N.C.G.S. § 62-2(9) (Supp. 1991). The second is N.C.G.S. § 62-158, which provides:

> (a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company's franchised territory that otherwise would not be feasible for the company to construct. . . .
>
> (b) Sources of funding for a natural gas local distribution company's expansion fund may, pursuant to the order of the Commission, after hearing, include:

(1) Refunds to a local distribution company from the company's suppliers of natural gas and transportation services pursuant to refund orders or requirements of the Federal Energy Regulatory Commission;

(2) Expansion surcharges by the local distribution company charged to customers purchasing natural gas . . . ; and

(3) Other sources of funding approved by the Commission.

N.C.G.S. § 62-158 (Supp. 1991).

The refunds referred to in N.C.G.S. § 62-158(b)(1) are due to excessive rates charged on an interim basis to local distribution companies by their interstate pipeline suppliers subject to a later refund. When the Federal Energy Regulatory Commission ("FERC") establishes wholesale rates for natural gas, any excess amounts already paid by the local distribution companies to their interstate suppliers are subject to refund to the local companies pursuant to FERC order.

Public Service Company is a local distribution company ("LDC") within the meaning of N.C.G.S. § 62-158. On 22 May 1992, Public Service Company filed a petition to authorize establishment of an expansion fund with the North Carolina Utilities Commission. With this petition, Public Service Company requested that the Commission order the establishment of a natural gas expansion fund and approve the deposit of supplier refunds into the fund.[1] On 3 June

1. By its petition to authorize establishment of expansion fund dated 22 May 1992, Public Service Company sought approval to deposit a supplier refund in the amount of $5.8 million received in February 1992 into the expansion fund, plus previous supplier refunds amounting to approximately $150,000 received pursuant to FERC Docket No. RP 88-68 *et al.* ("Supplier Refund RP 88-68"). Public Service Company anticipated continuing payments of approximately $20,000 per month in connection with Supplier Refund RP 88-68.

In a supplemental request for approval of funding dated 11 September 1992, Public Service Company reported that the amount of the February 1992 refund was now $5,925,000 with interest and reported that Supplier Refund RP 88-68 now totaled $257,000 and that Public Service Company remained in anticipation of continuing refunds in the amount of $20,000 per month.

In this supplemental request, Public Service Company noted that the February 1992 refund was subject to appeal and suggested that "if this money is applied to the expansion fund, it should be maintained in a separate sub-account until this contingency is resolved." Also in this supplemental request, Public Service Company requested the transfer of another supplier refund in the amount of $4,288,946, received on 7 August 1992, into the fund, as well as a producer settlement payment of $51,526. The 7 August 1992 refund was no longer subject to appeal.

1993, the Commission entered an order establishing an expansion fund for Public Service Company and directed Public Service Company to transfer certain supplier refunds to the Commission for deposit into the fund.[2]

Carolina Utility Customers Association ("CUCA") is an organization of utilities customers that frequently intervenes and participates in proceedings before the Commission. CUCA opposed the order in part because it wanted the supplier refunds that were used to fund the expansion fund to be returned to the customers of Public Service Company. As the Commission stated in its order:

> This Commission's practice has been to return such supplier refunds to customers consistent with the authority granted the Commission by G.S. 62-136(c). The Commission would have done so here but for the provisions of G.S. 62-158.

CUCA appeals the order of the Commission establishing the expansion fund, approving the level of initial funding for the fund, and ordering the transfer of the supplier refunds for deposit into the fund.

In this appeal of the Commission's order, CUCA challenges the procedures used by the Commission in the implementation of N.C.G.S. § 62-158 and challenges the validity of N.C.G.S. § 62-158 on numerous constitutional grounds. We shall first address CUCA's contentions that the Commission erred in its interpretation and implementation of the legislation at issue.

[1] In its first assignment of error, CUCA contends that the Commission misapprehended the scope of its discretion under N.C.G.S. § 62-158 in making the decision to grant or deny Public Service Company's petition. As the Commission stated in its order, "[o]nce we have found unserved areas that are otherwise infeasible to serve, . . . the General Assembly intends for the Commission to exercise limited discretion as to whether a fund should be created for that particular natural gas utility." CUCA argues that the Com-

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2. In this order, the Commission directed the "transfer to the Commission for deposit in Public Service's expansion fund the sum of $4,774,840 as calculated in Hoard Exhibit 1, plus the additional monthly supplier refunds since calculation of Hoard Exhibit 1 and through July 1994," plus applicable interest. Hoard Exhibit 1 indicates that the sum of $4,774,840 is composed of (1) the 7 August 1992 supplier refund, $4,288,946; (2) the producer settlement payment of $51,526; (3) Supplier Refund RP 88-68 as increased by subsequent monthly refunds to a total of $357,333; and (4) accrued interest in the amount of $77,035.

mission in fact had wide discretion to determine whether to authorize the establishment of an expansion fund for any particular LDC and that the Commission's refusal to exercise its full discretion caused its failure to address CUCA's legal and factual position. Furthermore, CUCA contends that the order should be reversed because it constitutes a Commission decision based upon a misinterpretation of applicable law. *See State ex rel. Utilities Commission v. Haywood Electric Membership Corporation*, 260 N.C. 59, 69, 131 S.E.2d 865, 871-72 (1963).

CUCA bases its argument on that portion of N.C.G.S. § 62-158(a) that reads as follows:

> (a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission *may*, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities . . . .

N.C.G.S. § 62-158(a) (emphasis added). CUCA contends that the word "may" as contained in the statute is to be viewed in the permissive sense and indicates that the legislature intended that the Commission exercise more than "limited discretion" in determining, in light of all the surrounding facts and circumstances, whether authorizing the establishment of an expansion fund is appropriate.

Even if we adopt CUCA's interpretation of the Commission's authority, the record does not indicate that the Commission viewed itself as without discretion to grant or deny the petition. The Commission in fact stated that it was to exercise "limited discretion," as opposed to no discretion whatsoever.

The Commission held a hearing on the matter and received testimony from numerous witnesses who were either in favor of or opposed to the creation of the expansion fund. After doing so, the Commission issued an order that included extensive findings of fact. The Commission concluded that "the creation of an expansion fund for the Company is in the public interest."

In addition, the terms of the statute itself clearly indicate that there are certain limitations on the Commission's authority to order the creation of an expansion fund. N.C.G.S. § 62-158 limits the creation of expansion funds for the construction of natural

gas facilities to unserved areas in which it would otherwise be economically infeasible for the LDC to extend natural gas lines. In order to implement this statute, the Commission adopted Commission Rule R6-82, which requires that an LDC show "that there are unserved areas in the LDC's franchised territory and that expansion of natural gas facilities to such areas is economically infeasible." N.C. Utilities Commission, *North Carolina Public Laws and Regulations*, Rule R6-82(b) (1993 ed.) (Michie 1994) [hereinafter "Commission Rule"]. Such limitations are in keeping with the language of the enabling statute, N.C.G.S. § 62-158. In addition, Rule R6-82(d) states:

> In determining the establishment of a Fund and the sources and magnitude of the initial funding, the Commission will consider the LDC's showing that expanding to serve unserved areas is economically infeasible and such other factors as the Commission deems reasonable and consistent with the intent of G.S. 62-158 and G.S. 62-2(9). Before ordering the establishment of a Fund, the Commission must find that it is in the public interest to do so.

Commission Rule R6-82(d). The plain language of this rule indicates that the Commission had a proper view of its discretion in making a determination of whether to authorize the creation of an expansion fund: It was to evaluate pertinent factors in a manner consistent with the legislative intent; if, after doing so, the Commission concluded that the creation of an expansion fund would not be in the public interest, it would presumably decline to order the creation of such a fund. Because the General Assembly has clearly stated that it is the policy of the state "[t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare," N.C.G.S. § 62-2(9), the Commission is not free to exercise its discretion with regard to whether, in a general sense, this policy is wise or unwise.

We hold that the Commission did not act under a misapprehension of applicable law and that it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so. CUCA's assignment of error on these grounds is overruled.

[2] In its next assignment of error, CUCA contends that the Commission's factual findings concerning the economic development prospects for Public Service Company's franchised but unserviced areas

lack evidentiary support. CUCA says the same for the Commission's factual findings concerning the potential benefits to existing customers in Public Service Company's unserviced areas.

The Commission found as fact that:

> 8. The General Assembly has made the policy decision that it is necessary and in the public interest to authorize special funding methods, including the use of supplier refunds and customer surcharges, to facilitate the construction of facilities and the extension of natural gas service into areas of the State where it may not be economically feasible to expand with traditional funding methods in order to provide infrastructure to aid industrial recruitment and economic development.
>
> 9. The establishment of an expansion fund for Public Service for the purpose of constructing transmission lines into unserved counties in its territory that are otherwise infeasible to serve in order to provide infrastructure to aid industrial recruitment and economic development is consistent with G.S. 62-158 and 62-2(9) and is in the public interest.
>
> 10. Expansion of natural gas facilities in the unserved areas by use of expansion funds can reasonably be expected to assist in the economic development of unserved areas in Public Service's franchised territory. The availability of natural gas service is an important factor in industrial recruitment. Economic development will in turn provide a larger tax base, more employment opportunities, and a better quality of life.

As support for these findings, the Commission recited the following evidence adduced at the hearing:

> Several witnesses addressed the issue of public interest in their testimony, and the Commission finds that this testimony bolsters the finding of public interest in this case. Mr. Dickey testified:
>
> > Expansion of natural gas service into these [unserved] areas will improve the chances for industrial development in portions of the State which presently are unable to attract certain gas-consuming industries. Industrial expansion will bring jobs, additional residential and commercial development, and increases in tax base to these counties.

> Mr. Abernathy and Mr. Harmon, based on their extensive experience in industrial development activities, testified that approximately one-third of all potential industries seeking to relocate list natural gas as a requirement. Mr. Edwards testified similarly. Mr. Glass testified that natural gas "means jobs, it means lower industrial costs, a better qualify [sic] of life for our citizens." He further stated, "In the past six years, we have greatly improved our educational system, dramatically enlarged our water distribution system, sought regional cooperation in other public services, such as solid waste and recycling. Natural gas is the missing link in the chain that will strengthen public services in our county." Similarly Mr. Birdsong testified that "natural gas is one of those items that is important when you're talking about economy growth." This testimony tends to show that expansion of natural gas facilities into unserved areas by use of expansion funds will assist in the economic development of unserved areas in Public Service's franchised territory.

CUCA contends that these bare expressions of opinion of various witnesses are not sufficient to support the Commission's finding that the introduction of natural gas facilities into the areas would "reasonably be expected to assist in the economic development of unserved areas." Accordingly, CUCA argues, the Commission's order fails to satisfy the requirements of N.C.G.S. § 62-65(a), which states in pertinent part that "no decision or order of the Commission shall be made or entered in any such proceeding unless the same is supported by competent material and substantial evidence upon consideration of the whole record." N.C.G.S. § 62-65(a) (1989). We hold that the Commission's findings on this matter are properly supported by the evidence.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comr. of Insurance v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). A review of the record indicates that the Commission heard testimony from numerous witnesses who were knowledgeable about the economic impact of natural gas facilities on local economies. Their testimony was in turn supported by written reports and studies of the matter, which were also presented to the Commission for its consideration. These studies are replete with empirical data that demonstrates the benefits of the extension of natural gas facilities to the unserved areas

at issue. Simply put, the Commission heard ample evidence adequate to support its finding that the introduction of natural gas facilities into the unserved areas at issue would assist in the economic development of those areas.

CUCA refers many times to the fact that economic development cannot be predicted with certainty. Notwithstanding this reality, a review of the record reveals that there is substantial evidence to support the findings of the Commission.

CUCA makes a similar argument with regard to the Commission's Finding of Fact No. 11, that "[c]ustomers on Public Service's system stand to benefit from the expansion to be made possible by the expansion fund. These benefits include increased throughput, which tends to reduce expenses per unit of gas sold." Again, we hold that the Commission's finding in this regard was supported by substantial evidence. In the portion of the order designated "Evidence and Conclusions for Findings of Fact Nos. 6-11," the Commission noted that Mr. Dickey

> testified that there is benefit to all gas customers to the extent that economic development does occur, in that it will tend to lower overall rates in the future (or moderate increases in rates that might otherwise occur) due to the spreading of fixed costs over larger volumes.

On the other hand, Mr. Dickey admitted that "we do not know as a fact what will happen because it's dependent upon whether industry and the associated residential and commercial development actually occurs in these counties."

In determining whether the record as a whole supports the findings of the Commission, we note that "[t]his Court's statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. We ask, instead, whether there is substantial evidence, in view of the entire record, to support the position the Commission *did* adopt." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E.2d 339, 347 (1987). A review of the record as a whole reveals that there is substantial evidence to support the findings of the Commission. We therefore affirm the decisions of the Commission with respect to these findings.

[3] In its next assignment of error, CUCA contends that the Commission erred in entering an order that lacked evidentiary support for what CUCA contends are the material issues in the matter,

the decision to create an expansion fund and the level of initial funding for the fund.

CUCA argued before the Commission that in order to determine whether the fund should be created, the Commission was required to engage in a weighing process in accordance with its own mandate that "[b]efore ordering the establishment of a Fund, the Commission must find that it is in the public interest to do so." Commission Rule R6-82(d). CUCA presented evidence and testimony before the Commission that demonstrated that it would be impossible to predict with any certainty whether the anticipated economic development expected as a result of the creation of the fund would occur. In addition, CUCA presented evidence designed to show that it would not occur. CUCA now contends that the Commission erred when it did not engage in a balancing process, or cost/benefit analysis, to determine whether the creation of an expansion fund in this case was in fact in the public interest. CUCA further contends that the Commission's order lacks the "summary of the appellant's argument and its rejection of the same," *State ex rel. Utilities Comm. v. Conservation Council of North America*, 312 N.C. 59, 62, 320 S.E.2d 679, 682 (1984), as required by N.C.G.S. § 62-79(a), and therefore must be reversed. We disagree.

CUCA's arguments in this regard can more properly be viewed as an attempt to have the Commission reanalyze the policy decisions made by the General Assembly in the enactment of N.C.G.S. § 62-158. The General Assembly has already determined that it is the policy of this state "[t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State." N.C.G.S. § 62-2(9). The Commission was without authority to reconsider this policy decision, and despite the fact that there was evidence that economic development was uncertain or would not occur, "[t]he Commission . . . is not required to comment on 'every single fact or item of evidence presented by the parties.' " *Eddleman*, 320 N.C. at 351, 358 S.E.2d at 345 (quoting *State ex rel. Utilities Comm. v. Nantahala Power and Light Co.*, 313 N.C. 614, 745, 332 S.E.2d 397, 474 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986)). It is furthermore not necessary that the Commission evaluate the evidence based upon CUCA's faulty interpretation of N.C.G.S. § 62-158, with which CUCA implies that the Commission is required to redetermine the economic values inherent in facilitating the construction of natural gas facilities in an unserved area, a

task already undertaken by the General Assembly. To the extent that the General Assembly has already done so, it has effectively declared that the establishment of an expansion fund is in the public interest.

[4] CUCA further contends that the Commission's order is deficient because it lacks a "summary of the appellant's argument and its rejection of the same." *State ex rel. Utilities Comm. v. Conservation Council of North Carolina*, 312 N.C. at 62, 320 S.E.2d at 682. By making this argument, CUCA engrafts a requirement upon N.C.G.S. § 62-79 that does not exist. All that is required under N.C.G.S. § 62-79 is that

> [a]ll 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). This statute does not require that an order of the Commission contain the "summary of the appellant's argument" referred to in *State ex rel. Utilities Comm. v. Conservation Council of North Carolina*, 312 N.C. 59, 320 S.E.2d 679,[3] if the order taken as a whole is "sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings" and contains the necessary findings of fact and conclusions of law, N.C.G.S. § 62-79(a). We hold that the order is sufficient to do so, and CUCA's assignment of error on these grounds is overruled.

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3. The portion of *State ex rel. Utilities Comm. v. Conservation Council of North Carolina* to which CUCA refers is the following: "The Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding. That is all that G.S. § 62-79(a) requires." 312 N.C. at 62, 320 S.E.2d at 682. We do not read this as *requiring* a summary and rejection of each argument before the Commission, but only as an indication that the manner in which the order was promulgated in that particular case was sufficient to enable the Court to properly engage in its review.

[5] CUCA makes a similar argument with regard to the amount of funding authorized for the expansion fund. CUCA's position before the Commission was that, if the expansion fund was to be established at all, the amount of initial funding should be nominal because Public Service Company had not formally proposed specific expansion projects. CUCA contends that the Commission could have rationally concluded that the insertion of a significant amount of money into the expansion fund would have been unduly burdensome to Public Service Company's existing ratepayers and that because the Commission's order lacks a summary of its argument, it is insufficient. Again, we decline to impose the requirement that Commission orders contain a summary and rejection of each argument presented before it. In addition, we hold that the Commission properly authorized the initial funding based upon its findings of the economic infeasibility of extending natural gas service to currently unserved areas.

In making the determination that the expansion of natural gas service to unserved areas is economically infeasible, the Commission is required to adhere to the requirements of N.C.G.S. § 62-158(c), which states that "[o]nly those projects with a negative net present value shall be determined to be economically infeasible for the company to construct." The Commission's own rules define net present value as "[t]he present value of expected future net cash inflows over the useful life of a Project minus the present value of net cash outflows." Commission Rule R6-81(b)(3). If the projected costs associated with a project are greater than the expected returns of the project, the project has a "negative net present value" and is economically infeasible for the company to construct. The record indicates that Public Service Company demonstrated that extension of natural gas service into its unserved areas had a negative net present value. The record also indicates that the Commission had before it documentation showing that the amount of initial funding requested was insufficient to fully offset this negative net present value. Thus, even if the entire amount of funds requested by Public Service Company was dedicated to the extension of natural gas service to the unserved areas in its franchised territory, the projects would nonetheless remain economically infeasible. The level of funding authorized by the Commission is less than what would be required for Public Service Company to "break even" on the construction of natural gas facilities in presently unserved areas. Accordingly, the amount of funding

authorized by the Commission appears to have been reasonable and in accordance with the policy and intent of the natural gas expansion legislation, and we see no reason to overturn the decision of the Commission on this point. CUCA's assignment of error on these grounds is overruled.

[6] In its next assignment of error, CUCA contends that the Commission erred when it determined that it did not have the authority to determine the constitutionality of N.C.G.S. § 62-158.[4] CUCA argues that the Commission has this authority pursuant to N.C.G.S. § 62-60, which provides:

> For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.

N.C.G.S. § 62-60 (1989). CUCA takes the position that this statute gives the Commission the authority to determine the constitutionality of the legislation at issue. We disagree.

We addressed this question in a similar context in *Great American Insurance Co. v. Gold*, 254 N.C. 168, 118 S.E.2d 792 (1961), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), where an insurance company sought a declaratory judgment in order to have the Fireman's Pension Fund created by the legislature declared unconstitutional. In that case, the Court asked the following pertinent question and answered it:

> Quaere: Does a quasi-judicial board of the executive branch of government have jurisdiction to pass upon the constitutionality of a statute? Administrative boards have only such authority as is properly conferred upon them by the Legislature. The question of constitutionality of a statute is for the judicial branch.

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4. In Finding of Fact No. 3, the Commission stated that "[t]he Commission has no authority to rule on CUCA's motion to dismiss the Petition in this proceeding on grounds that G.S. 62-158 is unconstitutional." In so finding, the Commission adhered to a ruling made pursuant to another expansion proceeding, Docket No. G-21, Subs 306 and 307.

Id. at 173, 118 S.E.2d at 796; *see also In re Appeals of Timber Cos.*, 98 N.C. App. 412, 415, 391 S.E.2d 503, 505 (1990) ("Property Tax Commission is without authority to rule on the constitutionality of [statute]"); *Johnston v. Gaston County*, 71 N.C. App. 707, 713, 323 S.E.2d 381, 384 (1984) ("constitutional claims will not be acted upon by administrative tribunals").

N.C.G.S. § 62-23 provides:

> The Commission is hereby declared to be an administrative board or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration . . . . In proceedings in which the Commission is exercising functions judicial in nature, it shall act in a judicial capacity as provided in G.S. 62-60.

N.C.G.S. § 62-23 (1989). Again, N.C.G.S. § 62-60 provides that, for certain purposes, "the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction *as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.*" (Emphasis added.) As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments. We hold that the Commission did not have the authority to determine the constitutionality of N.C.G.S. § 62-2(9) or N.C.G.S. § 62-158 and properly declined to do so.

[7] CUCA now seeks to have this Court determine that the legislation at issue here is unconstitutional.

CUCA's constitutional challenges to the legislation at issue concern the Commission's authority to create the expansion fund and the Commission's authority to order the use of supplier refunds to fund the expansion fund.

So that we may resolve CUCA's constitutional challenges in an orderly manner, we first address the contention that the creation of the expansion fund is an unconstitutional exercise of Commission authority.

In its first challenge to the Commission's authority to order the creation of an expansion fund, CUCA contends that the expan-

sion fund scheme is an unconstitutional delegation of legislative power to the Commission because the Commission is vested with too much discretionary power with regard to the decision to order the creation of an expansion fund. As CUCA concedes, however, "we have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978). "[T]he General Assembly cannot delegate a portion of its legislative power to subordinate agencies or units of government without accompanying such a delegation with adequate guiding standards to govern the exercise of the delegated power." *Northampton County Drainage District Number One v. Bailey*, 326 N.C. 742, 748, 392 S.E.2d 352, 356 (1990). The principal inquiry to be made in assessing the constitutionality of a grant of legislative authority is "to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." *Adams*, 295 N.C. at 697-98, 249 S.E.2d at 411 (quoting Peter G. Glenn, *The Coastal Management Act in the Courts: A Preliminary Analysis*, 53 N.C. L. Rev. 303, 315 (1974)). In undertaking such an analysis, this Court has listed certain factors to be considered. These include (1) "declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers," and (2) "whether the authority vested in the agency is subject to procedural safeguards." *Id.* at 698, 249 S.E.2d at 411.

After applying these principles to the case *sub judice*, we conclude that the expansion fund legislation at issue is a proper delegation of legislative authority to an administrative agency.

The General Assembly amended the declaration of policy section of Chapter 62 to state clearly that it is the policy of the state

> [t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of an expansion fund for each natural gas

> local distribution company to be administered under the supervision of the North Carolina Utilities Commission.

N.C.G.S. § 62-2(9). In addition, within the legislation itself, there are extensive procedural safeguards designed to ensure that the Commission carries out the expansion of natural gas facilities in a way that is consistent with the intent of the legislature and in furtherance of the stated policies. These safeguards specifically include a direction that "[t]he Commission shall ensure that all projects to which expansion funds are applied are consistent with the intent of this section and G.S. 62-2(9)." N.C.G.S. § 62-158(c). This portion of the statute goes on to direct that

> [i]n determining economic feasibility, the Commission shall employ the net present value method of analysis on a project specific basis. Only those projects with a negative net present value shall be determined to be economically infeasible for the company to construct. In no event shall the Commission authorize a distribution from the fund of an amount greater than the negative net present value of any proposed project as determined by the Commission. If at any time a project is determined by the Commission to have become economically feasible, the Commission may require the company to remit to the expansion fund or to customers appropriate portions of the distributions from the fund related to the project, and the Commission may order such funds to be returned with interest in a reasonable amount to be determined by the Commission. Utility plant acquired with expansion funds shall be included in the local distribution company's rate base at zero cost except to the extent such funds have been remitted by the company pursuant to order of the Commission.

N.C.G.S. § 62-158(c). The Commission is also directed to "report to the Joint Legislative Utility Review Committee on the operation of any expansion funds in conjunction with the reports required under G.S. 62-36A." N.C.G.S. § 62-158(d). We hold that this delegation of authority to the Commission meets the criteria outlined in *Adams*; accordingly, CUCA's assignment of error on these grounds is overruled.

[8] CUCA next contends that the legislation at issue violates that part of the North Carolina Constitution which provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration

of public services." N.C. Const. art. I, § 32. CUCA argues that the legislation creates a private benefit only for those residents of unserved areas, therefore constituting an exclusive emolument prohibited by our Constitution.

That residents of unserved areas would receive more benefit than other members of the public from the extension of natural gas service to their areas is not determinative of the question of whether the act constitutes exclusive or separate emoluments in violation of our Constitution. "[N]ot every classification which favors a particular group of persons is an 'exclusive or separate emolument or privilege' within the meaning of the constitutional prohibition." *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984). The prohibition against exclusive emoluments or privileges is not implicated when the enactment is intended for "the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the Legislature to conclude that the granting of the [benefit] would be in the public interest." *State v. Knight*, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967). In the present case, both of these requirements are met. The General Assembly clearly stated that the purpose of natural gas expansion is to "promote the public welfare throughout the State." N.C.G.S. § 62-2(9). In addition, it is not difficult to see how the legislature could have concluded that expansion of natural gas facilities into previously unserved areas would be in the public interest. As stated in the declaration of policy of the Public Utilities Act, "it has been determined that the rates, services and operations of public utilities . . . are affected with a public interest *and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government* of North Carolina is a matter of public policy." N.C.G.S. § 62-2 (emphasis added). We conclude, therefore, that the legislation at issue here does not confer an exclusive emolument or privilege in violation of Article I, Section 32 of the North Carolina Constitution.

[9] We now turn our attention to CUCA's contention that the use of supplier refunds as a source of funding of the natural gas expansion fund is violative of several provisions of the state and federal constitutions.

With regard to CUCA's constitutional challenges to the capture of supplier refunds, it first contends that the capture of supplier refunds for the purpose of funding the expansion fund con-

stitutes a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution.

CUCA further contends that the use of supplier refunds to fund the expansion of natural gas lines to unserved areas violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and, again, the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution. Because we hold that neither CUCA nor the companies represented by CUCA have a property interest in the refunds at issue, these contentions are rejected.

Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection. Where there is no property interest, there is no entitlement to constitutional protection. To have a property interest that is subject to procedural due process protection, the individual must be entitled to a benefit created and defined by a source independent of the Constitution, such as state law. *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990). The supplier refunds in the present case do not qualify as such a vested benefit.

> "A vested right, entitled to protection from legislation, must be something more than a *mere expectation* based upon an anticipated continuance of the existing law; *it must have become a title*, legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another.*"

Armstrong v. Armstrong, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (quoting *Godfrey v. State*, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975)).

In the present case, the very existence of supplier refunds is dependent upon the actions and rulings of the FERC. Should refunds to LDCs be mandated by FERC order, their subsequent distribution to the customers of the LDC then becomes a matter governed by N.C.G.S. § 62-136(c), which states in pertinent part:

> If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the

> company from which the distributing company obtains the energy, service or commodity distributed, the Commission may, in cases where the charges have been included in rates paid by the customers of the distributing company, require said distributing company to distribute said refund plus interest among the distributing company's customers in a manner prescribed by the Commission.

Accordingly, the Commission is to determine the eventual fate of these supplier refunds. Apart from the decision to direct the distribution of refunds to utilities customers, the Commission is authorized to apply refunds to other purposes, for instance, to legal fees and travel expenses incurred when it appears before federal or state courts on behalf of the users of public utility service. N.C.G.S. § 62-48(b) (1989). Presumably, the entire amount of supplier refunds could be so dedicated, leaving no surplus for distribution to LDC customers.

We also note that subsequent to the 1981 amendments to N.C.G.S. § 62-136(c), which governs the distribution of supplier refunds, "the Commission is now empowered to order the distribution of supplier refunds to either current *or* past customers, utilizing whatever method the Commission deems most appropriate." *State ex rel. Utilities Commission v. Public Service Co.*, 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983). In addition, it is no longer required that the refunds be returned to the customers in proportion to the charges paid by them. *Id.* Implicit in these rulings is the proposition that it makes no difference that a customer who receives a refund might not have paid any rates that composed the source of the refund. Accordingly, the existence of a property interest in the refunds has not been the basis of a Commission decision to order an LDC to distribute the refunds to its customers, and N.C.G.S. § 62-136(c) does not, by virtue of its existence, create anything more than a mere expectation that LDC customers will receive a refund distribution.

It is clear that customers of an LDC cannot know whether, when, or in what amount supplier refunds will be made to them pursuant to N.C.G.S. § 62-136(c). Despite the fact that it has been the practice of the Commission to remit supplier refunds to customers of local distribution companies, past history is not determinative of the question of the nature or existence of the customers' interest in the refunds. Until the Commission makes a decision to remit

these supplier refunds to LDC customers, the interest of these customers in the refunds is nothing more than a mere expectation of receiving them.

When viewed in the overall framework of utilities regulation, it becomes apparent that rights in the refunds at issue do not automatically vest in LDC customers in the event that they are created by FERC order. Instead, the refunds to the LDC come under the supervision of the Commission until such time as it makes a determination with regard to the disposition of the refunds. This remains true until the Commission, pursuant to N.C.G.S. § 62-136(c), makes the determination to create such rights on behalf of the customers. Until that time, the utilities customers have no vested interest in the refunds.

Neither CUCA nor its members have an interest in the refunds sufficient to entitle them to constitutional protection from legislative action impacting upon the refunds. Accordingly, CUCA's contention that the Commission's transfer of supplier refunds to the expansion fund pursuant to N.C.G.S. § 62-158 amounts to an unconstitutional taking and a violation of due process is overruled.

[10] CUCA next contends that the use of supplier refunds to fund the expansion fund is a violation of the Equal Protection Clauses of the United States and North Carolina Constitutions because the burden of financing the expansion fund mechanism is imposed only upon existing customers, while the economic benefits created by the expansion of natural gas lines will accrue to all North Carolina citizens.

With regard to challenges to legislation on grounds that the law violates the right to equal protection, we have said

> that the principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States, was also inherent in the Constitution of this State even prior to the revision thereof at the General Election of 1970. By the above mentioned revision, it has now been expressly incorporated in Art. I, § 19, of the Constitution of North Carolina, effective 1 July 1971.

S.S. Kresge Co. v. Davis, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971) (citations omitted). "The North Carolina cases applying the equal protection clause of the state and federal constitutions to challenged classifications have used the same test the federal courts

use[ ] . . . ." *Duggins v. North Carolina State Board of Certified Public Accountant Examiners*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978).

A claim that legislation violates the Equal Protection Clause is to be evaluated under one of two levels of review. The first of these entails "strict scrutiny" of the challenged legislation; this level of review is required when the challenged legislation impacts upon a "suspect class"[5] or a "fundamental right."[6] *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L. Ed. 2d 520, 524 (1976); *see also Texfi Industries, Inc. v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). This level of review "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

The second level of review, which is used when the legislation at issue does not impact upon a suspect class or a fundamental right, involves a determination of whether the "challenged classification bears *any* reasonable relation to the purpose of the statute." *Duggins*, 294 N.C. at 131, 240 S.E.2d at 413 (emphasis added). Since the legislation at issue here does not involve a suspect class or a fundamental right, our inquiry is limited to this lower level of review. "[S]tate economic regulatory classifications need bear only a rational relationship to a legitimate governmental objective in order to withstand an equal protection challenge." *State ex rel. Utilities Commission v. Edmisten*, 294 N.C. 598, 611, 242 S.E.2d 862, 870 (1978).

Expansion of natural gas facilities to unserved areas of the state is undoubtedly a legitimate governmental objective. *Id.* With regard to the contention that the legislation does not bear a rational

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5. Suspect classes heretofore identified by the United States Supreme Court include: alienage, *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534 (1971); race, *McLaughlin v. Florida*, 379 U.S. 184, 13 L. Ed. 2d 222 (1964); and ancestry, *Oyama v. California*, 332 U.S. 633, 92 L. Ed. 249 (1948).

6. Fundamental rights heretofore identified by the United States Supreme Court include: rights of a uniquely private nature, *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147 (1973); the right to vote, *Bullock v. Carter*, 405 U.S. 134, 31 L. Ed. 2d 92 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662 (1974); rights guaranteed by the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 21 L. Ed. 2d 24 (1968); and the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655 (1942).

relationship to the ends sought, it has been held that the relationship need not be a perfect one, but that the legislature need only have had a reasonable basis for concluding that the measures taken would assist in the accomplishment of the goal. *See Duggins*, 294 N.C. at 131, 240 S.E.2d at 413 ("if the challenged classification bears any reasonable relation to the purpose of the statute it will not be set aside merely because it results in some inequalities in practice").

In the present case, the legislation directs that the refunds be applied for a purpose that the General Assembly has determined to be for the benefit of the citizens of North Carolina, including both existing and future ratepayers. The utilization of the refunds in the manner prescribed by the expansion fund scheme will result in a direct furtherance of the goal sought to be accomplished by the legislature: expansion of natural gas facilities to unserved areas. We have already determined that existing LDC customers have no cognizable property interest in the supplier refunds that are to be used for this purpose. The burden upon existing customers, if any, does not necessitate a finding that the legislation is wholly irrational and without reasonable basis. The same is true given the fact that heretofore unserved citizens may derive equal or greater benefits from the extension of natural gas services, although they did not pay the rates that resulted in the subsequent refunds.

We hold that N.C.G.S. § 62-158 clearly bears a sufficient relationship to the legitimate goal of expanding natural gas facilities to unserved areas of the state to withstand a challenge that it violates the Equal Protection Clauses of the United States and North Carolina Constitutions. Accordingly, CUCA's challenge to the legislation on these grounds is overruled.

[11] In its next assignment of error, CUCA contends that the capture of supplier refunds for use in establishing an expansion fund constitutes a tax that violates the requirements of Article V, Section 2 of the North Carolina Constitution, which provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, § 2(1). CUCA contends that the payments required of existing ratepayers are not used for a public purpose but are used to subsidize the extension of economic benefits to the individuals and private businesses

of unserved areas. Accordingly, CUCA argues, the scheme violates Article V, Section 2 of the North Carolina Constitution.

This Court has defined a tax as "a charge 'levied and collected as a contribution to the maintenance of the general government . . . . [It is] imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue . . . .' " *State ex rel. Dorothea Dix Hospital v. Davis*, 292 N.C. 147, 156, 232 S.E.2d 698, 705 (1977) (quoting *Tarboro v. Forbes*, 185 N.C. 59, 62, 116 S.E. 81, 82 (1923)). The capture of supplier refunds does not conform to this definition of a tax.

The monies making up the supplier refunds consist of payments made pursuant to rates set by the Commission in accordance with statutorily controlled standards. The capture of the refunds is not a charge levied upon the general citizenry for the general maintenance of the government. The capture and dedication of supplier refunds to an expansion fund is not a tax.

In addition, amounts refunded to local distribution companies cannot be characterized as payments made by natural gas utilities customers. We have previously stated that because an independent agency, the FERC, causes refunds to be made to local distribution companies, a property interest in the funds is not suddenly created in these refunds on behalf of natural gas customers. It is true that the Commission may order the refunds to be distributed to utilities customers, but its authority to do so does not amount to a directive that it must always be done. Unless the Commission makes the decision to do so, the utilities customers have no property interest in the refunds; accordingly, the allocation of the refunds to the expansion fund does not amount to an unconstitutional tax. CUCA's assignment of error on these grounds is overruled.

To conclude, we hold that N.C.G.S. § 62-158 as enacted pursuant to the General Assembly's declaration of policy in N.C.G.S. § 62-2(9) is a constitutional exercise of legislative authority and that the Commission properly authorized, established, and funded the challenged expansion fund pursuant to the authority lawfully delegated to it by the legislature. The order of the Commission is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. WILLIE ERVIN FISHER

No. 62A93

(Filed 29 July 1994)

1. **Jury § 114 (NCI4th)— first-degree murder—individual voir dire denied—no error**

The trial court did not err in a first-degree murder prosecution by denying defendant's pretrial motion for an individual sequestered *voir dire* where defendant did not show how the answers to *voir dire* prejudiced him in any way or unduly "educated" other jurors on how to be removed from the panel.

Am Jur 2d, Jury § 197.

2. **Jury § 120 (NCI4th)— first-degree murder—jury selection—juror questionnaire—denied**

The trial court did not err in a first-degree murder prosecution by denying defendant's pretrial motion to require that prospective jurors complete a two-page questionnaire prior to entering the courtroom for *voir dire* examination. Defendant does not allege that he was in any way prohibited from individually asking prospective jurors the same questions set out in his questionnaire and failed to show that the court abused its discretion or that he was prejudiced by the court's denial of his motion.

Am Jur 2d, Jury §§ 201, 202.

3. **Jury § 140 (NCI4th)— first-degree murder—jury selection—questions regarding felony murder rule—no prejudice**

There was no prejudice in a first-degree murder prosecution where the trial court overruled defendant's objection to the questioning of prospective jurors by the district attorney regarding the felony murder rule. Assuming error, there was no prejudice because the district attorney made clear in his question that the judge, not he, would be instructing jurors on the law of the case and the trial court gave a correct instruction on the felony murder rule.

Am Jur 2d, Jury §§ 201, 202.

4. Criminal Law § 473 (NCI4th)— first-degree murder—introduction of counsel—forecast of evidence—objection sustained

There was no abuse of discretion in a first-degree murder prosecution during the introduction of defense counsel to prospective jurors where the trial court sustained the district attorney's objections to statements of defense counsel regarding the circumstances of the victim's death and the defendant's consumption of alcohol and controlled substances prior to the victim's death. Defendant was allowed to ask questions regarding attitudes of prospective jurors towards drugs and alcohol and defendant presented information regarding the circumstances of the victim's death and defendant's consumption of alcohol and controlled substances during his opening statement.

Am Jur 2d, Trial §§ 497 et seq.

5. Jury § 82 (NCI4th)— first-degree murder—jury selection—juror accepted by both parties—excused by court

The trial court did not err in excusing a juror *ex mero motu* where a prospective juror was passed by the State and defendant, asked to speak to the judge, expressed her concern for her two-year-old daughter who was ill with a fever, stated that her child care had only been worked out with some hardship, and the trial judge excused the juror from the panel and called a replacement. N.C.G.S. § 15A-1212(2).

Am Jur 2d, Jury §§ 265 et seq.

6. Evidence and Witnesses § 740 (NCI4th); Criminal Law § 447 (NCI4th)— first-degree murder—impact on victim's family

The trial court did not err in a first-degree murder prosecution by overruling defendant's objections to statements of the district attorney during jury arguments and the admission of evidence concerning the impact of the murder on the victim's family. Bringing the four-year-old son of the victim and defendant before the jury permitted the jury to better evaluate the State's evidence that defendant was upset because the child was left at home without his mother; testimony that the boy was asleep in bed during the altercation was relevant to show the whereabouts of the members of the household during the altercation; the prosecutor's opening argument regarding the age of the victim and the identity of her survivors

was supported by testimony, without objection from defendant; there was likewise no abuse of discretion in overruling defendant's objections during closing argument; and, in the context of the victim's survivors being present at the altercation in which she died, and two of them trying to stop defendant, the reference to the survivors and defendant's family having to live with defendant's act lends support to a finding that the murder was especially heinous, atrocious or cruel.

Am Jur 2d, Appeal and Error §§ 797-801, 803.

7. Evidence and Witnesses § 351 (NCI4th)— first-degree murder—warrant for assault on a female—admissible

The trial court did not err in the first-degree murder prosecution of defendant for killing his girlfriend by allowing two of the State's witnesses to testify concerning the issuance of a warrant for assault on a female against defendant in the early morning hours of the day the killing occurred. This testimony establishes intent and the motive of returning to continue the assault and tends to prove premeditation, deliberation, and malice. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide § 311.

8. Evidence and Witnesses § 1700 (NCI4th)— first-degree murder—photographs of victim—admissible

The trial court did not err in a first-degree murder prosecution by admitting autopsy photographs of the victim's body and the testimony of the pathologist concerning these photographs where the trial judge excluded six color photographs as being redundant and "perhaps" inflammatory and the photographs admitted into evidence were illustrative of testimony regarding the nature and number of the victim's wounds and were not excessive in number. Their probative value was not substantially outweighed by any prejudicial effect.

Am Jur 2d, Evidence § 974.

9. Evidence and Witnesses § 2299 (NCI4th)— first-degree murder—whether defendant would have killed without alcohol and cocaine—psychologist's opinion—not admissible

The trial court did not err in a first-degree murder prosecution by sustaining the State's objection to a clinical psychologist's opinion of whether defendant would have killed

the victim if it were not for the influence of alcohol and cocaine. An expert witness is competent to render an opinion concerning whether a defendant was able to formulate the prerequisite intent in a criminal matter but may not testify to a particular legal conclusion or that a legal standard has or has not been met, at least when the standard is a legal term which carries a specific meaning not readily apparent to the witness. Essentially, defendant was asking the expert to opine as to why the murder was committed. N.C.G.S. § 8C-1, Rule 704.

Am Jur 2d, Expert and Opinion Evidence § 190.

10. Homicide § 694 (NCI4th)— first-degree murder—defense of unconsciousness—instruction not given

The trial court did not err in a first-degree murder prosecution by refusing defendant's request to instruct the jury on the defense of unconsciousness. There is no evidence that defendant was unconscious at the time of the homicide or immediately thereafter and defendant's own evidence showed that his mental state on the morning of the homicide was caused by the voluntary ingestion of alcohol and drugs. Defendant did not meet his burden of proving the affirmative defense of unconsciousness.

Am Jur 2d, Homicide § 116.

11. Evidence and Witnesses § 1070 (NCI4th)— first-degree murder—flight—sufficiency of evidence to support instruction

The evidence was sufficient to warrant an instruction on flight in a first-degree murder prosecution where defendant ran from the scene after a neighbor fired his gun, threw down the identifying Redskins jacket he was wearing and disappeared among the bushes, a bloodhound was unsuccessful in tracking him, and he telephoned the police department hours later to turn himself in.

Am Jur 2d, Evidence §§ 532, 533.

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

A sentence of death for a first-degree murder was not disproportionate where the evidence clearly supported the aggravating circumstances that the murder was committed while defendant was engaged in a first-degree burglary and that

it was especially heinous, atrocious, or cruel, there was nothing in the record to suggest that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and the sentence was not disproportionate or excessive when compared to similar cases in the pool.

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Mills, J., at the 25 January 1993 Criminal Session of Superior Court, Forsyth County. Defendant's motion to bypass the Court of Appeals as to his convictions of assault with a deadly weapon inflicting serious injury and first-degree burglary was allowed 20 September 1993. Heard in the Supreme Court 14 March 1994.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Robert T. Hargett, Associate Attorney General, for the State.

David F. Tamer for defendant-appellant.

FRYE, Justice.

On 26 May 1992 a Forsyth County Grand Jury indicted defendant for the 2 April 1992 murder of his girlfriend, Angela Johnson. Defendant was also indicted for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury. In a capital trial, the jury returned a verdict finding defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule with first-degree burglary as the underlying felony. The jury also found defendant guilty of first-degree burglary and assault with a deadly weapon inflicting serious injury. 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. The trial court imposed sentences for the other convictions as follows: fifteen years imprisonment for the first-degree burglary conviction and three years imprisonment for the assault with a deadly weapon inflicting serious injury conviction. Defendant

gave oral notice of appeal on 4 February 1993. An order staying execution was entered by this Court on 12 February 1993.

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. The victim, Angela Johnson, was living at her grandmother's (Josephine Johnson) residence, 2839 Old Greensboro Road in Winston-Salem, at the time of the murder. Angela's mother, Shirley Johnson; Angela's thirteen-year-old daughter, Shemika; and her four-year-old son, Willie Ervin, Jr. (who is also defendant's child), were living there as well.

On 1 April 1992, defendant came to the Johnson residence at about 9:00 p.m. Angela was not at home. He stayed for about three hours, holding Willie Jr. and watching television. Shirley Johnson worked at night and left to go to work at approximately 10:00 p.m. When Angela returned to the house after her mother had gone to work, she and defendant began arguing. Angela ran into her grandmother's room and said that defendant had hit her in the eye. Defendant pushed Angela onto the bed on top of her grandmother and then hit her grandmother while trying to hit Angela. Angela's grandmother called the police.

Soon thereafter, a taxi which had been called earlier by either the victim or defendant arrived at the residence. Angela ran out of the house, while trying to put on her shoes, wearing a T-shirt and jogging pants. Defendant tried to catch her but she got into the taxi and it "pulled off." Angela was crying and her hair was tousled. She had bruises all over her body and her shirt had been torn. Angela went to the Winston-Salem Journal/Sentinel where her mother was working.

Officer T.C. Smoot of the Winston-Salem Police Department received a call at 12:35 a.m. to go to the residence. When he arrived, he began talking to Josephine Johnson about an alleged assault. Angela and her mother arrived later. Officer Smoot noticed that Angela's shirt was torn and her eyes were swollen.

Angela and her mother went to the clerk's office where Angela obtained a warrant charging defendant with assault. A criminal

summons was issued for assault on a female and the police began searching for defendant. Angela and her mother went home but did not go to bed until after 3:00 a.m. There were two twin beds in the bedroom. Angela and Willie Jr. were in one bed and Angela's mother and Shemika were in the other. Angela's grandmother was in a separate room. After they went to sleep, the telephone rang and Angela answered it. She gave the telephone to her mother who recognized the caller as defendant. Angela's mother asked defendant what had happened at the house. He told her that he had not hit Angela or her grandmother.

About ten minutes after the telephone conversation ended, Shirley Johnson heard someone kicking the front door. She jumped up and saw defendant stepping over broken glass from the door and coming into the house. He was wearing a Redskins jacket and had a knife in his hand. He came in the bedroom and told Angela to get up. Angela got up and started running towards, and then out the back door with defendant following her. Angela ran to the front of the house and through the front door with defendant still behind her. Defendant cornered Angela in the living room and began stabbing her in the chest and stomach. Shemika tried to pull him off Angela and she was stabbed on the arm and in the back. Angela's mother began fighting with defendant and he struck her. Defendant dragged Angela out the front door, down the steps, and into the driveway—pulling off her nightgown. He continued to stab, beat, and kick Angela after he dragged her into the street. A next door neighbor, Lucius Simmons, heard the commotion and came to the door. He yelled to defendant to stop. Simmons yelled again, defendant stopped beating Angela and told Simmons to shut up. Simmons shot his gun into the air and defendant ran down the street.

The police arrived at the residence and found Angela lying in Simmons' driveway covered with blood. She had a pulse and appeared to be alive. Officer Smoot saw Shemika and noticed blood down her back and on her pants. She had a three-inch cut on her arm and had been stabbed in the back. The wound in her back was about an inch wide and an inch long. It was gaping open and bleeding. Angela and Shemika were taken by paramedics to the emergency room. Shemika's wounds were cleaned and her lacerations repaired. Angela was unresponsive to emergency medical treatment and was pronounced dead at 7:30 a.m.

An autopsy on Angela was performed by Dr. Patrick Lantz, a forensic pathologist. The autopsy indicated roughly thirty-two stab wounds that varied in depth from superficial to over five inches. According to Dr. Lantz, Angela died of multiple sharp force injuries, including incised wounds and blunt force injuries.

After officers arrived, a bloodhound was brought to the scene to track defendant. The bloodhound tracked defendant's scent for about thirty-five to forty minutes before the dog lost the scent. In the afternoon of 2 April 1992, a telephone call was received at the Winston-Salem Police Department from defendant who told officers where he could be found. Officers were dispatched to the 2500 block of Old Greensboro Road where defendant was standing near a telephone booth. Defendant was arrested and taken to Forsyth Memorial Hospital where he was treated for wounds to his hand as well as other injuries. While waiting in the emergency room, defendant made a voluntary statement to officers. Defendant was admitted to the hospital and when released, he was taken to jail. On 6 April 1992, defendant was questioned by police officers at the police station after being read Miranda rights which he waived.

At trial, defendant testified in his own defense that he had been involved with Angela for seven years and the couple had been living together on a periodic basis. They had one son, Willie Jr. Defendant stated that he had used alcohol, marijuana, and crack cocaine on a regular basis. According to defendant, he and Angela spent the night prior to her death at his father's house. After getting off work at about 3:30 p.m. on 1 April 1992, defendant went home. Defendant's nephew arrived and took him to the store so he could cash his check. At that time, defendant bought beer and malt liquor.

Defendant further testified that upon returning to his residence from the store, he drank no less than four quarts of malt liquor, as well as a quantity of beer. Defendant thereafter went to the store with his sister's boyfriend to buy wine and more beer. During this period of time, he attempted to reach Angela by telephone, but was unsuccessful. Between the hours of 9:00 and 10:00 p.m., defendant's nephew took him to Angela's house where defendant waited for her to return. When Angela returned to the house between 11:00 p.m. and midnight, she and defendant began arguing about the way in which she was caring for their son. Defendant stated that Angela struck him and then they began to fight. After

Angela left the house in a taxi, defendant walked to the home of a friend, Cliff Foster. Upon arriving at Foster's residence, defendant began drinking alcohol and smoking crack cocaine. Defendant called Angela's residence, but her mother would not allow her to come to the telephone. Defendant testified that he continued to smoke crack cocaine after this telephone call.

According to defendant, he left Foster's residence at approximately 4:00 a.m., and walked to Angela's house, carrying a knife that Foster had given him for protection. Upon arriving at her house, he broke the glass in the door, entered the house and began talking to Angela. Defendant remembered Angela coming towards him and trying to take the knife out of his hand but he did not remember stabbing Angela or Shemika. Defendant also stated that he did not remember assaulting Angela with a stick or kicking her. According to defendant, he did not recall anything except Simmons firing a gun, at which time he ran from the scene. After remaining in nearby woods during the day, defendant telephoned the Winston-Salem Police Department for the purpose of turning himself in to the authorities.

Clifton Foster testified that he and defendant smoked four rocks of crack cocaine after 3:00 a.m. on 2 April 1992. After smoking the cocaine, defendant made a telephone call and then left. According to Foster, the knife that defendant had that night did not come from his house.

Defendant introduced evidence from Dr. J. Gary Hoover, a clinical psychologist, that at the time of the murder defendant was functioning "inside an alcohol/crack cocaine black-out and that his emotional or his behavior was directly related to reduced impulse control, reduced his ability to think, plan, organize himself inside what is probable to be an alcoholic black-out enhanced by the use of crack cocaine." Dr. Hoover gave defendant an intelligence test which showed him to be in the below average range of intelligence. Dr. Hoover concluded that defendant was an individual with a substance abuse problem and overtones of chronic depression. Dr. Hoover opined that defendant could not have carried out any sort of concerted intellectually-based plan on 2 April 1992.

The State presented no evidence at the sentencing phase, relying upon the evidence at the guilt-innocence phase of trial.

Defendant called Lieutenant Larry Murphy of the Forsyth County Sheriff's Department who testified that defendant had not caused any disciplinary problems during his incarceration. Defendant also presented several witnesses who testified to his mother's alcohol problem and to the good relationship that defendant had with his son. As his final evidence, defendant introduced a certified criminal record check from the Clerk of Superior Court, Forsyth County showing that defendant had no prior convictions.

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

JURY SELECTION ISSUES

[1] In defendant's first assignment of error, he contends that the trial court erred in denying his pretrial motion for individual sequestered *voir dire*. Defendant argues that the collective *voir dire* inhibited the candor of the jurors and educated prospective jurors to responses which would allow them to be excused from the panel. This Court has previously rejected similar arguments in *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1989) (defendant's argument that collective *voir dire* permits prospective jurors to become educated as to responses that would allow them to be excused from the panel rejected as being speculative), and in *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979) (defendant's argument that collective *voir dire* made the prospective jurors aware of prejudicial matters and inhibited the candor of jurors rejected as being speculative).

Motions for individual *voir dire* and jury sequestration are addressed to the discretion of the trial judge; his ruling will not be reversed absent an abuse of discretion. *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 357 (1987). Defendant has not shown how the answers to *voir dire* prejudiced him in any way or unduly "educated" other jurors on how to be removed from the panel. Accordingly, this assignment of error is rejected.

[2] By his second assignment of error, defendant contends that the trial court erred in denying his pretrial motion seeking entry of an order requiring that prospective jurors complete a two-page questionnaire prior to entering the courtroom for *voir dire* examination.

Regulation of the manner and extent of the inquiry of prospective jurors concerning their fitness rests largely in the discretion

of the trial court, and such regulation will not be found to constitute reversible error absent a showing of an abuse of discretion. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985); *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984). Defendant does not allege that he was in any way prohibited from individually asking prospective jurors the same questions set out in his questionnaire. In sum, he has failed to show that the court abused its discretion or that he was prejudiced by the court's denial of his motion; therefore, this assignment of error is without merit.

[3] In his third assignment of error, defendant contends that the court erred in overruling his objection to the questioning of prospective jurors by the district attorney regarding the felony murder rule. Specifically, defendant argues that this questioning represented an incorrect summary of the law.

During the process of *voir dire* conducted by the district attorney, the following exchange occurred:

> MR. BARRETT: . . . Ladies and gentlemen, there's a rule of law and I'm just going to bring it up and make sure you folks can follow it. I'm not going to get into the law of this case. That's the judge's domain. He's the one who instructs you on the law. He tells you what the law is and you're to follow his instructions but I want to bring a rule of law to your attention and make sure you can follow it. It's a rule of law known as the felony murder rule and I don't know if any of you folks have ever heard about it.
>
> The law of this state is that if a person, during the commission of a felony, commits a murder or proximately causes another person's death during the commission of that felony, they're guilty of first degree murder under the felony murder rule. The State doesn't have to show premeditation and deliberation.
>
> All you folks feel like you can follow that law if the State proved to you that this defendant committed another felony and then proximately caused the death, you can find him guilty under that rule? All you folks feel like you can do that?
>
> MR. TAMER: Object to the State's phrasing, Your Honor.
>
> THE COURT: Overruled. Go ahead.

MR. BARRETT: Nobody has any problem with that at all I assume?

(NO RESPONSE.)

Defendant argues that this summary of the law was improper in that it tended to suggest that merely upon a showing that defendant had committed a felony and that he had proximately caused the death of the victim, defendant could be found guilty under the felony murder rule.

> [T]he law is clear in this State that a killing is committed in the perpetration or attempted perpetration of a felony for the purpose of the felony murder rule when there is no break in the chain of events leading from the initial felony to the act causing death. *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981). An interrelationship between the felony and the homicide is a prerequisite to the application of the felony murder rule. *State v. Strickland*, 307 N.C. 274, 291-94, 298 S.E.2d 645, 657-58 (1983); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

State v. Avery, 315 N.C. 1, 26, 337 S.E.2d 786, 800 (1985), *appeal after remand*, 95 N.C. App. 572, 383 S.E.2d 224 (1989), *rev. denied*, 326 N.C. 51, 389 S.E.2d 96 (1990).

Assuming error *arguendo*, defendant has failed to show a clear abuse of discretion and prejudice resulting from the trial court's ruling. *See id.* at 20, 337 S.E.2d at 797. The district attorney made clear in his question that the judge, not he, would be instructing jurors on the law of the case. The trial court in its jury instructions gave a correct instruction on the felony murder rule and defendant has not raised an objection to that instruction. Therefore, this assignment of error is rejected.

[4] By his next assignment of error, defendant argues that the trial court erred in sustaining the district attorney's objections to statements of defense counsel regarding the circumstances of the victim's death and the defendant's consumption of alcohol and controlled substances prior to the victim's death, during the introduction of defense counsel to prospective jurors. Defendant concedes that he was allowed to ask questions regarding attitudes of prospective jurors towards drugs and alcohol. The State argues that the appropriate place for defendant's forecast of evidence

is the opening statement as provided by N.C.G.S. § 15A-1221(a)(4), not prior to *voir dire*. We agree with the State.

> While the exact scope and extent of an opening statement rest largely in the discretion of the trial judge, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it. *See generally*, 23 A. [sic] C.J.S., *Criminal Law*, § 1086 (1961).

State v. Paige, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986) (quoting *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied, appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984)).

The record reflects that defendant presented information regarding the circumstances of the victim's death and defendant's consumption of alcohol and controlled substances during his opening statement. Defendant has failed to show that the trial court abused its discretion; thus, this assignment of error is rejected.

[5] Next, defendant argues that the trial court erred in excusing a juror *ex mero motu* and for no sufficient reason, after the juror had been passed as being qualified by both the State and defendant.

At the beginning of the *voir dire* process on 26 January 1993, prospective juror Elizabeth Lineberger was called into the jury box and seated. After being passed by the State and defendant, Ms. Lineberger was seated with the other individuals that had been passed by both parties. On the second day of *voir dire*, Ms. Lineberger asked to speak to the judge. After excusing the other jurors, the court heard from Ms. Lineberger. While crying, Ms. Lineberger expressed her concern about her two-year-old daughter who was ill with a fever. In addition, Ms. Lineberger stated that her child care had only been worked out with some hardship. The trial judge, finding it to be in the best interest of Ms. Lineberger, the court, the State, and defendant, excused Ms. Lineberger from the panel and called a replacement. After removal of Ms. Lineberger, the court gave the State and defendant an additional peremptory challenge.

N.C.G.S. § 15A-1214(g) provides that:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the

juror has made an incorrect statement during voir dire or that some other good reason exists:

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

N.C.G.S. § 15A-1214(g) (1988).

N.C.G.S. § 15A-1212(2) provides that jurors may be challenged for cause if they are incapable by reason of mental or physical infirmity of rendering jury service. The record reflects that Ms. Lineberger's mental state would have hampered her ability to perform her duty as a juror. She was visibly upset about her child's sickness. Ms. Lineberger was in tears while explaining her situation to the trial judge. She stated that she was distracted by her child's sickness and that she was sitting there thinking about it. After carefully reviewing the exchange between the trial court and Ms. Lineberger in the record, we find no error in the trial court's removal of this juror for cause.

GUILT-INNOCENCE PHASE ISSUES

[6] By four combined assignments of error, defendant argues that the trial court erred in overruling his objections to certain statements of the district attorney during jury arguments and the admission of evidence concerning the impact of this murder on the victim's family. During opening argument, the district attorney made the following statement:

> Ladies and gentleman, the events that are about to unfold in front of you are not events to be taken lightly and I know you won't take them in that manner. Angela Johnson was 29 years of age at the time of her death. She is survived by two children and her mother and her grandmother.

Defendant contends that this was a play for sympathy which continued when the district attorney had Willie Jr. brought in front of the bar and displayed before the jury during Shemika's testimony. Defendant also objected to questioning of Shemika concerning the whereabouts of Willie Jr. during the altercation in which their mother was killed. He argues that this play for sympathy was "brought to a head" during the closing argument of the sentencing phase when the district attorney told the jury that

> [i]f there is any sympathy to be doled out in this case, ladies and gentlemen, it's for the people he left being and Angela left behind. You've heard these people who had to come up here—his sisters and his brother and break down and cry and have to live with this act the rest of their lives because of what he did and what you heard from Shirley Johnson and Shemika and little Willie Fisher.

Defendant contends that the incidents mentioned above served no other purpose than to inflame the prejudice of the jury in violation of his constitutional rights under the provisions of Article I, Sections 23-27, of the North Carolina State Constitution. The State contends that the statements of the district attorney and the evidence presented were relevant and that no error occurred by their admission.

Generally, all 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. N.C.G.S. § 8C-1, Rule 403 (1992). The State's evidence, through Shemika, was that defendant was angry when he found that the victim had left their small son and gone out. When Willie Jr. was brought in front of the jury, Shemika identified him as her younger brother. This in-court identification permitted the jury to see the child and thus better evaluate the State's evidence that defendant was upset because the child was left at home without his mother. Evidence which tends to show the defendant's emotional state at or around the time of the killing tends to shed light on the circumstances surrounding that killing and is relevant and admissible. *See State v. Stager*, 329 N.C. 278, 321-22, 406 S.E.2d 876, 901 (1991). The transcript reflects that Willie Jr. was "momentarily brought into the courtroom in front of the jury." Under these circumstances, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

In addition, Shemika's testimony that Willie Jr. was asleep in bed during the altercation was relevant to show the whereabouts of the members of the household during the altercation.

As to the opening and closing arguments of the district attorney, it is well settled that "control of counsel's argument is largely left to the trial court's discretion." *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991) (*citing State v. Whisenant*, 308 N.C. 791, 798, 303 S.E.2d 784, 788 (1983)); *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976). Trial counsel are allowed wide latitude in jury arguments and are permitted to argue the facts based on evidence which has been presented as well as reasonable inferences which can be drawn therefrom. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992); *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986), *cert. denied*, 465 U.S. 932, 72 L. Ed. 2d 450 (1982). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law or remarks calculated to prejudice the jury." *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1970), *appeal after remand*, 291 N.C. 528, 231 S.E.2d 644 (1977).

The prosecutor's statements during opening argument regarding the age of the victim and the identity of her survivors were supported by the testimony of Dr. Patrick Lantz, Shemika and Shirley Johnson, without objection from defendant. Defendant has failed to show prejudice and we conclude that the trial court did not abuse its discretion in overruling defendant's objection to these statements. Likewise, the trial court did not abuse its discretion in overruling defendant's objections during closing argument in the sentencing phase of trial.

At the sentencing phase, the trial court submitted the aggravating circumstance, "the capital felony was especially heinous, atrocious, or cruel," which the jury found. The victim's survivors were present at the time of the altercation between her and defendant which led to her death. Two of the victim's survivors even attempted to stop defendant from killing her. In this context, the prosecutor's reference to the victim's survivors, as well as to the members of defendant's family having to live with defendant's act for the rest of their lives, lends support to a finding that the murder was especially heinous, atrocious, or cruel. Defendant argues that the prosecutor's remarks were akin to victim impact statements which the U.S. Supreme Court held were inadmissible in *Booth*

v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991), *reh'g denied*, 501 U.S. 1277, 115 L. Ed. 2d 1110 (1991). However, in *Payne v. Tennessee*, the Court held that "a state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827, 115 L. Ed. 2d at 736. For the foregoing reasons, this assignment of error is rejected.

[7] By his next assignment of error, defendant contends that the trial court erred in allowing two of the State's witnesses to testify concerning the issuance of a warrant for assault on a female against defendant in the early morning hours of 2 April 1992. Over objection, Shirley Johnson testified that she took Angela to the clerk's office to obtain a warrant against defendant for beating Angela. Subsequently, Officer T.C. Smoot testified, over objection, that he went to the Johnson residence after receiving a report of an assault. He testified that he saw Angela and that she looked as if she had sustained a recent injury. Officer Smoot also stated that he met Angela at the clerk's office later that night for the purpose of obtaining a warrant against defendant. Defendant contends that this evidence was not admissible.

N.C.G.S. § 8C-1, Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. N.C.G.S. § 8C-1, Rule 404(b) (1992).

In *State v. Stager*, 329 N.C. at 321-22, 406 S.E.2d at 901, this Court held that

> testimony that the defendant was calm and was not crying described her emotional state shortly after her husband was killed, based upon the witnesses' observations of her demeanor at that time. Such evidence, and the evidence that the defendant disposed of her husband's personal effects the day after his funeral, amounted to evidence tending to shed light upon the circumstances surrounding the killing in this case and, thus, are relevant and admissible. N.C.G.S. § 8C-1, Rules 401 and 402 (1988).

In the instant case, evidence regarding the issuance of a warrant for defendant's arrest in the hours immediately preceding the murder tends to shed light on defendant's emotional state at or around the time of the killing and the circumstances surrounding that killing; thus, it is relevant and admissible. *See id.* This testimony establishes intent and the motive of returning to continue the assault and tends to prove premeditation, deliberation, and malice. For the foregoing reasons, this assignment of error is rejected.

[8] Defendant next argues that the trial court erred in admitting into evidence, over his objection, certain 8x10 color autopsy photographs of the victim's body and the testimony of the pathologist concerning these photographs. The photographs were of the victim's upper and lower body indicating the multiple stab wounds. Defendant contends that these photographs were not relevant and were inflammatory. Defendant argues that the photographs were not relevant because he proffered a stipulation that the identity of the victim was Angela Johnson, the decedent's death was caused by multiple stab wounds, and he was the individual who inflicted such stab wounds upon the decedent. However, defendant conceded in oral argument that the State rejected the proffered stipulation and it was not before the jury at any time during the trial.

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 as evidence of malice, 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).

State v. Rose, 335 N.C. 301, 319, 439 S.E.2d 518, 528 (1994). Admissible evidence may be excluded, however, under Rule 403 of the

North Carolina Rules of Evidence if the probative value of such evidence is substantially outweighed by its prejudicial effect. "Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each . . . lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (*citing State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979)).

Upon objection by defendant to the admission of these photographs, a *voir dire* was held. At the close of the *voir dire* the trial judge excluded six color photographs as being redundant and "perhaps" inflammatory and admitted thirteen others. The photographs admitted into evidence were illustrative of testimony regarding the nature and number of the victim's wounds and were not excessive in number. *See State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, *cert. denied*, --- U.S. ---, 126 L. Ed. 2d 341 (1993), *reh'g denied*, --- U.S. ---, 126 L. Ed. 2d 707 (1994); *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). The photographs, and the pathologist's testimony concerning them, were also admissible on the issue of premeditation and deliberation. *See State v. Hennis*, 323 N.C. at 284, 372 S.E.2d at 526 (photographs may be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree). After examining the photographs, we agree with the trial court that their probative value was not substantially outweighed by any prejudicial effect. Therefore, the trial court did not abuse its discretion in refusing to exclude them.

[9] By his next assignment of error, defendant contends that the trial court erred in sustaining the State's objection to a clinical psychologist's opinion of whether defendant would have killed the victim if it were not for the influence of alcohol and cocaine. Defendant offered the testimony of Dr. J. Gary Hoover regarding his examination of defendant. During Dr. Hoover's testimony, the following exchange occurred:

> Q. Based upon the standardized test which you administered, clinical interview you conducted, as well as other information made available to you in the course of your evaluation, do you have an opinion as to whether or not Willie Fisher would

have killed Angela Johnson but for the influence of alcohol and cocaine?

A. It's inconceivable—

MR. BARRETT: —Objection.

THE COURT: Sustained.

MR. BARRETT: Move to strike that.

THE COURT: Members of the jury, disregard that.

Q. Do you have such an opinion?

A. Yes.

Q. What is your opinion?

MR. BARRETT: Objection.

THE COURT: Sustained.

Out of the presence of the jury, Dr. Hoover's answer for the record was as follows:

A. Given his—given what I know about Mr. Fisher, both in terms of interview, testing, and what appears to be the case with regard to substance abuse, it's inconceivable to me that he would kill that which he appeared to love most.

Q. And that would have been Angela Johnson?

A. That's correct.

Expert testimony is admissible under North Carolina Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702 (1992).

An expert witness is competent to render an opinion concerning whether a defendant was able to formulate the prerequisite intent in a criminal matter. *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), *appeal after remand*, 327 N.C. 405, 394 S.E.2d 811 (1990). An expert witness may not, however, testify to a par-

ticular legal conclusion or that a legal standard has or has not been met, at least when the standard is a legal term which carries a specific meaning not readily apparent to the witness. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).

Under Rule 704, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704. However, according to the advisory committee note to Rule 704:

> "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpfuls of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. . . ."

N.C.G.S. § 8C-1, Rule 704 advisory committee's note (citations omitted).

Defense counsel asked Dr. Hoover if he had an opinion as to the ability of defendant to formulate and carry out a plan at or about five a.m. on 2 April 1992. This was a proper question, and the witness was permitted to respond that "his state coupled with his personality organization, his general intellectual level, rendered him to be very difficult to carry out any sort of concerted intellectually based plan." On redirect examination, defense counsel asked Dr. Hoover if he had an opinion as to whether defendant would have killed the victim "but for the influence of alcohol and cocaine?" We disagree with defendant's contention that the opinion called for by this question was not substantially different from an opinion regarding a defendant's ability to form a specific intent or his capacity to premeditate or deliberate. Essentially, defendant was asking Dr. Hoover to opine as to why the murder was committed. We are not convinced that Dr. Hoover was in any better position than the jury to make this determination. Therefore, we conclude that the trial court did not err in refusing to admit this testimony.

[10] In his next assignment of error, defendant contends that the trial court erred in refusing his request to instruct the jury on

the defense of unconsciousness. "The rule in this jurisdiction is that where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious." *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983) (citations omitted). However, unconsciousness as a result of voluntary ingestion of alcohol or drugs will not warrant the instruction requested here by defendant. *State v. Boone*, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982); *State v. Williams*, 296 N.C. 693, 701, 252 S.E.2d 739, 744 (1979).

First, there is no evidence that defendant was unconscious at the time of the homicide or immediately thereafter. Defendant gave a detailed statement to police upon his treatment at the hospital on the day of the murder. His testimony at trial itself regarding the altercation between himself and Angela which led to her death as well as his testimony regarding the assault earlier that evening all belie unconsciousness. Secondly, defendant's own evidence showed that his mental state on the morning of the homicide was caused by the voluntary ingestion of alcohol and drugs. Defendant testified that he smoked crack cocaine and drank beer excessively in the hours leading up to the murder. Although defendant contends that there is no evidence that this conduct was "an effort to steel himself for the preparation of a crime," there is also no evidence that his drinking and smoking were anything other than voluntary acts. We conclude that defendant has not met his burden of proving the affirmative defense of unconsciousness; therefore, the trial court did not err in refusing to give the instruction.

[11] Finally, defendant contends that the trial judge erroneously instructed the jury on the issue of defendant's flight as evidence of his guilt. Over objection, the trial judge instructed the jury as follows:

> Members of the jury, the State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. This circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation; therefore, it must not be considered by you as evidence of premeditation or deliberation.

According to defendant, there was insufficient evidence that he engaged in flight to warrant this instruction. In *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991), this Court held that in order to justify an instruction on flight there must be some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that the defendant left the scene of the crime is not enough to support an instruction on flight. There must also be evidence that the defendant took steps to avoid apprehension. *Id.*

After Simmons fired his gun, defendant began running from the scene. He threw down the identifying Redskins jacket he was wearing and disappeared among the houses. A bloodhound brought to the scene was unsuccessful in tracking defendant. Some hours later, defendant telephoned the Winston-Salem Police Department to turn himself in. We conclude that this evidence was sufficient to warrant the instruction given by the trial court. Accordingly, this assignment of error is rejected.

PROPORTIONALITY

[12] Having found no prejudicial error in the guilt-innocence and sentencing phases of defendant's trial, 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. Rose*, 335 N.C. 301, 439 S.E.2d 518 (1994).

In this case, the jury found the two aggravating circumstances which were submitted: "the capital felony was committed while the defendant was engaged in the commission of the crime of first degree burglary" and "the capital felony was especially heinous, atrocious or cruel." Defendant makes no argument that the record does not support the jury's finding of either of these aggravating circumstances. The evidence presented at trial showed that defendant broke down the door and entered the Johnson's home around 3:00 a.m. on 2 April 1992 and brutally stabbed Angela in front of her daughter and her mother who tried to stop him. Defendant then proceeded to drag Angela out of the front door and into the driveway while continuously stabbing, hitting, and kicking her.

This evidence clearly supports the jury's finding of each of these aggravating circumstances.

Further, there is nothing in the record that suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In conducting proportionality review, "[we] determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). 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. at 400, 428 S.E.2d at 146 (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)). 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)).

Characteristics distinguishing the present case include (1) the murder of a girlfriend of seven years who was the mother of defendant's child; (2) an assault on the victim by defendant in the hours preceding the murder; (3) the brutality of the murder—roughly thirty-two stab wounds, a broken cheek and broken jaw; (4) the fact that the murder occurred in front of family members of the victim in their home while the victim and defendant's young son were in the bedroom sleeping; (5) the stabbing of the victim's

daughter who attempted to assist her mother; and (6) the continued pursuit of the victim by dragging her outside of the house while continuously stabbing, hitting, and kicking her.

The jury found the two aggravating circumstances submitted, that the capital felony was committed while defendant was engaged in a burglary and that the capital felony was especially heinous, atrocious or cruel. The jury found two statutory mitigating circumstances, the defendant had no significant history of prior criminal activity and the capital felony was committed while the defendant was under the influence of mental or emotional disturbance. It found six nonstatutory mitigating circumstances: that defendant voluntarily surrendered to law enforcement officers; that defendant freely and voluntarily admitted to law enforcement officers responsibility for the death; that defendant's conduct while in custody at Forsyth County Jail was without disciplinary problems; that defendant voluntarily participated in Narcotics Anonymous while confined to the Forsyth County Jail; that defendant has expressed remorse for his action; and that by reason of an abusive father and alcoholic mother the defendant has a passive dependent personality.

Of the cases in which this Court has found the death penalty disproportionate, only two included the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). Neither requires a finding that the death penalty is disproportionate in this case.

In *Stokes*, defendant and three young men robbed 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. The facts of *Stokes* are 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 was convicted on the felony murder theory, whereas in the present case, defendant was convicted on the basis of felony murder and on the basis of malice, premeditation and deliberation. There was also no evidence in *Stokes* showing who was the ringleader of the robbery, or that the defendant deserved a death sentence any more than did an older confederate who received a life sentence. In this case, defendant was the sole perpetrator of this brutal murder.

As in the present case, the jury in *Stokes* found the statutory mitigating circumstances that the defendant had no significant history of prior criminal activity and that the murder was committed while the defendant was under the influence of mental or emotional disturbance. However, the jury found only one aggravating circumstance in *Stokes*, that the murder was especially heinous, atrocious or cruel, whereas in the present case the jury also found that the murder was committed while defendant was engaged in the commission of the crime of first-degree burglary. A more important distinction between these cases is that in *Stokes*, the jury found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. In the instant case, this mitigating circumstance was submitted to the jury and rejected.

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. In the present case, by contrast, the defendant followed the infliction of one potentially fatal wound with another. He resisted physical attempts to stop him from the victim's daughter and mother. He also ignored the shouts of a neighbor for him to stop and did so only after the neighbor fired gunshots into the air, at which time he fled the scene. Defendant's later expressions of remorse are not comparable to the actions taken by the defendant in *Bondurant*.

This Court has affirmed the death penalty in several factually similar cases where the jury found the murder to be especially heinous, atrocious or cruel. *See Syriani*, 333 N.C. 350, 428 S.E.2d 118 (defendant stabbed his wife while she was in an automobile with their ten-year-old son who tried to stop him); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 851 L. Ed. 2d 169 (1985) (defendant beat his mother-in-law to death with a cast iron skillet inflicting multiple wounds to her head, neck and shoulders); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 84 L. Ed. 2d 324 (1985) (defendant killed his estranged girlfriend by stabbing her repeated-

ly in front of her mother and daughter). We find these cases to be most comparable to the one at hand.

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 capital 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. CARL STEPHEN MOSELEY

No. 385A92

(Filed 29 July 1994)

1. Criminal Law § 762 (NCI4th)— instruction on reasonable doubt—use of moral certainty and substantial misgiving—no due process violation

The trial court's instructions on reasonable doubt which included the terms "moral certainty" and "substantial misgiving" did not reduce the burden of proof for the State to less than proof beyond a reasonable doubt in violation of due process since the court's use of the terms "fully satisfied or entirely convinced" and "abiding faith" in conjunction with "moral certainty" made it clear to the jury that the State's burden was not less than the constitutional standard; the court made it clear that the jurors must consider all the evidence in determining whether they were convinced beyond a reasonable doubt; and the use of the term "substantial misgiving" alone is insufficient to render the instruction unconstitutional.

Am Jur 2d, Trial § 1385.

2. Evidence and Witnesses § 318 (NCI4th)— murder trial—evidence of prior murder by defendant—admissibility to show identity

Evidence that defendant had murdered a woman in Stokes County three months prior to the murder of a woman in Forsyth County was admissible to show the identity of defendant as the perpetrator of the Forsyth County murder where both victims were last seen alive in the same club in Winston-Salem; the defendant was in the club on each occasion; the body of each victim had similar wounds; a foreign object had been forced into the genitalia of each woman; the signature in each murder was that the murderer had inflicted far more injuries to the victim than was necessary to cause death; and testimony by a DNA expert indicated that the chance that defendant was not the donor of semen found in the Stokes County victim was approximately one in 274 million. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide § 312.

3. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstance—stipulation of convictions of violent crimes—graphic testimony by victim of those crimes

In a capital sentencing proceeding in which the State relied in part on the aggravating circumstance that defendant had previously been convicted of a felony involving violence to the person and defendant stipulated that he had been convicted of assault with a deadly weapon inflicting serious injury and attempted second-degree rape, the trial court did not err by permitting the victim of those two crimes to give detailed and graphic testimony about the manner in which those crimes were committed. 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.

4. Evidence and Witnesses § 740 (NCI4th)— mother's identification of autopsy photograph—sympathy and accountability not sought

Testimony by a murder victim's mother identifying an autopsy photograph of the victim was relevant to establish the victim's identity and did not violate the rule that the jury's decision should be based on the evidence and not on accountability to the victim's family where there was nothing in the record to support defendant's contention that the witness cried while she was testifying, and no questions were asked of the witness seeking sympathy or suggesting the need for accountability.

Am Jur 2d, Appeal and Error §§ 797-801, 803.

5. Criminal Law § 104 (NCI4th)— measurement of knife blade—not test result subject to discovery

Where a pathologist testified in a murder trial that he simply opened a knife that had belonged to the defendant, looked at the blade, and measured it, this was not the type of test whose results must be given to the defendant pursuant to N.C.G.S. § 15A-903(e), and the pathologist was properly permitted to testify that the knife was consistent with the size and shape of the wounds inflicted upon the victim even though defendant was not informed of any tests on the knife.

Am Jur 2d, Depositions and Discovery §§ 447-449.

6. Evidence and Witnesses § 2210 (NCI4th)— expert testimony—"indications" of blood

An SBI agent was properly permitted to testify that phenolphthalein testing revealed "indications" of the presence of blood on defendant's boots and clothing but that the quantities were insufficient to determine definitively whether in fact blood was present, and to testify about the transfer of "indications" to clothing through secondary transfer or spattering. This testimony, though not strong, was relevant to show that blood had spattered on the defendant.

Am Jur 2d, Expert and Opinion Evidence § 300.

7. Evidence and Witnesses § 1685 (NCI4th)— slides illustrating testimony—no excessive use

Two sets of slides used by an expert witness to illustrate his testimony concerning the similarities of wounds suffered

by the victim in this murder trial and another woman murdered by defendant were not unnecessarily repetitive, graphic and misleading where slides of each victim were shown side-by-side; no slide was kept on the screen for an excessive period or unnecessarily repeated; the presentation was made to the jury only on one occasion; and the trial court gave the jury limiting instructions at all appropriate times.

Am Jur 2d, Evidence § 763.

8. **Criminal Law § 1344 (NCI4th)— capital sentencing—heinous, atrocious, or cruel aggravating circumstance—sufficiency of evidence for submission**

The trial court in a capital sentencing proceeding properly submitted to the jury the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where the evidence tended to show that the victim was sexually assaulted with a blunt object and was beaten about the head, face, neck, chest, and abdomen; the victim was stabbed twelve times and was tortured by means of two long incisions on her chest and two more across her neck; and the victim was manually strangled. This evidence was sufficient to show that the murder was characterized by excessive brutality, physical pain, psychological suffering and dehumanizing aspects not normally found in a first-degree murder case.

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.

9. **Homicide § 552 (NCI4th)— first-degree murder—submission of second-degree murder not required**

The trial court in a first-degree murder prosecution did not err by failing to submit second-degree murder to the jury where the evidence was sufficient to fully satisfy the State's burden of proving each and every element of first-degree murder, and defendant only offered evidence of alibi and other evidence that he did not commit the offense.

Am Jur 2d, Homicide §§ 525 et seq.

10. Jury § 111 (NCI4th)— capital trial—newspaper article—denial of individual voir dire and sequestration of jurors—no abuse of discretion

The trial court did not abuse its discretion in the denial of defendant's motion for individual voir dire and sequestration of prospective jurors in a capital trial where the question of individual voir dire arose on the second day of jury selection from juror responses regarding whether they had read a certain newspaper article; the court indicated that it paid careful attention to jurors' responses concerning the article and was satisfied with their unequivocal responses as to their ability to give defendant a fair and impartial trial; and the court informed defendant that it would monitor the situation and, if necessary, would again consider whether individual voir dire of any prospective juror would be appropriate.

Am Jur 2d, Jury § 197.

11. Criminal Law § 78 (NCI4th)— capital trial—newspaper article—denial of change of venue

The trial court did not err by the denial of defendant's motion for a change of venue of his first-degree murder trial based on a newspaper article detailing the history of the case and quoting a statement by the district attorney that the State would rely on circumstantial evidence and that tied this case to a murder in another county where defendant admitted in open court that he had no evidence that he had been prejudiced by the article but asked the court to reserve ruling on the motion to see if prospective jurors had been tainted by the article, and defendant failed to show anything from the questioning of prospective jurors indicating that any of them were prejudiced by the article.

Am Jur 2d, Criminal Law § 378.

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

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant where the jury found as aggravating circumstances that (1) defendant had previously been convicted of a felony involving violence to the person, (2) the murder was committed while defendant was engaged in the commis-

sion of first-degree rape or first-degree sexual offense, and (3) the murder was especially heinous, atrocious, or cruel; the evidence showed that defendant offered a ride home to a small, trusting woman but instead took her to a secluded location where he sexually assaulted, tortured, beat, strangled, and stabbed her until she was dead; defendant inflicted far more injuries to the victim than were necessary to cause death; and the murder was thus characterized by brutality and "overkill."

Am Jur 2d, Criminal Law § 628.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Albright (W. Douglas, Jr.), J., at the 14 September 1992 Criminal Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 18 November 1993.

The defendant was tried for the first-degree murder of Deborah Jane Henley. The State's evidence showed that the defendant met Ms. Henley at the SRO dance club in Winston-Salem on the evening of 25 July 1991. After the club closed, the defendant offered Ms. Henley a ride to her home. There was testimony that the defendant and Ms. Henley left the club together at approximately 1:30 a.m. and the defendant was next seen at approximately 2:45 a.m.

Ms. Henley's nude body was later found partially concealed in a field approximately five miles from the SRO club. The wounds on Ms. Henley's body revealed that she had been savagely beaten, stabbed, sexually assaulted with a blunt instrument, and manually strangled.

The jury found the defendant guilty of first-degree murder and after a sentencing hearing recommended that he receive the death penalty. This sentence was imposed by the court.

The defendant appealed.

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

Richard D. Ramsey and Thomas G. Taylor for defendant-appellant.

WEBB, Justice.

[1] The defendant's first assignment of error is to the charge of the court. The court charged on reasonable doubt as follows:

> 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.
>
> Defined another way, a reasonable doubt is not a vain, imaginary, or fanciful doubt; but is a sane, rational 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 and 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 the criminal law, is an honest substantial misgiving generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. It is not to [sic] the doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony. Nor is it one borne of merciful inclination or disposition to permit the defendant to escape the penalty of the law. Nor is it one prompted by sympathy for him or those connected with him.

The defendant, relying on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990) and *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), *cert. granted, judgment vacated, N.C. v. Bryant*, --- U.S. ---, 128 L. Ed. 2d 42 (1994), argues that by using the terms "moral certainty" and "substantial misgiving," the court violated the due process clause of the United States Constitution by reducing the burden of proof for the State to less than beyond a reasonable doubt. In *Cage*, the United States Supreme Court held that the use of the words "grave uncertainty," "actual substantial doubt"

and "moral certainty" when defining reasonable doubt, created a reasonable likelihood that the jury applied the reasonable doubt standard in an unconstitutional manner by finding the defendant guilty on a degree of proof less than a reasonable doubt. *Cage v. Louisiana*, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342.

In *Bryant*, we applied *Cage* and awarded a new trial for errors in a charge very similar to the charge in this case. After our decision in *Bryant*, the United States Supreme Court revisited this subject in *Victor v. Nebraska*, 511 U.S. ---, 127 L. Ed. 2d 583 (1994). In that case, although suggesting that the term "moral certainty" not be used in jury instructions, the Court held that its use was not error if the rest of the charge gives meaning to these words and shows that they do not mean the State's burden is lower than beyond a reasonable doubt. In *Victor*, the court had charged the jurors that they must have " 'an abiding conviction, to a moral certainty, of the truth of the charge.' " *Id.* at ---, 127 L. Ed. 2d at 596. The United States Supreme Court said the use of the words "abiding conviction" in conjunction with "moral certainty" made it clear to the jury that "moral certainty" did not have a meaning different from reasonable doubt.

The defendant in *Victor* had also argued that one definition of moral certainty, found in *The American Heritage Dictionary of the English Language* 1173 (3d ed) (1992), is " '[b]ased on strong likelihood or firm conviction, rather than on the actual evidence[.]' " He said that under this definition, the jury could have convicted him on something other than the evidence. The Supreme Court said this danger was allayed because the court had instructed the jury that it must base its verdict on all the evidence.

In this case, the court, in defining reasonable doubt, told the jury it "must be fully satisfied or entirely convinced or satisfied to a moral certainty." It also told the jurors that if "they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt." Pursuant to *Victor*, we hold that the use of the terms "fully satisfied or entirely convinced" and "abiding faith" in conjunction with "moral certainty" made it clear to the jury that the State's burden of proof was not less than the constitutional standard.

In addition, the court in this case made it clear that in determining whether they were convinced beyond a reasonable doubt, the jurors must consider all the evidence. Pursuant to *Victor*, there

is not a reasonable likelihood that under this instruction the jury would have understood moral certainty to be disassociated from the evidence in the case.

In *Victor*, the Supreme Court also dealt with the words "substantial doubt." In that case, the court had charged that " '[a] reasonable doubt is an actual and substantial doubt . . . *as distinguished from* a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.' " *Victor v. Nebraska*, 511 U.S. at ---, 127 L. Ed. 2d at 599. The Supreme Court said that in *Cage*, the Court was concerned that the jury would interpret the term "substantial doubt" in parallel with the preceding reference to "grave uncertainty," leading to an overstatement of the doubt necessary to acquit. The Supreme Court said that in *Cage* the reference to substantial doubt alone was not sufficient to render the instruction unconstitutional.

Pursuant to *Victor*, we hold that the use of the term "substantial misgiving" alone does not make the instruction in this case unconstitutional. This assignment of error is overruled.

We note that on remand from the United States Supreme Court, we have today reversed our decision in *Bryant* and held there was no error in the charge in that case.

[2] The defendant next assigns error to the admission of evidence that he had murdered Dorothy W. Johnson on 12 April 1991 in Stokes County. The defendant made a motion to exclude this evidence and a *voir dire* hearing was held out of the presence of the jury.

There was testimony at the hearing that the victim in this case and Ms. Johnson were last seen alive at the SRO club. The defendant was in the club on each occasion. The body of each victim had similar wounds. A foreign object had been forced into the genitalia of each woman. A Special Agent of the Federal Bureau of Investigation testified that the signature to a crime is that behavior which is unnecessary to commit the crime. The signature in both the Stokes and Forsyth murders was overkill. The murderer in each case had inflicted far more injuries to the victim than were necessary to cause death. Michael Budzynski, of the DNA Unit of the State Bureau of Investigation, testified that the chance that the defendant was not the donor of semen found in Ms. Johnson was approximately one in 274 million.

The court found facts consistent with this testimony and ordered that evidence of the Stokes County murder be admitted into evidence.

The defendant contends evidence of the Stokes County murder should have been excluded by N.C.G.S. § 8C-1, Rule 404(b), which provides that evidence of other crimes must be excluded if it is offered only to prove the character of a person to show he acted in conformity therewith. If evidence of other crimes, wrongs, or acts is offered for some purpose other than to show the defendant had the propensity to commit the crime for which he is being tried, it is admissible. *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

The evidence of the Stokes County murder was relevant to prove the defendant committed the murder with which he was charged in this case. There was evidence from which the jury could find that the two murders were committed by the same person. There was also evidence from which the jury could find the defendant committed the murder in Stokes County. If the same person committed both murders, proof that the defendant committed the Stokes County murder is proof he committed the murder for which he was being tried. This is evidence, for its relevance, which does not depend on the proof of the character of the defendant by showing he committed a crime.

The defendant says the evidence of similarity of the two crimes was not sufficient to allow a jury to find they were committed by the same person. He also says the evidence was not sufficient for the jury to find he committed the Stokes County murder. We disagree. When two women are murdered in a similar manner after being abducted from the same club approximately three months apart, a jury could reasonably conclude that the same person killed both of them. Mr. Budzynski's testimony as to the chance that the defendant was the donor of the semen found in Ms. Johnson's body is evidence from which the jury could have found the defendant killed Ms. Johnson.

This assignment of error is overruled.

[3] The defendant next assigns error to the admission of testimony during the sentencing hearing. The State relied in part on the aggravating circumstance that "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1988). The defendant stipulated

that he had been convicted of assault with a deadly weapon inflicting serious injury and attempted second-degree rape. The State called as a witness Laura Denise Fletcher, the victim in those two crimes, who testified in some detail as to how they occurred.

The defendant, relying on dicta in *State v. Green*, 321 N.C. 594, 610, 365 S.E.2d 587, 597, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988) and *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), argues that it was error to allow the victim of the two crimes to testify after he had stipulated to the convictions. In *Green*, this Court held that it was not error to introduce evidence as to the manner in which the crime was committed after the defendant had stipulated to the commission of the crime. We said that the testimony was not in depth.

The defendant says that in this case the testimony was in great detail and graphic. He says it resulted in a mini-trial for the former crime and was prejudicial to him. The State was entitled to let the jury know what happened and the fact that the evidence was graphic does not make it inadmissible. The defendant concedes we have decided this question contra to his position. *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (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).

This assignment of error is overruled.

[4] The defendant next argues four legal questions under one assignment of error. All the arguments deal with the introduction of evidence. The State's first witness was Dorothy Parsley Henley, the mother of the victim. She identified an autopsy photograph of the victim as being an accurate representation of her daughter's body when she saw the body at the hospital. The defendant asserts in his brief, "[a]s may well be imagined, this testimony caused a great deal of consternation to the witness, who was briefly unable to continue and cried throughout the end of her testimony" and that the prejudicial effect of this display and testimony greatly outweighed any probative value.

The defendant contends that the allowance of this testimony violates the language of *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *cert. granted, judg. vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), in which we said:

> The jury's determination of guilt or innocence and recommendation as to sentence must be based on the evidence introduced and not . . . accountability to the victim's family.

Id. at 106, 381 S.E.2d at 624.

We find nothing in the record to support the defendant's contention that Mrs. Henley cried while she was testifying. The court reporter noted it in other places in the transcript when a witness became emotional. There is no such notation during the testimony of Mrs. Henley. Furthermore, no questions were asked of her seeking sympathy or suggesting a need for accountability. Requesting positive identification of the victim from a family member elicits testimony relevant to establishing the identity of the deceased. No error occurred during Ms. Henley's testimony.

[5] The defendant next contends it was error to allow a pathologist to testify that a knife which had belonged to the defendant was consistent with the size and shape of the wounds inflicted on the victim. The defendant says the State did not inform him of the tests performed on the knife and he was not able to rebut this testimony. The pathologist testified that he did not do any particular tests on the knife, but simply opened it, looked at the blade, and measured it. This was not the type test whose result must be given to the defendant pursuant to N.C.G.S. § 15A-903(e). This testimony had some probative value and it was not error to admit it.

[6] The third witness whose testimony is challenged by the defendant was an agent of the State Bureau of Investigation who testified regarding the presence of blood on the defendant's boots and clothing. The agent testified that phenolphthalein testing revealed indications of the presence of blood, but that the quantities were insufficient to determine definitively whether in fact blood was present. The agent then testified as to "indications" being transferred to the clothing through secondary transfer or spattering.

The defendant says the obvious effect of the testimony as to the "indications" being transferred was that his clothes had been spattered with the victim's blood and this was highly prejudicial. He contends this testimony was more prejudicial than probative and should have been excluded pursuant to N.C.G.S. § 8C-1, Rule 403.

The witness was entitled to testify as to the results of the test. This testimony, although not strong, had some tendency to

show that blood had spattered on the defendant. It was relevant and properly admissible. *See State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986).

[7] Finally, under this assignment of error, the defendant argues that Dr. Patrick Lantz, who testified as to the similarity of the wounds of Ms. Henley and Ms. Johnson, used two sets of slides and photographs which were unnecessarily repetitive, graphic and misleading. We note that the defendant did not object to this evidence at the trial and its admission is not reviewable by us under the North Carolina Rules of Appellate Procedure, Rule 10(b)(1). In light of the fact that this is a capital case, we will review this argument.

We have held in numerous cases that photographs may be introduced as evidence "even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *See State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Each of the victims had received numerous wounds. Dr. Lantz used the slides to illustrate his testimony concerning the similarities between the injuries suffered by the two victims. Slides of each victim were shown side-by-side and no slide was kept on the screen for an excessive period nor were slides unnecessarily repeated. The presentation was made to the jury on one occasion only. At all appropriate times, the court gave the jury limiting instructions. We find no error in the use of the slides.

This assignment of error is overruled.

[8] The defendant next assigns error to the submission to the jury during the sentencing stage of the aggravating circumstance that the murder was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). The defendant argues at one point that there was no evidence that the victim was alive when the majority of the injuries were inflicted. When determining the sufficiency of evidence supporting an aggravating circumstance, the evidence must be considered in the light most favorable to the State and with all reasonable inferences to be drawn from the evidence. *State v. Rose*, 335 N.C. 301, 439 S.E.2d 518, *cert. denied*, --- U.S. ---, --- L. Ed. 2d ---, 1994 WL 245495 (1994); *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, --- U.S. ---, 129 L. Ed 2d 883, 1994 WL 112017 (1994); *State v. Quick*,

329 N.C. 1, 405 S.E.2d 179 (1991). Following this rule, we must assume that many of the injuries were received by the victim while she was alive.

The defendant's principal argument under this part of the assignment of error is that the evidence he inflicted the injuries on the victim or killed her was too weak to support finding this aggravating circumstance. The defendant does not challenge the sufficiency of the evidence to support the guilty verdict. The same evidence supports the finding of this aggravating circumstance.

The evidence in this case showed that Deborah Henley was sexually assaulted with a blunt object, was beaten about the head, face, neck, chest, and abdomen. It showed she was stabbed twelve times and was tortured by means of two long incisions on her chest and two more across her neck. She was manually strangled. This evidence shows the murder in this case was characterized by excessive brutality, physical pain, psychological suffering and dehumanizing aspects not normally found in a first-degree murder case. *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). This aggravating circumstance was properly submitted to the jury. This assignment of error is overruled.

[9] The defendant next assigns error to the failure of the court to submit second-degree murder to the jury. We have held that if the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of first-degree murder and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, second-degree murder should not be submitted to the jury. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983).

The defendant offered some evidence of alibi and other evidence that he did not commit the offense. This is simply a denial that he committed the offense. This was not sufficient to submit the charge of second-degree murder to the jury. This assignment of error is overruled.

The defendant next contends it was error for the court not to strike the death penalty from consideration by the jury and impose a sentence of life in prison. He bases this argument on what he contends was error in admitting the testimony of Laura Denise Fletcher as to the assault by the defendant on her. He says this makes the sentence imposed arbitrary and capricious.

We have held it was not error to admit this testimony. This assignment of error is overruled.

[10] The defendant next assigns error to the denial of his motion to sequester the jury and to allow him to question each juror individually. He acknowledges that this is a matter within the discretion of the court. *See State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988); *State v. Weeks*, 322 N.C. 152, 369 S.E.2d 895 (1988). The defendant contends the court's failure to permit individual *voir dire* was an abuse of discretion because it: (1) inhibited the jurors' candor; (2) permitted prospective jurors to formulate responses enabling them to be excused from the panel; and (3) educated prospective jurors enabling them to form responses which would enable them to conceal preconceived determinations regarding guilt or innocence. We note this danger is present in every case in which sequestration and individual *voir dire* is not allowed.

The question of individual *voir dire* arose on the second day of jury selection and grew from juror responses regarding whether they had read an article published in the *Winston-Salem Journal* the day before jury selection commenced. The court said questioning of prospective jurors on the content of the article would be inappropriate "[w]hether we be proceeding by collective *voir dire* or by individual *voir dire*." The court indicated that it had paid careful attention to prospective jurors' responses concerning the article and was satisfied with their unequivocal responses as to their ability to give the defendant a fair and impartial trial. The court informed the defendant that it would monitor the situation, and if for some reason it became apparent that some further inquiry would be appropriate with any of the prospective jurors, the court would consider whether that juror should be individually questioned. We cannot say the court abused its discretion in denying the sequestration and individual *voir dire* of the jurors. *State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992); *State v. Crandell*, 322 N.C. 487, 369 S.E.2d 579 (1988). This assignment of error is overruled.

[11] The defendant under his last assignment of error contends that it was error not to grant his motion for a change of venue. The defendant based this motion on an article that appeared in the *Winston-Salem Journal* on the day preceding the trial. The article detailed the history of the case and quoted the district attorney who admitted the State would rely on circumstantial evidence, but tied this case to the Stokes County case. The defend-

ant admitted in open court that he had no evidence which would show he had been prejudiced by the news article but suggested to the court that it reserve ruling on the motion and see if the prospective jurors had been so tainted by the news article that he could not receive a fair trial.

The court denied the motion. The defendant has not shown anything from the questioning of prospective jurors which would indicate any of them were prejudiced by the news article. *See State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *cert. granted, judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990); *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987). This assignment of error is overruled.

PROPORTIONALITY REVIEW

In reviewing the sentence, as we are required to do by N.C.G.S. § 15A-2000(d), *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); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987), we hold that the aggravating circumstances were supported by the record and that the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

[12] Our final task is to determine whether the sentence was excessive or disproportionate to the penalty imposed in other first-degree murder cases. We hold that the sentence was not excessive or disproportionate.

In determining proportionality, we are impressed with the brutality and "overkill" evidenced in this murder. The defendant offered assistance to a small, trusting woman, took her to a secluded location, where he sexually assaulted her, tortured her, and beat, strangled, and stabbed her until she was dead.

The jury found as aggravating circumstances that: (1) the defendant had been previously convicted of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the defendant was engaged in the commission of first-degree rape or first-degree sex offense; and (3) the capital felony was especially heinous, atrocious, or cruel.

Eight mitigating circumstances were submitted to the jury. They were: (1) the age of the defendant at the time of this murder;

(2) the defendant was considerate and loving to his mother, father, and sister; (3) the defendant was a loving father to his son; (4) the defendant had been a productive member of society, having sought education and consistently been gainfully and responsibly employed; (5) the defendant sought to exert a good religious influence on the life of his son; (6) the defendant was cooperative with the police in not resisting arrest and voluntarily agreeing to and assisting in the search of his bedroom at his parents' house; (7) the offense was out of character for the defendant; and (8) any other circumstance arising from the evidence which the jury deems to have mitigating value. Of these eight circumstances, one or more jurors found mitigating value only in the defendant's not resisting arrest and assisting officers in the search of his bedroom.

We have reviewed the pool of capitally tried cases and have found ten cases in which the jury found the three aggravating circumstances found in the instant case. Of those ten, four have been remanded for either a new trial or a new sentencing hearing. The remaining six cases include five life sentences and one death sentence. However, the five cases in which a life sentence was imposed are distinguishable.

In *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986), the victim was a fifty-year-old male who was shot once in the back. The evidence tended to indicate that the defendant had offered the victim a ride from a bar to pick up the victim's car. They stopped by a house to have another beer. The defendant then shot the victim, robbed him, and dumped him along the side of a dirt road. The victim was found a short time later and taken to a hospital. He died several days later of pneumonia related to paralysis suffered as a result of the gunshot wound. At trial, the jury found the same three aggravating circumstances as were found in the instant case. However, the jury also found several mitigating circumstances including the statutory mitigating circumstances that the defendant's capacity to appreciate the criminality of his conduct was impaired and that the crime was committed while the defendant was mentally or emotionally disturbed.

In *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983), the defendant was one of a group of men who took the victim out into the woods where the defendant was twice thrown down a mine shaft. The first time, the victim dropped only a few feet, so the defendant and others helped him back out and then threw

him down again. According to eyewitness testimony, the second drop carried the victim out of sight down the shaft. Two rocks approximately eight inches across were also dropped down the shaft to make sure the victim had dropped to the bottom. The defendant was found guilty of first-degree murder and the same aggravating circumstances as were found in the case *sub judice* were found to be present in *Bare*. The jury deadlocked on the issue of whether the aggravating circumstances found were "sufficiently substantial to call for the imposition of the death penalty." *Id.* at 126, 305 S.E.2d at 516. For this reason, the jury never reached the mitigating circumstances. The motive in *Bare* was revenge. The individuals involved had a business relationship indicative of organized crime activities.

In *State v. Hill*, 308 N.C. 382, 302 S.E.2d 202 (1983), the defendant was part of a gang which set out to rob Good Samaritans. A female member of the group was to feign car trouble. Once a passing motorist stopped to assist her, the defendant and another male would step from the woods, armed with guns, and hold up the motorist. The defendant was armed with a shotgun and his cohort had a .38 pistol. The group staged one robbery and locked the victim in the trunk of his car. The group changed locations and repeated the scenario. A vehicle with three males in it stopped. When one of the occupants tried to flee, he was chased down by two members of the gang, while the defendant stood guard on the other two victims. At some point the defendant hit one victim with his shotgun, breaking the shotgun and opening a ten-stitch gash on the victim's head. The defendant then took the .38 pistol. The defendant ordered two of the victims into the trunk of the victims' car. The third victim was ordered to drive the car in which the defendant was a passenger, while the other members of the gang followed in the defendant's car. The two cars were driven to a nearby barn. There, the defendant shot and killed the driver of the vehicle and fired two additional shots into the trunk of the car. The jury in this case found four aggravating circumstances, the three found in the case at bar, plus that the capital felony was committed by means of a weapon or device hazardous to the public. The jury also found two statutory mitigating circumstances to be present, the catch-all and that the murder was committed while the defendant was mentally or emotionally disturbed. This case can be distinguished in that the defendant in the instant case was not found to be emotionally or mentally disturbed.

In *State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988), the defendant entered a store and stabbed an employee resulting in that employee's death. The defendant then robbed the store of several hundred dollars in cash and coins. In deciding the case, the jury in *Darden* found the three aggravating circumstances found in the instant case, as well as finding that the act was committed for pecuniary gain. The jury found no statutory mitigating circumstances, but did find several non-statutory circumstances. The defendant was found guilty of first-degree murder under both the felony murder theory and on the basis of premeditation and deliberation.

In *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991), the defendant told several people that he planned to rob a local cocaine dealer. After injecting cocaine with some friends one evening, the defendant suggested that he knew where they could get more drugs and money. The three obtained a sawed-off double-barreled shotgun along with another shotgun. They then went to the victim's trailer and talked their way inside. Once inside, the defendant and the victim argued over money the defendant owed the victim. Brandishing their weapons, the defendant and his friend obtained cocaine, marijuana and cash from the victim and a female in the trailer. The victim and the female were then forced to lie down on the bed. The victim's hands were bound. The female was then shot in the hand and face by the defendant's cohort. The victim attempted to stand up at which point the defendant shot the victim in the face. The victim was dead at the scene. The female called authorities though she was seriously wounded. The jury convicted the defendant of first-degree murder on the basis of both premeditation and deliberation and felony murder. The jury found five aggravating circumstances to be present, the three found in the instant case, plus that the murder was committed for pecuniary gain and that the crime was part of a course of conduct including other violent crimes. The jury found two statutory mitigating circumstances, that the crime was committed while the defendant was mentally or emotionally disturbed and the defendant acted under duress or the domination of another. The jury also found two non-statutory mitigating circumstances involving the defendant's drug abuse and his having been adopted.

While these cases are all similar in that the same aggravating circumstances were found to be present, they are distinguishable inasmuch as the cause of death and the surrounding facts may be seen

to be much less egregious. None of the cases cited above show the level of overkill or the indicia of torture found in the instant case.

We believe the instant case to be much more like *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). In *Brown*, the victim was a convenience store clerk who was abducted from the store, taken to a remote logging path and shot six times while lying face down on the ground. The medical examiner determined that the victim slowly bled to death over approximately fifteen minutes. The victim would have retained consciousness until shortly before her death. There were a series of three and one-half inch long scratches on the victim's left forearm. The jury found the same three aggravating circumstances and none of the submitted mitigating circumstances. The jury recommended a death sentence.

More recently, this Court upheld the death penalty in *State v. Rose*, 335 N.C. 301, 439 S.E.2d 578. In *Rose*, the victim died as the result of blunt force trauma and sharp trauma to the head, as well as manual strangulation. There was evidence of several incised wounds on the victim's body inflicted prior to death. The body was burned at some point after death. Here, the jury found two aggravating circumstances, that the 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 did not find any of the statutory mitigating circumstances submitted, but did find all nine of the non-statutory mitigating circumstances. The jury recommended the death sentence and we upheld that decision.

In both *Brown* and *Rose*, the facts indicate that the female victim was alone and vulnerable. In both cases, there was evidence indicating the victim survived the initial wounds, remained conscious for a period of time prior to death and that the wounds were painful. Further, there is no indication that the defendant in this case suffered any mental or emotional disturbance which would mitigate his actions. There was no evidence of privation or abuse of a type which has been found to mitigate a defendant's actions.

We are confident that the death penalty is not an aberration in this state for a murder such as this one. The defendant's sentence was not disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA v. JAMES FELTON EASON

No. 280A93

(Filed 29 July 1994)

1. **Jury § 261 (NCI4th)— peremptory challenge—Jehovah's Witness—death penalty views—no religious discrimination**

The prosecutor's peremptory challenge of a Jehovah's Witness in a first-degree murder trial did not constitute religious discrimination in violation of Art. I, § 26 of the N.C. Constitution or the First Amendment of the U.S. Constitution where the juror was stricken because she expressed reservations about the death penalty, and the prosecutor moved to excuse her after learning that she was a Jehovah's Witness only after making further inquiry to discover how her religious beliefs might affect her ability to follow the law. The prosecutor's statement that one reason he excused the juror was that he had been informed "that this religion does not believe in the death penalty" did not show religious discrimination since an attorney cannot be expected to ignore all outside knowledge and experience when exercising peremptory challenges, and this knowledge was used in combination with the juror's own statements to show a high probability that the juror might not be able fairly to consider the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

2. **Criminal Law § 76 (NCI4th)— venue change allowed—return to original venue allowed—invited error—denial of subsequent motion to change venue**

Where the first trial judge changed the venue of defendant's murder trial from Harnett County to Johnston County upon motion by defendant for a change of venue based on local publicity, defendant was dissatisfied with this change of venue because it changed only the county and not the district, and defendant asked the second trial judge to return the case to Harnett County on the ground that he had only one attorney for his capital trial at the time his original motion for a change of venue was granted, any error by the second trial judge in returning the case to Harnett County was invited by defendant's request that the second trial judge vitiate the action of the first judge, and defendant cannot complain of the second

judge's action. Once the case was returned to Harnett County, a third trial judge did not err by denying defendant's motion for a change of venue where all the seated jurors indicated that they could disregard pretrial publicity and decide the case solely on the basis of the evidence presented at trial, and defendant still had three unused peremptory challenges when the jury was seated.

Am Jur 2d, Criminal Law § 378.

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

3. Homicide § 489 (NCI4th) — first-degree murder — premeditation and deliberation — inference from lack of provocation — instruction supported by contradictory evidence

Although the defendant in a first-degree murder trial presented evidence of provocation by testimony that he had been struck in the groin with a pool cue, others in the bar were laughing at him, after he broke a pool cue in anger, the victim demanded money for the broken cue, and a bar employee separated them and tried to calm the situation, the State presented sufficient evidence that defendant was not provoked to support the trial court's instruction that premeditation and deliberation could be inferred from a lack of provocation where its evidence tended to show that no one in the bar, including defendant, believed that the victim had been the one who hit defendant in the groin, the victim had tried to be a peacemaker and defuse the situation, after they had been separated, the victim shook defendant's hand and tried to befriend him, and at the time he was attacked by defendant with a knife, the victim had just taken a phone call.

Am Jur 2d, Homicide § 501.

4. Criminal Law § 373 (NCI4th) — judicial notice — court's statement while ruling on objection — no expression of opinion on evidence

The trial court's statement, "That's within judicial notice," made when overruling defendant's objection to the prosecutor's jury argument that alcohol is a depressant and that a murder victim was subdued, laid back, not aggressive, and not wanting to fight, could not have caused the jury to infer that the court was taking judicial notice that the victim was laid back

and not aggressive and, when considered with the court's instruction on provocation, that the prosecution had proven premeditation and deliberation from a lack of provocation. The evidence was sufficient to show premeditation and deliberation from a lack of provocation without the court's statement, and the statement could not have affected the jury's verdict.

Am Jur 2d, Trial § 284.

5. **Evidence and Witnesses § 1250 (NCI4th)— in-custody statement—no invocation of right to attorney**

Defendant's in-custody statement was not improperly obtained after defendant invoked his right to an attorney where there was ample evidence to support the trial court's finding that defendant never requested an attorney after he had been given the *Miranda* warnings.

Am Jur 2d, Evidence §§ 749, 750.

6. **Evidence and Witnesses § 1260 (NCI4th)— in-custody statement—invocation of right to silence—reinitiation of interrogation by defendant—absence of finding—harmless error**

Any error in the admission of defendant's in-custody statement in a first-degree murder trial without a finding that he reinitiated the questioning following invocation of his right to silence was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt, including testimony by six eyewitnesses, evidence that police officers chased defendant from the crime scene and caught him splattered with blood and with a bloody knife still in his hand, and evidence that defendant made several spontaneous incriminating statements after his arrest.

Am Jur 2d, Evidence §§ 749, 750.

7. **Evidence and Witnesses § 2051 (NCI4th)— aggravated assault—enjoyment by defendant—shorthand statement of fact**

Testimony by an aggravated assault victim, who was describing how defendant had attacked him with a knife, that defendant had a grin on his face and "was enjoying what he was doing" was admissible as a shorthand statement of fact since it represented an instantaneous conclusion of the witness based on his perception of defendant's appearance, facial expressions, and mannerisms. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence § 29.

8. Criminal Law § 1183 (NCI4th)— aggravating factor—prior conviction—lost transcript—addendum to record

Although a transcript of the prosecution's presentation of evidence of a previous conviction was lost through transcription error, the trial court's finding of defendant's previous conviction as an aggravating factor was shown to have been supported by the evidence where an addendum to the record contained a certified copy of the judgment and commitment from the previous conviction and a sworn affidavit by the prosecutor that this was the same evidence presented to the trial court as proof of that conviction.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Trawick, J., at the 29 January 1992 Criminal Session of Superior Court, Harnett County. Defendant's motion to bypass the Court of Appeals on judgments entered on other felony convictions was allowed by the Supreme Court on 15 July 1993. Heard in the Supreme Court 3 February 1994.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

William F.W. Massengale and Marilyn G. Ozer for defendant-appellant.

WHICHARD, Justice.

In a capital trial, the jury found defendant guilty of the first-degree murder of Kirk Upchurch. He was also found guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury. Following the guilt phase of the murder trial, the State offered no additional evidence at sentencing, and the trial court determined that the State's guilt-phase evidence was insufficient to warrant submission of any capital sentencing aggravating circumstances to the jury. It accordingly sentenced defendant to life imprisonment on the murder charge. It sentenced him to twenty years imprisonment on each of the assault charges, the sentences to run consecutively. We find no error.

The State's evidence tended to show that on the evening of 16 July 1990, defendant was drinking beer and shooting pool at

the Silver Bullet, a lounge located at the Comfort Inn in Dunn, North Carolina. Kirk Upchurch, Raymond Houston, Paige Thomas, Charles Parker and William Medley also were patronizing the Silver Bullet that night. Claudette Roberts was tending bar, and Ricky Hall was assisting her.

During a game of pool, defendant became angry, walked between the pool tables, snapped a pool cue over his knee, and approached the bar with the two halves of the pool cue in his hands. He said he had been getting ready to play when someone hit him hard in the testicles. He said to Thomas, "That son of a bitch just jabbed me in the nuts with a pool stick," pointing to Charles Parker. There was evidence that neither Upchurch, Thomas nor Houston saw the incident. Parker and Medley testified they had no knowledge of it.

At the bar, Upchurch was trying to calm defendant. Defendant remained upset and moved to the other end of the bar. Shortly thereafter, defendant moved to Upchurch's end of the bar and seated himself next to Upchurch. The telephone rang. One of Upchurch's friends asked to speak to Upchurch. She could hear Upchurch's voice as he neared the phone, then a woman screaming, "Make him stop it!" Then the phone went dead.

Houston was standing at the bar when he saw defendant scuffling with Upchurch. Houston tried to part them. Claudette Roberts went to Upchurch, who by this time was behind the bar clutching his throat, which had been sliced and was completely open. Upchurch died as a result of these wounds. Roberts then saw defendant standing over Houston, cutting his throat. Houston testified that he had taken a step toward Upchurch and defendant when defendant grabbed him, spun him around backwards, picked him up by the throat, and threw him to the floor. Paige Thomas took Houston to the hospital.

Parker testified that while defendant was attacking Upchurch and Houston, he was putting his pool cue back in the rack, oblivious to what was happening at the bar. Defendant then attacked him from behind, cutting his mouth and part of his face. Roberts attempted to get help but was thwarted because the phone had been broken during the attack on Upchurch. After verbal exchanges between defendant and Roberts, in which defendant said he would kill her also, defendant left.

Officer James Cannady of the Dunn Police Department was dispatched to the Comfort Inn and arrived around 1:00 a.m. As Cannady walked toward the motel entrance, he heard Ricky Hall say that defendant was the one who "did it" and "get him." Defendant ran behind a house and hid. He soon was cornered by four police officers. When told he would be shot if he did not drop the knife, defendant closed the blade of the knife and dropped it. Once he dropped the knife, however, he refused to give up, and it took all four officers to wrestle him to the ground. When apprehended, defendant had blood on his clothing and a bloody knife in his hands.

During the drive to the police station, defendant spontaneously stated that he thought he had killed all three of the victims and deserved whatever he was going to get. He also stated, "I should have killed them. I should have killed them when I had the chance." Later at the station, defendant stated, "If [I] had the time to go back over it again, I would kill you SOBs too," referring to the officers.

Captain Sills testified that as defendant was being taken to the processing room, he heard defendant spontaneously say "that he knew he had killed the mother------, and he hoped the mother------ down there didn't have AIDS and that he knowed one was dead because he stuck him real good." When defendant arrived at the station, he received the *Miranda* warnings, but refused to make a statement. About an hour later, when the investigating officer arrived, defendant again received *Miranda* warnings. At this time, defendant made a tape-recorded statement which was essentially a confession.

Defendant offered no evidence.

PRE-TRIAL ISSUES

[1] Defendant first assigns error to the trial court's denial of his motion to prohibit the prosecutor from using a peremptory challenge in a discriminatory manner. He asserts that in striking a Jehovah's Witness from the jury, the State violated the First and Fourteenth Amendments to the United States Constitution and Article I, Section 26 of the North Carolina Constitution.

Article I, Section 26 of the North Carolina Constitution states: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." Defendant claims that in

striking a Jehovah's Witness from the jury with a peremptory challenge, the State violated the prohibition on religious discrimination. We disagree.

In enacting Article I, Section 26, the citizens of North Carolina rejected the corruption of their jury system by any form of irrational prejudice. *State v. Moore*, 329 N.C. 245, 247, 404 S.E.2d 845, 847 (1991); *State v. Cofield*, 320 N.C. 297, 302-04, 357 S.E.2d 622, 625-27 (1987). The elimination of discrimination was essential to protect not only the rights of the defendant but also the integrity of the judicial system. *Moore*, 329 N.C. at 247-48, 404 S.E.2d at 847-48. Discrimination in selecting juries so strongly taints the judicial system that any proceeding in which it appears is fatally flawed. *Cofield*, 320 N.C. at 304, 357 S.E.2d at 627. For this reason, the fact that the defendant's race or religion differs from the excluded person's is irrelevant. *See Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991) (white defendant may challenge discriminatory excusal of black jurors); *Moore*, 329 N.C. at 246-48, 404 S.E.2d at 847-48.

The potential juror here was not stricken solely because she was a Jehovah's Witness, however. Rather, the prospective juror, because of her strong personal and religious convictions, expressed reservations about the death penalty and was stricken because of these reservations. When a potential juror has convictions that would prevent him or her from voting to impose the death penalty, without regard to the evidence presented at trial, that juror is properly excused for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.21, 20 L. Ed. 2d 776, 785 n.21 (1968); *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). When a juror's reservations about the death penalty are not so grave as to merit an excusal for cause under *Witherspoon*, the juror frequently is excused with a peremptory challenge. *State v. Allen*, 323 N.C. 208, 221-22, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand, sentence reinstated*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 775 (1993). In *Allen*, we held that this violated neither the North Carolina nor the United States Constitution. *Id.* at 222, 372 S.E.2d at 863. We have noted that the exercise of peremptory challenges is frequently " 'more art than science' " and is based on "legitimate 'hunches' and past experience." *State v. Thomas*, 329 N.C. 423, 432, 407 S.E.2d 141, 147 (1991) (quoting *State v.*

Porter, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990)). Because so much of the peremptory challenge determination depends on feel and intuition, great deference must be given to the trial judge who actually saw and heard the potential juror. *Wainwright v. Witt*, 469 U.S. 412, 424-26, 83 L. Ed. 2d 841, 851-53 (1985); *Davis*, 325 N.C. at 622, 386 S.E.2d at 425.

Here, potential juror Shirley McKoy expressed reservations about the death penalty. After the trial judge asked the prospective jurors if any of them had feelings about capital punishment that might substantially impair their ability to consider it fairly, the following exchange occurred:

> Q: Ms. McKoy, you haven't answered, but I see your head shaking.
>
> A: I'm not sure. I have mixed feelings.
>
> Q: You have mixed feelings?
>
> A: Yes.
>
> Q: Do you have—Are your mixed feelings, Ms. McKoy, about whether or not we should have—about whether or not you could abide by the Court's instructions and the evidence that comes from the witness stand and base your decision on the Court's instructions and the evidence that comes from the witness stand regardless of your personal feelings? Can you put your personal feelings aside and base your decision—
>
> A: Yes.
>
> Q: You could do that?
>
> A: [Nods affirmatively].

The prosecutor later renewed this discussion, attempting to clarify McKoy's feelings about the death penalty:

> Q: Earlier this afternoon, Ms. McKoy, if I recall correctly, you said you had some reservations about the death penalty; is that correct?
>
> A: [Nods affirmatively].
>
> Q: You have some mixed feelings. Can you explain more of those feelings as best you can?

A: Well, I think it's under the circumstances which the crime was committed, what was involved, the person's background and—that committed the crime.

Q: Are your reservations about the death penalty grounded upon or based upon your religious beliefs and moral convictions?

A: A little of both.

Q: In light of your religious beliefs and moral convictions, Ms. McKoy, do you think that if the defendant in this case is first convicted of first degree murder, do you think that you yourself could fairly consider both possible things, not only life imprisonment, but the death penalty and make your decision based upon the law and the evidence?

A: I think the law and evidence, yeah.

Based on these exchanges, the prosecutor elected to exercise a peremptory challenge to excuse McKoy. At that time, he wrote three race-neutral reasons on a piece of paper and submitted them to the court. The first two were:

1) This juror was very equivocal in explaining her feelings about the death penalty, admitting at least twice that she had very 'mixed feelings' about the death penalty;

2) This juror is a Jehovah's Witness. The prosecutor has been informed, although he does not know for certain, that this religious denomination does not believe in the death penalty. If so, there is a danger that this juror's religious beliefs would interfere with her ability to deliberate as to punishment.

The third reason is irrelevant to consideration of this issue.

Defendant argues that the second reason was discriminatory because it stereotypes Jehovah's Witnesses. We disagree. What this statement does is briefly state the prosecutor's knowledge of a specific tenet of that religious faith. An attorney cannot be expected to ignore all outside knowledge and experience when exercising peremptory challenges. *See Thomas*, 329 N.C. at 432, 407 S.E.2d at 147-48. This knowledge was used in combination with the juror's own statements to show a high probability that the juror might not be able fairly to consider the death penalty.

The prosecutor did not learn that McKoy was a Jehovah's Witness, and move to excuse her, without further inquiry to discover

how her religious beliefs might affect her ability to follow the law.[1] Instead, the judge and the prosecutor attempted to have McKoy clarify her feelings about the death penalty. We have acknowledged that jurors frequently are unable to articulate how their beliefs may influence their deliberations. *Davis*, 325 N.C. at 622-24, 386 S.E.2d at 425-26. Because prospective jurors convey from the jury box far more than can be reflected in a cold transcript, we generally defer to the trial judge who had the benefit of being present during the courtroom exchanges. *Id.* The judge here found the prospective juror's reservations about the death penalty sufficient to permit a peremptory challenge, and we find no basis in the record for overturning this conclusion.

The State's position is strengthened by the fact that another prospective juror stated that he attended a Jehovah's Witness church. In contrast to McKoy, he stated that he had no reservations which might impair his serving on the jury, and he was chosen to sit. This provides further support for the conclusion that McKoy was removed from the jury because of her reservations about the death penalty, not because of her religious affiliation.

For these reasons, we hold that defendant has failed to prove religious discrimination under Article I, Section 26 of the North Carolina Constitution. The reasons given apply with equal force to deny validity to defendant's arguments under the federal Constitution. *See Thomas*, 329 N.C. at 432-33, 407 S.E.2d at 148 (same deference to trial court's ruling under both constitutions); *Allen*, 323 N.C. at 222, 372 S.E.2d at 863 ("not error under the Constitution of the United States for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to *Witherspoon*"). This assignment of error is overruled.

[2] Defendant next argues he was denied a fair trial because of improper venue decisions. Defendant originally asked for a change

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1. *Cf. State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, --- U.S. ---, 128 L. Ed. 2d 679 (1994). In that case, the prosecutor learned that a potential juror was a Jehovah's Witness and moved to strike without conducting a more specific inquiry into the juror's beliefs. Further, the prosecutor stated that because of her past experience with Jehovah's Witnesses, she would never fail to strike one if she had a peremptory left. *Id.* at 768. The Minnesota Supreme Court held that this did not violate a statutory provision similar to Article I, Section 26 of the North Carolina Constitution.

of venue to a new district because the victim was the son of a well-known court reporter in the district, and his case had generated significant local publicity in Harnett County. The first trial judge agreed regarding the local publicity and changed the venue to Johnston County, a different county but within the same judicial district. At the time this motion was granted, however, the defendant had only one attorney for his capital trial, a violation of N.C.G.S. § 7A-450(b1). The trial judge assigned to Johnston County therefore returned the trial to Harnett County. After the case was returned to Harnett County, a third judge denied a motion to change venue. Defendant contends that the net result of these decisions was to deny him a fair trial. We disagree.

Defendant correctly notes that generally one superior court judge cannot rectify what may seem to be legal errors by another in the same case. *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 498 (1981). If this were allowed, the review function of appellate courts would be usurped and trials would become chaotic, as litigants searched for judges willing to grant them more favorable rulings. *Id.* Thus, the general rule is that altering a prior ruling is acceptable only after a showing of a substantial change in circumstances which warrants a different disposition. *Id.*

Here, however, any violation of this general rule occurred at defendant's request. Before any changes in venue had occurred, one of defendant's attorneys withdrew from the case. At that time, motions to change the venue and to continue the proceedings until a second counsel could be appointed were pending. The next day, and before a new assistant counsel could be appointed, the original trial judge denied the motion to continue the proceedings and granted the motion to change the venue from Harnett to Johnston County. When the case came to Johnston County, defendant explained to the trial judge there that the original motion had been granted while the defendant had only one attorney, a violation of N.C.G.S. § 7A-450(b1) as interpreted and applied in *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988). Then the following exchange occurred:

> THE COURT: So, what you're really saying is that the motion for change of venue should not have been heard.
>
> [DEFENSE ATTORNEY]: Yes, sir. That is—
>
> THE COURT: So, what you're really saying is that venue of this case is properly in Harnett County.

[DEFENSE ATTORNEY]: Yes, sir.

THE COURT: All right.

[DEFENSE ATTORNEY]: That's what I'm saying. I think that's correct, and then we'd like to move it out of Harnett County, out of the district entirely. And my concern is, I've gone ahead and filed a motion to change venue out of Johnston, and I think that that is going to become a more difficult task in light of what I consider to be a ruling that should not have occurred on March 19, 1991. So, in any event, Your Honor, I think that it's clear that when Judge Barefoot entered his order on March 19, 1991 [moving the case from Harnett to Johnston County], Mr. Eason did not have two attorneys he was entitled to as a matter of the statute and according to the Supreme Court holding in Hucks.

In view of the foregoing, we hold that if it was error for the trial judge in Johnston County to return the case to Harnett County, defendant invited the error. When a party invites a course of action, he is estopped from later arguing that it was error. N.C.G.S. § 15A-1443(c) (1988); *Brittain v. Blankenship*, 244 N.C. 518, 521, 94 S.E.2d 489, 491 (1956). Here, defendant was dissatisfied with the original change of venue because it changed only the county, not the district, and he asked the second trial judge to return the case to the original county so he could try again for a venue out of the district. By asking for a return to the original venue, defendant invited the second trial judge to vitiate the action of the first one, and he cannot complain of this action now.

Defendant further contends that once the case was back in Harnett County, it was error for the trial judge there to deny the motion to change venue, especially because the trial judge who heard the original motion had found cause to change the venue. We disagree.

The decision as to whether to change venue is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Madric*, 328 N.C. 223, 226-27, 400 S.E.2d 31, 33-34 (1991). To show prejudice by a failure to change venue, a defendant must have used all his peremptories and have accepted a juror prejudiced by pretrial publicity. *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). Although there was local media

coverage of the murder, the existence of pretrial publicity, standing alone, does not establish a reasonable likelihood that a fair trial cannot be had. *State v. Soyars*, 332 N.C. 47, 53, 418 S.E.2d 480, 484 (1992).

Defendant has the burden of showing it was reasonably likely that the jurors would base their decision on the media coverage, not on the information presented at trial. *Id.* Here, all the seated jurors indicated they could decide the case based solely on the evidence presented at trial. We have stated previously that the jurors' statements as to whether they could limit their deliberations to the evidence presented at trial is the best evidence that pretrial publicity was not prejudicial or inflammatory. *Id.* at 54, 418 S.E.2d at 484; *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). The court also reminded the jury several times during the trial that it was not to read or listen to any stories about the case during the trial.

Further, when the jury was seated defendant still had three unused peremptory challenges. "To meet his burden of proof, defendant must show that the jurors had prior knowledge of the case, that he exhausted his peremptory challenges, and that an objectionable juror sat on the jury." *State v. Mash*, 328 N.C. 61, 64, 399 S.E.2d 307, 310 (1991). Because defendant has failed to meet his burden, we reject this argument.

GUILT PHASE ISSUES

[3] Defendant next contends the trial court erred when it instructed that premeditation and deliberation could be inferred from a lack of provocation and in taking judicial notice of one of the prosecutor's comments during closing arguments. He argues that the cumulative effect of these actions was to mislead the jury into thinking the court believed the prosecution had proven the element of premeditation and deliberation.

It is proper to charge that premeditation and deliberation can be inferred from a lack of provocation when the charge is supported by competent evidence. *State v. Thomas*, 332 N.C. 544, 563, 423 S.E.2d 75, 86 (1992). Even though the evidence may be contradictory, such an instruction is proper if there is sufficient evidence from which a jury could reasonably conclude that the defendant was not provoked. *State v. Handy*, 331 N.C. 515, 524-25, 419 S.E.2d 545, 549-50 (1992).

Here, defendant essentially argues that the evidence of provocation was so strong that lack of provocation should have been removed from the case as a matter of law. Defendant had been hit in the groin by a pool cue and testified that others in the bar had been laughing at and belittling him. After defendant had broken a pool cue in anger, witnesses testified that the victim had demanded money for the broken pool cue, and that a bar employee separated them and tried to calm the situation.

The State presented evidence, however, to support the conclusion that defendant was not provoked. No one in the bar, including defendant, believed the victim had been the one who hit defendant in the groin. Several witnesses testified that the victim had tried to be a peacemaker and defuse the situation. For example, after defendant had been hit in the groin with the pool cue, the victim told him that while he did not see it, it must have been accidental and that defendant should calm down. Later, after they had been separated, he went over to defendant, shook his hand, and tried to befriend defendant. Additionally, at the time he was attacked, the victim had just taken a phone call.

Thus, although the evidence was contradictory, a jury could reasonably have concluded that the victim did not provoke the attack. Therefore, it was proper to include the instruction that premeditation and deliberation could be inferred from a lack of provocation.

[4] Defendant also contends the trial court impermissibly took judicial notice of one of the prosecutor's statements during closing arguments. He argues that the instruction on provocation and the following exchange caused the jury to believe the court was accepting the prosecution's arguments:

> [PROSECUTOR]: You might wonder about the effect of alcohol and cocaine with Kirk Upchurch [the victim]. First of all, alcohol is a depressant. It seems like that's what he had mostly in his system. It's a depressant. He was subdued. He was laid back, not aggressive, not wanting to fight.
>
> [DEFENSE ATTORNEY]: I object. There has been nothing in testimony to that, Judge.
>
> THE COURT: Sustained—overruled. That's within judicial notice, overruled.

Defendant recognizes that the court may have merely taken notice of the fact that alcohol is a depressant. He contends, however, that the jury may have inferred from this exchange that the court was taking judicial notice of the fact that the victim was laid back and subdued and that the court therefore believed the prosecution had proven this point.

Because defendant failed to object or request a clarification at trial, he must show plain error—*i.e.*, not only that there was error, but also that without the error the jury probably would have reached a different verdict. *Thomas*, 332 N.C. at 563, 423 S.E.2d at 86. Defendant essentially contends that absent the instruction on provocation and the judge's responses in the above exchange, the jury would have returned a verdict finding him guilty of second-degree murder or voluntary manslaughter.

The exchange quoted above is somewhat ambiguous, but we cannot conclude that it so affected the jury that without it the jury would have returned a different verdict. Witnesses testified that the victim had not provoked the attack and had attempted to befriend and calm defendant. Witnesses also testified that ten to fifteen minutes passed between when defendant and the victim were separated and when the attack occurred. Finally, at the moment of the attack, the victim had just answered the phone. We therefore reject defendant's contention that the evidence would have been insufficient to show premeditation and deliberation from a lack of provocation without the exchange quoted above, or that the exchange probably affected the verdict.

[5] Defendant's fourth contention is that the trial court erred by admitting into evidence a taped statement defendant made to the police. He argues that this statement was obtained after he had invoked his right to an attorney and his right to remain silent and should have been excluded as a violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree.

This Court and the United States Supreme Court have held that once a defendant requests an attorney, the police may no longer initiate questioning. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981); *State v. Lang*, 309 N.C. 512, 521, 308 S.E.2d 317, 321 (1983); *see also State v. Pope*, 333 N.C. 106, 112, 423 S.E.2d 740, 743-44 (1992) (citing United States Supreme Court decisions defining rule). Defendant relies on these cases to

argue that the police impermissibly reinitiated the interrogation after he had requested an attorney.

The trial court found, however, that defendant never requested that an attorney be present during questioning. During the *voir dire* hearing on the admissibility of defendant's statements, the State presented testimony of the arresting and interrogating officers, who stated that defendant never requested an attorney. Defendant testified that he had requested an attorney. After listening to the testimony, the trial court made multiple findings of fact, including a finding that defendant never requested an attorney. A trial court's findings of fact following a hearing on the admissibility of a defendant's statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. *State v. Torres*, 330 N.C. 517, 523, 412 S.E.2d 20, 23 (1992); *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986). As there was ample evidence to support the trial court's finding that defendant never requested an attorney, we cannot disturb it.

[6] Defendant further contends that his statement was obtained in violation of his right to remain silent. In *Mosely v. Michigan*, 423 U.S. 96, 46 L. Ed. 2d 313 (1975), the United States Supreme Court held that once a defendant invokes his right to remain silent, it must be scrupulously honored. *Id.* at 104, 46 L. Ed. 2d at 321. When defendant was given the *Miranda* warnings shortly after arriving at the police station, he refused to make a statement. When the interrogating officer arrived at the police station about an hour later, defendant told him he did not want to be a problem. The officer repeated the *Miranda* warnings to defendant, who proceeded to sign the waiver form and give a statement.

Defendant contends this statement was admitted erroneously because the trial court did not find that defendant reinitiated the interrogation. Only the defendant can reinitiate the interrogation once a request for an attorney has been made. *Lang*, 309 N.C. at 520-21, 308 S.E.2d at 321 (citing *Edwards v. Arizona*, 451 U.S. at 484-85, 68 L. Ed. 2d at 386). Defendant asks us to adopt the holding of *State v. Bragg*, 67 N.C. App. 759, 760-61, 314 S.E.2d 1, 2 (1984), which, by equating the right to counsel and the right to remain silent, held that once a defendant invokes his right to remain silent, only he can reinitiate the interrogation. Here, it is unclear who initiated the interrogation after defendant had invoked his right to remain silent, and the trial court did not make

a specific finding on this issue. Because we have held it to be error for a trial court to fail to make a finding regarding who resumed the questioning once a request for an attorney has been made, *Lang*, 309 N.C. at 520-21, 308 S.E.2d at 321, defendant contends, by analogy, that his confession after invoking his right to silence was admitted erroneously and a new trial should be granted.

Assuming, *arguendo*, that the statement should not have been admitted without a finding as to who reinitiated the discussion, the evidence of defendant's guilt was overwhelming. Six eyewitnesses, including two assault victims who survived, saw defendant attack and kill Kirk Upchurch by slashing his throat with a knife. These witnesses also saw defendant attack Parker and Houston, also by slashing their throats. Police officers began chasing defendant as he fled the scene and caught him, splattered with blood and with the bloody knife still in his hand. After his arrest, defendant made several spontaneous, incriminating statements, the admission of which he does not contest. In light of this overwhelming evidence, any error in admitting defendant's statement, without a finding that he reinitiated the questioning following invocation of his right to silence, was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988).

[7] Defendant's fifth contention is that the trial court erred in allowing a statement from a witness about what defendant was thinking. We disagree. The comment objected to occurred while the prosecutor was questioning one of the victims, who was describing how defendant had attacked him.

> Q. How many times do you remember being cut that evening?
>
> A. I just sort of went blank. I just kind of went blank and I was trying to—I don't know what I was trying to do, you know. I just kept seeing him in front of me, and he had this grin on his face. He was enjoying what he was doing.
>
> [DEFENSE ATTORNEY]: Object, Your Honor.
>
> THE COURT: Overruled.
>
> A. Excuse me.
>
> Q. Go ahead.
>
> A. Did I do something wrong?
>
> Q. Go ahead.

A. He had a grin on his face. You know, the man was enjoying what he was doing.

Defendant did not object to the statement when it was made the second time.

Generally, a witness is not allowed to testify as to what another person is thinking because this is speculative and amounts to impermissible opinion evidence. However, Rule 701 allows a lay witness to testify in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1992); *see State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987). This exception includes what are frequently called "shorthand statements of facts." *Id.* "[A] witness may state the 'instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.' " *Id.* (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E. 71, 72 (1921))). The comment "he was enjoying what he was doing" represents an instantaneous conclusion of the witness based on his perception of defendant's appearance, facial expressions, mannerisms, etc. As such, it is a "shorthand statement of fact," and defendant's objection was properly overruled. Further, even if there was error, defendant waived his objection when he failed to renew it when the statement was repeated.

SENTENCING PHASE ISSUE

[8] Defendant's final contention is that the trial court impermissibly used a previous conviction as an aggravating factor in sentencing on the assault convictions. He argues that there is inadequate evidence to support the previous conviction because the tape recording of the prosecution presenting its argument for aggravating factors was erased by an error in the transcription process.

The State has the burden of proving any aggravating factors. *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 500 (1985). Many different forms of proof are acceptable, however. *See State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983). Because the transcript of the prosecution's argument was lost through

transcription error, it is unclear what evidence was presented at the sentencing hearing to prove the previous conviction. An addendum to the record contains a certified copy of the judgment and commitment from the previous conviction, however. This document clearly establishes the existence of the previous conviction. Further, the addendum to the record contains a sworn affidavit from the prosecutor that this was the same evidence presented to defendant and the trial court as proof of the prior conviction. Defendant's argument is therefore without merit.

NO ERROR.

STATE OF NORTH CAROLINA v. ROBERT JAMES BAYMON

No. 25A93

(Filed 29 July 1994)

1. **Evidence and Witnesses § 2332 (NCI4th) — child sexual abuse — expert testimony — coaching of child — redirect examination — no error**

The trial court did not err in a prosecution for rape and sexual offenses against a nine-year-old child by allowing Dr. Everett, an expert in pediatric medicine and child sexual abuse, to testify on redirect examination that she had not picked up on anything to suggest that someone had told the victim what to say or that the victim had been coached. Although an expert witness may not testify that the prosecuting child-witness in a sexual abuse trial is believable or that the child is not lying about the alleged sexual assault, defense counsel on cross-examination attempted to leave the impression that the victim had been coached by her relatives or social workers involved in the case and opened the door for the State on redirect to proffer Dr. Everett's testimony that she did not perceive that the victim had been told what to say or had been coached.

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

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

2. **Evidence and Witnesses §§ 2972, 3158 (NCI4th)— child sexual abuse—specific acts of truthfulness—testimony of victim's teacher**

There was prejudicial error in a prosecution for rape and sexual offenses against a child where the child's teacher testified to specific acts of the child which were indicative of truthfulness. The testimony was improperly offered to show the victim's truthfulness in the past in order to suggest that she was being truthful concerning the subject matter of the charges against defendant and was prejudicial in light of the conflicting medical testimony. N.C.G.S. § 8C-1, Rule 608.

Am Jur 2d, Witnesses §§ 895 et seq.

Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed. 564.

3. **Criminal Law § 425 (NCI4th)— child sexual abuse—prosecutor's argument—number of incidents—lack of defendant's testimony**

There was prejudicial error in a prosecution for rape and sexual offense against a child from a prosecutor's argument that defendant knew how many times the child was sexually assaulted but wasn't telling. Defendant was charged with two counts of first-degree sexual offense and two counts of first-degree rape, so that an essential element of the State's case was the number of occasions defendant sexually assaulted the victim, the argument was a direct reference to defendant's failure to testify, and the argument was obviously intended to disparage defendant in the eyes of the jury for failing to testify.

Am Jur 2d, Trial § 590.

4. **Evidence and Witnesses § 1730 (NCI4th)— child sexual abuse—videotape of interview with counselor—admissible**

The trial court did not err in a prosecution for rape and sexual offense against a child in admitting into evidence a videotaped interview between the victim and a counselor where the counselor was deceased at the time of trial. The statements were not offered to prove that defendant sexually assaulted the victim, but rather to show that the victim had made a similar consistent statement; the counselor did not make any statement or give any testimony in the videotaped interview,

but merely asked questions of the victim to obtain a case history preliminary to the physical examination; and the victim testified concerning the subjects covered in the interview and defendant had ample opportunity to cross-examine her.

Am Jur 2d, Evidence § 979.

Admissibility of videotape film in evidence in criminal trial. 60 ALR3d 333.

Justice MEYER concurring in result.

Appeals by the State and defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 476, 424 S.E.2d 141 (1993), which vacated judgments entered by Butterfield, J., at the 19 March 1991 Criminal Session of Superior Court, Wilson County, and granted defendant a new trial. Defendant's petition for discretionary review of additional issues not determined by the Court of Appeals was allowed on 6 May 1993. Heard in the Supreme Court 16 November 1993.

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

W. Earl Taylor, Jr. for defendant.

PARKER, Justice.

Defendant, upon proper bills of indictment, was convicted of two counts of first-degree statutory rape and two counts of first-degree statutory sexual offense in violation of N.C.G.S. § 14-27.2 and N.C.G.S. § 14-27.4, respectively. The trial judge entered judgment and imposed four life sentences. On defendant's appeal, the Court of Appeals found reversible error. The State appealed to this Court as a matter of right based on the dissent below, and defendant filed a notice of appeal and a petition for discretionary review on two issues not determined by the Court of Appeals. The State's motion to dismiss defendant's appeal was denied and defendant's petition for discretionary review was allowed by this Court on 6 May 1993.

In brief, the record reflects that the female victim was nine years old at the time of the trial. She testified that defendant was in her home on several occasions while her mother was at work. On these occasions, defendant sent the other children

outside to play but forced the victim to remain inside with him. Using anatomically correct dolls, the child specifically testified to two episodes of sexual intercourse, both anal and vaginal, and alluded to numerous others. She stated that "[h]e stuck his ding-dong in me; kissed me all over." On at least one occasion, he beat her with a belt. She further testified she did not tell anyone what had happened to her because she was afraid defendant would beat her again. However, on 13 July 1990, following the second specific occasion of vaginal and anal penetration, the child, while visiting at her cousin's ("Aunt" Kell's) house nearby, bled in the commode. When questioned, the child told her cousin what defendant had been doing to her. The next day the victim told another cousin ("Aunt" Pearl) a similar story.

The State's evidence included the testimony of the victim's cousins; two social workers from the Wilson County Department of Social Services; a child therapist; the police detective who investigated the charges; the victim's schoolteacher; and two medical experts, Dr. Theodore George Brna and Dr. Vivian Denise Everett.

Dr. Brna testified that he examined the victim on 14 July 1990 and performed both a vaginal and rectal examination. He did not observe any secretions or tears in the vaginal area or any external tears, bruises, or lacerations in the rectal area, though he did observe redness around the urinary opening. He testified that he saw no evidence of sexual abuse in the victim's rectal area, and in his medical opinion, no penetration of the victim's vagina had occurred.

Dr. Everett, who was director of the child sexual abuse team at Wake Memorial Hospital, examined the victim on 31 July 1990. Prior to Dr. Everett's examination, Kimberly Crews, a counselor on the team, interviewed the victim. This interview was videotaped, and Dr. Everett discussed the interview with the counselor before examining the victim. Dr. Everett testified that the opening in the victim's hymen measured six millimeters, larger than was usual for a child the victim's age. To Dr. Everett this finding was a strong indicator of sexual abuse. Dr. Everett further testified that she did not find tears or lacerations in either the vaginal or rectal area, but did not consider it unusual not to observe tears and lacerations because of the healing powers of both the hymen and rectal tissue. In Dr. Everett's opinion, the interview and her examination were consistent with sexual abuse.

[1] Before the Court of Appeals, defendant argued, and the majority of the panel agreed, that the trial court erred in allowing, over objection, certain testimony by Dr. Everett on redirect examination. We agree with the State that under the circumstances admission of the testimony was not error.

Dr. Everett was qualified as an expert witness in the fields of pediatric medicine and child sexual abuse. On direct examination Dr. Everett testified that the basis of her opinion was her physical examination of the victim and her review of the videotaped interview between the victim and the counselor. On redirect examination, after strenuous cross-examination, Dr. Everett testified that she had not picked up on anything to suggest that someone had told the victim what to say or that the victim had been coached. Relying on *State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 64 (1987), the Court of Appeals ruled that "an expert witness may not testify regarding the veracity of the prosecuting child witness in a sexual abuse trial." *State v. Baymon*, 108 N.C. App. 476, 482, 424 S.E.2d 141, 144 (1993). The court held that the challenged testimony was a comment on the victim's credibility and was thus inadmissible.

In a dissenting opinion Judge Walker opined that "there is a distinction between testimony from a witness such as Dr. Everett that a child victim was truthful or untruthful, which is inadmissible, and testimony that the expert discerned no evidence that the child had been 'coached.'" *Baymon*, 108 N.C. App. at 485, 424 S.E.2d at 146. On appeal the State argues the correctness of the dissent's position that a statement that a child was not coached is not a statement on the child's truthfulness. The State further contends that defendant's cross-examination of Dr. Everett opened the door for the challenged testimony on redirect. We agree.

This Court has held that under Rules 405 and 608 of the North Carolina Rules of Evidence, an expert witness may not testify that the prosecuting child-witness in a sexual abuse trial is believable, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), or that the child is not lying about the alleged sexual assault, *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986). Under certain circumstances, however, otherwise inadmissible evidence may be admissible if the door has been opened by the opposing party's cross-examination of the witness. "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing

party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (citing *State v. Rose*, 335 N.C. 301, 337, 439 S.E.2d 518, 538, *cert. denied*, --- U.S. ---, 129 L. Ed. 2d 883 (1994)) *petition for cert. filed*, (U.S Oct. 5, 1994), (No. 94-6384).

During the cross-examination of Dr. Everett, defense counsel conducted the following colloquy:

> Q. Dr. Everett, you were talking about how children know various things.
>
> One way children know things or what they are told by adults, isn't it?
>
> A. That's possible.
>
> Q. And children often learn—that's why they go to school to be taught by adults, isn't it?
>
> A. That's correct.
>
> Q. That's a common learning method by children to be told by adults?
>
> A. They may be told things but their ability to relate what they have learned in that manner would be different.
>
> Q. And, the more times they are told that, the easier they have to retain that information, isn't it?
>
> A. Not necessarily so.
>
> I mean that's possible, but again, when the interviews are conducted, they are conducted in such a way as to pick up on that possibility.
>
> Q. But you weren't present when the interview was done?
>
> A. No. I wasn't present when the interview was done.
>
> Q. You don't have any idea what her Aunt Pearl had told her before she was examined, do you?
>
> A. No, I don't know what her Aunt had told her.
>
> Q. You don't know what Aunt Kell had told her, do you?

A. No. I just know what the interview between she and Ms. Crews.

Q. And you don't have any idea how many people she had told this story to before Ms. Crews interviewed her, do you?

A. No, I don't.

Q. But you are aware that there was a lot of involvement by social services?

A. There was a social worker involved in the case.

Q. And, did you view the interview by Ms. Crews as part of the basis of forming your opinions?

A. Yes.

Q. So, you used what [the victim] said as part of the basis to form your opinions?

A. Well, following the interview, Ms. Crews discussed the interview with me and informed me of what [the victim] had said to her just prior to my doing the physical exam.

Q. And, that was part of the basis for your examination was what [the victim] actually said?

A. That is correct. The history obtained.

Through this line of questioning, defense counsel, in an effort to undermine Dr. Everett's credibility, particularly her reliance on the history given by the victim in the videotaped interview, attempted to leave the impression that the victim had been coached by her relatives or social workers involved in the case. This attempt opened the door for the State on redirect to reestablish the reliability of the videotaped interview by proffering Dr. Everett's testimony that she did not perceive that the victim had been told what to say or coached.

The purpose of redirect examination is to clarify any questions raised on cross-examination concerning the subject matter of direct examination and to confront any new matters which arose during cross-examination. *State v. Price*, 301 N.C. 437, 452, 272 S.E.2d 103, 113 (1980).

Our Court has long recognized that

> [a] party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross-examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.

State v. Glenn, 95 N.C. 677, 679 (1886). *See also State v. Cates*, 293 N.C. 462, 470-71, 238 S.E.2d 465, 471 (1977); *State v. Patterson*, 284 N.C. 190, 196, 200 S.E.2d 16, 20 (1973). We hold that defendant's cross-examination of Dr. Everett rendered the challenged testimony admissible on redirect examination. Accordingly, the Court of Appeals erred on this issue.

[2] The State also contends the Court of Appeals erred in holding that the trial court erred by allowing certain testimony from Susan Everett, the victim's schoolteacher. During direct examination by the State, Ms. Everett testified that the victim had an IQ of forty-eight and was in a special class for the "educable mentally handicapped." When asked if she had the opportunity "to observe [the victim] in terms of relating factual happenings," Ms. Everett responded that the children often related things to her. The victim "would come and say things like she had been to church, and in a couple of weeks, she'd come and she would be singing a song I know she had learned in church, so I knew she hadn't made that up." Ms. Everett also stated that the victim might mention that she had been shopping and later "[s]he'd have on some new clothes so I knew that it was true. . . . I have never had any reason to doubt that what she tells me is not true." The Court of Appeals ruled that the testimony as to these specific instances of conduct was improper under Rule 608(b) of the North Carolina Rules of Evidence. We agree.

The rule in question provides in part:

> (a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence

> may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.G.S. § 8C-1, Rule 608(a), (b) (1992).

Under this rule direct examination of a witness concerning specific instances of conduct pertaining to a witness' character for truthfulness or untruthfulness is prohibited. Rather, as Rule 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." N.C.G.S. § 8C-1, Rule 405(a) (1992). As the Court of Appeals properly noted, specific instances of conduct are admissible to prove character or a trait of character only when the "character or a trait of character of a person is an essential element of a charge, claim, or defense." N.C.G.S. § 8C-1, Rule 405(b) (1992). *State v. Baymon*, 108 N.C. App. at 484, 424 S.E.2d at 145.

In the present case we agree with the Court of Appeals that Ms. Everett's testimony during direct examination by the State was improperly offered to show the victim's truthfulness in the past in order to suggest that she was being truthful concerning the subject matter of the charges against defendant. Ms. Everett testified to specific acts of the child which were indicative of truthfulness; she did not state whether she had an opinion as to the victim's character for truthfulness or whether she knew of the victim's reputation for truthfulness. The victim's character for truthfulness or lack thereof was not at issue. Even if the purpose of the inquiry was, as the State contends, to show the victim's ability to relate factual happenings and to communicate, the witness'

responses were beyond the scope of the question and directed to truthfulness. We also agree with the Court of Appeals' analysis that the error was prejudicial in light of the conflicting medical testimony. In child sexual abuse cases where the medical evidence is in conflict the victim's credibility is critical. Given this evidence, defendant has met his burden of showing that the error was prejudicial under the standard in N.C.G.S. § 15A-1443(a). On the record before us we cannot conclude as a matter of law that there was no reasonable possibility that the jury would have reached a different result had the improperly admitted testimony by a teacher concerning the child's veracity not been admitted. N.C.G.S. § 15A-1443(a) (1988). This testimony was offered to show that the victim was being truthful on this occasion and was thus prejudicial. Accordingly, we agree with that portion of the opinion of the court below finding error in the trial court's admission of Ms. Everett's testimony during direct examination as to prior occasions when the victim was truthful. For this reason defendant is entitled to a new trial.

[3] On discretionary review of defendant's issues, defendant first contends the trial court erred in failing to grant his request for a mistrial based on the district attorney's comments during closing argument. We agree and hold that this error also entitles defendant to a new trial.

The prosecutor's closing argument was not transcribed, and the trial judge was out of the courtroom when defendant's objection was raised. When the judge returned to the courtroom, he asked both counsel to reduce to writing their immediate recollection of the objectionable portion of the closing argument. The court overruled defendant's objection and denied defendant's motion for mistrial. The judge also did not give any curative instruction at that point in the prosecutor's argument, though he did give an instruction in the charge to the jury. Each attorney was later given the opportunity to read his notes into the record.

Defense counsel's recollection was that the prosecutor stated, "[W]e don't know how many times but the defendant knows and he's not going to tell you; he doesn't have to tell you." The prosecutor's recollection was that he stated, "We don't know how many times the child was . . . sexually [assaulted or abused]. . . . The defendant knows, but he's not going to tell you."

A criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965).

> When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify. Rather,
>
> > this Court has held the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.
>
> We consistently have held that when the trial court fails to give a curative instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial.

State v. Reid, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993) (quoting *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975)) (citations omitted).

In the present case defendant was charged with two counts of first-degree sexual offense and two counts of first-degree rape. Hence an essential element of the State's case against defendant was the number of occasions defendant sexually assaulted the victim. The implication left by the prosecutor's argument was that defendant knows he is guilty of these and perhaps of more assaults, but he is hiding behind his right not to take the stand to avoid admitting it so the jury must decide how many assaults actually occurred. Construed in the light most favorable to the State both versions of the prosecutor's closing argument were direct references to defendant's failure to testify. The comment was obviously intended to disparage defendant in the eyes of the jury for failing to testify. Under the language in *Reid*, the trial court's failure to give a curative instruction was error requiring a new trial unless the State can show that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The State has failed to make any showing that the error was harmless beyond a reasonable

doubt. Considering all the evidence including the conflicting expert medical testimony, we cannot conclude that defendant was not prejudiced by the comment.

[4] Defendant also asserts that the trial court erred in admitting into evidence the videotaped interview between the victim and Kimberly Crews, the counselor, which defendant contends was inadmissible hearsay. Relying on *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597 (1980), and *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977), defendant argues that the videotape stripped him of his constitutional right to confront Ms. Crews, who was deceased at the time of trial.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to defendant the right to a full and fair cross-examination of witnesses testifying against him in a criminal prosecution. *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597. Nevertheless, this Court has recognized the use of previously recorded testimony if certain criteria are met. Videotaped testimony is admissible

> if it [can] be shown that: (1) The witness is unavailable; (2) the proceedings at which the testimony was given was a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel.

Smith, 291 N.C. at 524, 231 S.E.2d at 675. "The justification for this exception is that the defendant's right of confrontation is adequately protected by the opportunity to cross-examine afforded at the initial proceeding." *State v. Graham*, 303 N.C. 521, 523, 279 S.E.2d 588, 590 (1981).

Defendant's reliance on *Smith* to support his argument that his Sixth Amendment right to confrontation was violated is misplaced. A defendant's right to confrontation is not implicated unless the challenged statement comes within the definition of hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). The videotape was offered and accepted by the court as corroboration of the victim's testimony.

Contrary to defendant's argument, the victim's statements on the video were not hearsay. The statements were not offered to prove that defendant sexually assaulted the victim, but rather to show that the victim had made a similar, consistent statement to Ms. Crews. *See State v. Riddle*, 316 N.C. 152, 340 S.E.2d 75 (1986). Ms. Crews did not make any statement or give any testimony in the videotaped interview; she merely asked questions of the victim to obtain a case history preliminary to Dr. Everett's physical examination of the victim. Hence, Ms. Crews' availability at trial was immaterial. At trial the victim testified concerning the subjects covered in the interview, and defendant had ample opportunity to cross-examine her. We conclude, therefore, that the trial court did not err by admitting the videotape into evidence.

For the foregoing reasons, rather than those stated by the Court of Appeals, we affirm the decision of the Court of Appeals which awarded defendant a new trial. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Wilson County, for proceedings not inconsistent with this opinion.

AFFIRMED.

Justice MEYER concurring in result.

The majority holds that the testimony of Susan Everett, the victim's schoolteacher, was impermissible as it improperly referred to specific acts of the victim to establish the victim's truthfulness in the past to show that she was being truthful about the charges against defendant. I disagree.

The defendant had earlier questioned witnesses about the victim's level of intelligence, and the jury was aware that the victim had an IQ of 48. The prosecutor asked Susan Everett if she "had an opportunity . . ., during the course of a year, to observe her [the victim] in terms of relating factual happenings to you [Ms. Everett]." Ms. Everett responded:

> There have been many times we talk a lot about what we do over the weekends, they relate things to me, and she would come and say things like she had been to church, and in a couple of weeks, she'd come and she would be singing a song I know she had learned in church, so I knew she hadn't made that up.

She might would come [sic] she had been shopping. She'd have on some new clothes so I knew that it was true.

She could go outside, they go outside with my assistant, and she could come in and tell me things that went on and I know that they are true.

In addition, Ms. Everett also noted, when answering that question, that she would always pick the victim to run errands to the library or office because the victim had "always been very reliable." The prosecutor then asked if the victim ever got "confused, mixed up with errands or messages." Ms. Everett responded "no."

I agree with Judge Walker that Susan Everett's testimony bore more directly on the victim's ability to communicate, her level of understanding, and her ability to take on responsibility, than on her veracity. *State v. Baymon*, 108 N.C. App. 476, 485-86, 424 S.E.2d 141, 146-47 (1993). Such testimony was relevant to illustrate the victim's ability to communicate and function in society in spite of her low IQ and resulting mental handicap, which were repeatedly stressed by the defendant. The child's capacity to communicate and describe things as they actually happened in her life had been repeatedly attacked by defense counsel. The State should have been allowed to present evidence that, even in light of the victim's mental handicap, she was able to communicate about things that happened in her life.

I conclude that the testimony was not evidence of specific acts of conduct indicating the victim's truthfulness and was not in violation of Rule 608(a) or (b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 608(a), (b) (1992). Therefore, I conclude that the trial court did not err in allowing the testimony into evidence.

However, because I agree that the trial court erred in overruling defendant's objection to the prosecutor's comments referring to the fact that defendant did not testify, defendant is entitled to a new trial.

STATE OF NORTH CAROLINA v. THOMAS ELLIS POWELL

No. 129A93

(Filed 29 July 1994)

1. **Animals, Livestock, or Poultry § 18 (NCI4th)— dog control ordinance—safety ordinance—involuntary manslaughter**

The State presented substantial evidence of each element of involuntary manslaughter based on culpable negligence where a safety ordinance was involved in that the evidence, including physical evidence, showed that defendant's dogs attacked and killed a jogger; the dogs were very large and aggressive; several witnesses testified that the dogs roamed the neighborhood at will; Forsyth Animal Control Officers had picked the dogs up on at least three occasions prior to their fatal attack; defendant had witnessed the dogs bolt towards a young child; and defendant had been warned by a neighbor that the dogs were a liability. The ordinance requiring that unattended dogs be restrained and restricted to the owner's property was designed to protect people as well as property; the fact that the ordinance serves a dual purpose does not make it any less a safety ordinance. Although the defendant contends the contrary, the provision in the ordinance requiring adequate fencing to prevent children from accessing a lot where dogs reside, by providing for the safety of the most vulnerable, provides a measure of safety for all, and allowing the owner to choose methods of restraint less effective than a fence still provides better protection than no restraint at all and recognizes that some owners may not need to incur the greater expense of a fence.

Am Jur 2d, Animals § 114.

2. **Homicide § 67 (NCI4th)— violation of dog control ordinance—safety ordinance—instructions**

The trial court did not err in a prosecution for involuntary manslaughter arising from the killing of a jogger by dogs by denying defendant's request for a jury instruction regarding the elements of involuntary manslaughter in cases involving domestic animals where there is no safety statute

or ordinance. The instruction was not supported by the evidence because a safety ordinance was involved.

Am Jur 2d, Homicide §§ 91 et seq.

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 109 N.C. App. 1, 426 S.E.2d 91 (1993), affirming a judgment entered by Morgan, J., at the 10 September 1990 Criminal Session of Superior Court, Forsyth County. Defendant's petition for discretionary review of additional issues was allowed by the Supreme Court 6 May 1993. Heard in the Supreme Court 6 December 1993.

Michael F. Easley, Attorney General, by Debra C. Graves and David F. Hoke, Assistant Attorneys General, for the State.

Malcolm Ray Hunter, Appellate Defender, by Teresa McHugh, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

On 4 December 1989, defendant was indicted for involuntary manslaughter of Hoke Lane Prevette. The jury found defendant guilty of involuntary manslaughter based on culpable negligence by leaving dogs unattended when not restrained and restricted to the owner's property by a fence adequate to keep the resident dogs on the lot, in violation of Section 318 of the Winston-Salem Code. The trial court found as an aggravating factor that defendant had three prior convictions for criminal offenses punishable by more than sixty days confinement. The court made no finding of mitigating factors and imposed a sentence of five years imprisonment. From this judgment, defendant appealed to the Court of Appeals.

The Court of Appeals found no error in defendant's conviction, with one judge dissenting. Defendant appeals to this Court based on the dissenting opinion in the Court of Appeals and on the basis of our grant of defendant's petition for discretionary review of the following issues: (1) whether the evidence was sufficient to support a conviction of involuntary manslaughter and (2) what standards of law apply in a case involving a charge of involuntary manslaughter based on the acts of animals in order to establish the elements of the charge. We now affirm the decision of the Court of Appeals.

The evidence presented at trial tended to show that on 20 October 1989, Hoke Lane Prevette, a five-foot, one and one-half inch, ninety-four pound jogger, was attacked by defendant's dogs and died as a result of multiple dog bites. The dogs were away from defendant's property and had been loose earlier that day.

Defendant lived at 601 Banner Avenue in Winston-Salem. He owned two Rottweilers, "Bruno" and "Woody." Each dog was a little over one year old. Bruno weighed eighty pounds and Woody weighed one hundred pounds. On the evening of 20 October 1989 at approximately 9:00 p.m., Hoke Prevette left his home at 805 Salisbury Road in Winston-Salem to go jogging. At about 11:00 p.m., James Fainter and his wife returned to their home at 701 Cascade Avenue, discovered Prevette's body in their front yard, and notified the police. Detective L.E. Taylor of the Winston-Salem Police Department was the first officer to arrive at the Fainter residence. He determined that Prevette did not have a pulse.

Dr. John Butts, Chief Medical Examiner for the State of North Carolina, performed the autopsy of Prevette. Dr. Butts concluded that Prevette died as the result of multiple dog bites. Prevette's external injuries included shallow scrapes, deeper puncture wounds that extended down into tissue, evulsing skin, and skin torn away creating large holes in some places. His internal injuries included broken ribs on the left side and collapsed lungs. The cause of death was determined to be collapsed lungs, loss of blood, and choking.

David Moore, who lived at 641 Cascade Avenue, testified that he saw defendant's dogs when he arrived home at about 9:30 p.m. on 20 October. One of the dogs growled but both dogs relented when Moore stamped his foot. Another neighbor of the Fainters, Comfort Morton, encountered two Rottweilers he recognized as defendant's dogs earlier that evening when he drove his sister and sister-in-law home. He held the dogs at bay while the women entered the house.

After the discovery of Prevette's body, Winston-Salem Police Officer Jason Swaim went to defendant's house to investigate a report that defendant's dogs had been out that evening. When Swaim advised defendant that he wanted to see his dogs, defendant responded, "Oh my God, what have they done now?" Defendant admitted that his dogs had been out twice that day and that he

picked the dogs up in his automobile at approximately 9:00 p.m. at the intersection of Cascade Avenue and Dinmont Street.

The police seized the dogs, a dog dish, a portion of the wall in defendant's kitchen, the dogs' collars, and a portion of the back seat of defendant's automobile.

Robert Neill of the State Bureau of Investigation Crime Laboratory testified that six hairs removed from Prevette's clothing were canine; however, he could not match the hairs to a particular dog. An SBI forensic serologist found human blood on Woody's collar, on a sample of Woody's hair, on the dog dish, on a portion of the wall from defendant's home, and on defendant's car seat. According to the serologist, the blood could not be typed because of the presence of an inhibiting substance, possibly soap. A forensic odontologist testified that dental impressions taken from Bruno and Woody were compatible with some of the lacerations in the wounds pictured in scale photographs of Prevette's body.

Several witnesses testified to seeing Bruno and Woody running loose in the neighborhood prior to 20 October 1989 and to their aggressive behavior. Defendant's former girlfriend testified that defendant abused the dogs by kicking and hitting them.

Forsyth County Animal Control Officers picked up defendant's Rottweilers on at least three occasions prior to 20 October 1989. Christine Simms, a Forsyth County Animal Control Officer, was called to Acadia Avenue on 30 June 1989 on a complaint about a Rottweiler. The dog, Bruno, would not leave the complainant's porch. The complainant's own dog was inside the house and was "in heat." Simms returned Bruno to defendant and warned him to keep the dog on his property or on a leash.

Robert Walker, also a Forsyth County Animal Control Officer, discovered Bruno and Woody running loose on 26 July 1989. He stopped his truck, snapped his fingers, and both dogs jumped into his truck. Walker took the dogs to the shelter where defendant picked them up two days later. On 29 July 1989, after receiving a call from the police department, Walker went to defendant's residence and found one of defendant's dogs tied to a tree. When defendant returned home, Walker examined defendant's fence and together they detected the place where the dogs dug out. Walker advised defendant to fill the hole with cement.

On 16 August 1989, R.W. Swafford of the Forsyth County Sheriff's Department was dispatched to defendant's neighborhood on complaints about roaming dogs. When she arrived, Bruno and Woody were playing with each other on the sidewalk. Swafford snapped her fingers and the dogs got into her truck. She took them to the shelter and defendant picked them up four days later.

Animal Psychologist Donna Brown testified regarding an evaluation for aggressive propensities that she performed on Bruno and Woody in November 1989. She videotaped her testing and showed the videotape to the jury. Dr. Brown concluded that both dogs showed dominance and predatory aggression. She opined that an attack on a person would be consistent with her observations of Bruno's and Woody's behavior.

Animal Behavioralist Peter Borthelt testified for the defense that, although he had not evaluated the dogs, he had reviewed Dr. Brown's videotape and her results which he found to be ambiguous. He testifed that aggressiveness was only one possible interpretation of the dogs' behavior and that some of it could be labeled "play."

Defendant presented several witnesses who testified that Bruno and Woody were friendly and playful and responded to his commands to get down or sit. Other defense witnesses testified that the dogs were not aggressive when they were loose in the neighborhood.

William Foltz testified that he installed a privacy fence around defendant's house for $5,475.00 in 1988.

Dr. Thomas Dundon, Director of Public Health in Forsyth County, testified that defendant consented to have the dogs put to death after the attack on Prevette. In the consent agreement, the animal control officer indicated that the department had no information that the dogs had previously bitten anyone.

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

The questions presented on appeal are: (1) whether there was sufficient evidence to submit the charge of involuntary manslaughter to the jury and (2) whether the trial judge erroneously instructed the jury on the charge of involuntary manslaughter. After careful review of the record and consideration of the briefs and arguments

of counsel, we conclude that there was sufficient evidence to submit the charge of involuntary manslaughter to the jury. We also conclude that the trial judge did not err in his instructions to the jury on involuntary manslaughter. Therefore, we affirm the decision of the Court of Appeals.

[1] By his first assignment of error, defendant contends that there was insufficient evidence to establish the essential elements of involuntary manslaughter; thus, the trial court erred in denying his motion to dismiss at the close of all the evidence. Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *See State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). Involuntary manslaughter may also be defined as 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. *Id.* at 651, 336 S.E.2d at 88-89, *citing State v. Redfern*, 292 N.C. 319, 230 S.E.2d 152 (1976). "An intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *State v. Stewardson*, 32 N.C. App. 344, 350, 232 S.E.2d 308, 312, *cert. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977) (quoting *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933)). A death which is proximately caused by culpable negligence is involuntary manslaughter. *State v. Lane*, 77 N.C. App. 741, 292 S.E.2d 410 (1985).

In this case, the State sought to prove that defendant's willful, wanton or intentional violation of a safety statute or a safety ordinance was the proximate cause of the victim's death. The two bases of guilt submitted to the jury were as follows:

> 1. Guilty of involuntary manslaughter on the basis of culpable negligence by intentionally, knowingly, and willfully allowing dogs to run unaccompanied at large in the nighttime [in violation of N.C.G.S. § 67-21].
>
> 2. Guilty of involuntary manslaughter on the basis of culpable negligence by leaving dogs unattended when not restrained and restricted to the owner's property by a fence adequate to keep the resident dogs on the lot [in violation of Winston-Salem Code § 3-18].

The jury found defendant guilty on the second basis. Thus, we limit our discussion to the willful, wanton or intentional violation of the Winston-Salem ordinance as the proximate cause of the victim's death.

Defendant contends that his motion to dismiss should have been granted because the evidence was insufficient to take the case to the jury. The law is well settled that

> [w]hen a defendant moves for a dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). '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) (citation omitted).
>
> In ruling on a motion to dismiss, the evidence must be considered by the court 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. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649.

State v. Stone, 323 N.C. 447, 451-52, 373 S.E.2d 430, 433 (1988) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984)).

At the time of the attack on Prevette, a Winston-Salem ordinance provided:

> (a) No dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device. Fencing, as required herein, shall be adequate in height, construction and placement to keep resident dogs on the lot, and keep other dogs and children from accessing the lot. One (1) or more secured gates to the lot shall be provided.

Winston-Salem Code § 3-18 (1989).

A safety statute or ordinance is one designed for the protection of life or limb and which imposes a duty upon members of society

to uphold that protection. *See Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992); *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933). According to the Court of Appeals and the State, Section 3-18 of the Winston-Salem Code "was designed to protect both the persons of Winston-Salem and their property, and thus is a safety ordinance." *State v. Powell*, 109 N.C. App. 1, 7, 426 S.E.2d 91, 94 (1993). The dissenting judge, on the other hand, concluded that the ordinance was not a safety ordinance, but was designed to "protect people from the minor annoyances posed from having someone else's pets roaming through your yard." *Id.* at 11, 426 S.E.2d at 97. Defendant contends that the ordinance is merely a nuisance law "designed to prevent roaming dogs from trespassing, damaging property, leaving waste in neighbors' yards and interfering with traffic."

After a careful reading of the ordinance, we conclude that it is designed to protect persons as well as property. Although it is silent as to its purpose, a logical reading of the ordinance leads us to conclude that it promotes the safety of persons as well as property. The ordinance provides that "no dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device." It is without question that the ordinance has the effect of protecting property from damage by roaming dogs. However, the life and limb of pedestrians, joggers, and the public at large are protected by this ordinance as well. The ordinance protects people generally by confining the dogs to the owner's property while providing, in some cases, an adequate fence to keep animals and children from accessing the lot and being exposed to the dogs. The fact that the ordinance serves a dual purpose does not make it any less a safety ordinance.

The provision in the ordinance requiring adequate fencing (if chosen as the means of restraint) to prevent children from accessing a lot where dogs reside is further evidence that the ordinance promotes the safety of persons. However, defendant argues, consistent with the dissent, that this provision supports the position that Section 3-18 is not a safety ordinance. Defendant and the dissent rely on this Court's decision in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174.

In *Hart*, this Court held that the plaintiff's complaint stated a cognizable claim under common law principles of negligence by

alleging that the defendants served alcoholic beverages to a person whom they knew or should have known was under the influence of alcohol and would drive an automobile on the streets or highway shortly after consuming the alcoholic beverages. However, a majority of this Court declined to hold defendants liable in damages to plaintiffs on the theory of negligence per se based on defendants' violation of N.C.G.S. § 18B-302 which prohibits, among other things, giving alcoholic beverages to anyone less than twenty-one years old. The majority concluded that N.C.G.S. § 18B-302 was not "a public safety statute which was intended to protect the plaintiffs," *id.* at 303, 420 S.E.2d at 177, but instead it was intended to stop persons under the statutory age from drinking alcoholic beverages.

Following the majority's reasoning in *Hart*, that if N.C.G.S. § 18B-302 was intended to be a public safety statute it would have applied to persons of all ages, the dissenting judge reasoned that the Winston-Salem ordinance was not intended to be a safety ordinance because of the "limited protective classification" of children. Viewed properly, the special provision requiring fencing to be adequate to keep children from accessing the lot is not "limited protective classification," as suggested by defendant and the dissent, but instead a recognition of the special vulnerability of children which warrants the extra protection provided by the ordinance.

The ordinance in question is all inclusive. It provides that "no dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device." Dog owners are required to comply with the ordinance, without regard to whether their dogs are vicious or docile. The ordinance requires that if fencing is the method chosen to restrain dogs, then the fencing "shall be adequate," not only to "keep resident dogs on the lot" but also adequate to "keep other dogs and children from accessing the lot." This requirement applies to the "height, construction and placement" of the fencing. By providing for the safety of the most vulnerable persons, children, this ordinance provides a measure of safety for all persons.

Defendant also argues that the ordinance does not promote safety because an owner may choose methods of restraint that are less effective than a fence. Assuming *arguendo* that the use of a tether, rope, chain or other device is not as effective as the use of a fence for restraining dogs, it is still far better protection than no restraint at all. Additionally, the flexibility allowed dog

owners in choosing the method of restraint is a recognition that some property owners may not need to incur the greater expense of a fence in order to restrain their dogs.

Based on the foregoing reasons, we agree with the Court of Appeals that Section 3-18 "was designed to protect both the persons of Winston-Salem and their property, and thus is a safety ordinance." *Powell*, 109 N.C. App. at 7, 426 S.E.2d at 94.

The evidence that defendant intentionally, willfully, or wantonly violated the safety ordinance was aptly set out by the Court of Appeals.

> Bruno and Woody had been picked up by animal control officers on at least three occasions prior to the fatal attack. The dogs had been taken by animal control officers to the animal shelter as recently as August, 1989, two months prior to the death of Prevette. Defendant admitted that his dogs had been out twice on the day of Prevette's death. On one occasion in July, 1989, after the dogs escaped by digging out from underneath the fence, defendant simply covered the escape hole with a cooler after returning the dogs to the fence. Defendant's next-door neighbor testified that the dogs were allowed to run loose "on a regular basis," day and night, and that defendant would often "just open the door and let the dogs out." Defendant's ex-girlfriend testified that defendant let the dogs run free both day and night.

Id. at 7-8, 426 S.E.2d at 95. The trial judge instructed the jury that "the violation of a statute or ordinance governing the care of dogs which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional." Viewed in the light most favorable to the State, as we must on a motion to dismiss, we find that the State presented sufficient evidence that defendant intentionally, willfully, or wantonly violated the ordinance.

Additionally, the State presented sufficient evidence that defendant's intentional, willful or wanton violation of the ordinance was the proximate cause of the victim's death.

> Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *Jenkins v. Electric Co.*, 254 N.C.

> 553, 119 S.E.2d 767. Foreseeability is an essential element of proximate cause. *Pinyan v. Settle*, 263 N.C. 578, 139 S.E.2d 863; *Pittman v. Swanson*, 255 N.C. 681, 122 S.E.2d 814. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E.2d 683; *Bondurant v. Mastin*, 252 N.C. 190, 113 S.E.2d 292.

Williams v. Boulerice, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966).

Relying on cases involving a civil suit for damages, defendant contends that the State must prove that he had knowledge of his dogs' vicious propensities in order to establish foreseeability in this criminal prosecution. *See Swain v. Tillett*, 269 N.C. 46, 152 S.E.2d 297 (1967); *Hunt v. Hunt*, 86 N.C. App. 323, 357 S.E.2d 444, *aff'd*, 321 N.C. 294, 362 S.E.2d 161 (1987). We agree, however, with the Court of Appeals that in a criminal prosecution where the State has presented sufficient evidence that defendant intentionally, willfully or wantonly violated a safety ordinance, "the State is required, in order to meet its burden on the issue of proximate cause, to present substantial evidence that the dogs in fact caused Prevette's death and that 'in the exercise of reasonable care, [defendant] might have foreseen that some injury would result' from his failure to abide by the ordinance." *Powell*, 109 N.C. App. at 9, 426 S.E.2d at 96 (citations omitted). Under these circumstances, knowledge of the dogs' vicious propensities is not the only evidence that will support a conclusion that injury was foreseeable.

Viewed in the light most favorable to the State, the evidence, including physical evidence, showed that defendant's dogs attacked and killed Prevette. The dogs were very large and aggressive. Several witnesses testifed that the dogs roamed the neighborhood at will. Forsyth Animal Control Officers had picked the dogs up on at least three occasions prior to their fatal attack. Defendant had witnessed the dogs bolt towards a young child and had also been warned by a neighbor that the dogs were a liability. Therefore, we conclude that the State presented substantial evidence that defendant's intentional, willful or wanton violation of the safety ordinance was the proximate cause of the victim's death.

For the foregoing reasons, we hold that the State presented substantial evidence of each element of the offense of involuntary manslaughter based on culpable negligence where a safety ordinance is involved. Accordingly, this assignment of error is rejected.

[2] Defendant next argues that the trial court erroneously instructed the jury on the charge of involuntary manslaughter. Defendant's request for a jury instruction regarding the elements of involuntary manslaughter in cases involving domestic animals where there is no safety statute or ordinance was denied. Instead, the trial court instructed the jury regarding culpable negligence where a safety statute or ordinance *is* involved. It is well settled that the trial court must give a requested instruction in substance if the instruction is correct and is supported by the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 266 (1982). Here, the instruction is not supported by the evidence as we have held that a safety ordinance *is* involved in this case. Therefore, the trial court committed no reversible error in refusing to instruct the jury as requested by defendant.

The decision of the Court of Appeals is affirmed.

AFFIRMED.

D. GRADY MORETZ, JR., SUCCESSOR TRUSTEE FOR THE COURTNEY ANN MORETZ AND WHITNEY RHYNE MORETZ TRUST	)	ORDER
v.	)	
PAUL E. MILLER, JR., TRUSTEE, AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA	)	

No. 253P94

(Filed 28 July 1994)

Plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 is allowed for the purpose of entering the following order:

The Court of Appeals' decision, filed 19 April 1994, dismissing plaintiff's appeal is reversed, and the case is remanded to the Court of Appeals for consideration of the merits of plaintiff's appeal.

By order of the Court in Conference, this 28 day of July, 1994.

s/ PARKER, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TERRY ANTHONY BURNS	)	

No. 568P93
(Filed 29 July 1994)

The State's petition for discretionary review pursuant to N.C.G.S. § 7A-31 is allowed for the purpose of entering the following order:

The Court of Appeals' opinion filed 12 December 1993, is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Bryant*, 337 N.C. 298, --- S.E. 2d --- (1994). The temporary stay heretofore entered 14 May 1994 is dissolved.

By order of the Court in Conference, this 29 day of July, 1994.

s./ PARKER, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DAVID STEVEN HARPER	)	

No. 505P93
(Filed 29 July 1994)

The State's petition for discretionary review pursuant to N.C.G.S. § 7A-31 is allowed for the purpose of entering the following order:

The Court of Appeals' opinion, filed 16 November 1993, is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Bryant*, 337 N.C. 298, --- S.E. 2d --- (1994). The temporary stay heretofore entered 14 May 1994 is dissolved.

By order of the Court in Conference, this 29 day of July, 1994.

s./ PARKER, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROY STEVEN WILLIAMS	)	

No. 505P93
(Filed 29 July 1994)

Upon reconsideration of the State's petition for discretionary review pursuant to N.C.G.S. § 7A-31, filed 11 October 1993, the petition is allowed for the purpose of entering the following order:

The Court of Appeals' opinion, filed 7 September 1993, is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Bryant*, 337 N.C. 298, --- S.E. 2d --- (1994). The temporary stay heretofore entered 14 May 1994 is dissolved.

By order of the Court in Conference, this 29 day of July, 1994.

s./ PARKER, J.
For the Court

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

ALLSBROOK v. ALLSBROOK

No. 262P94

Case below: 114 N.C.App. 267

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

ANDREW v. HANGING ROCK GOLF & COUNTRY CLUB

No. 284P94

Case below: 114 N.C.App. 665

Defendant's motion for voluntary dismissal of petition for discretionary review allowed 27 July 1994.

BURGE v. FIRST SOUTHERN SAVINGS BANK

No. 245P94

Case below: 114 N.C.App. 648

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

CALVIN HEIGHTS BAPTIST CHURCH v. LOWERRE

No. 251P94

Case below: 114 N.C.App. 504

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

COLE v. HUGHES

No. 252P94

Case below: 114 N.C.App. 424

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

DEAL v. N.C. STATE UNIVERSITY

No. 244P94

Case below: 114 N.C.App. 643

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

FLORADAY v. DON GALLOWAY HOMES

No. 232PA94

Case below: 114 N.C.App. 214

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1994.

FRENCH v. BROWN

No. 259PA94

Case below: 114 N.C.App. 504

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

GODLEY v. GODLEY

No. 231P94

Case below: 114 N.C.App. 268

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994. Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994.

GREEN v. CALLICUTT

No. 140P94

Case below: 113 N.C.App. 655

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

HARTMAN v. WALKERTOWN SHOPPING CENTER

No. 152P94

Case below: 113 N.C.App. 632

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

HILTON v. HILTON

No. 291P94

Case below: 114 N.C.App. 665

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994.

IN RE DENNIS v. DUKE POWER CO.

No. 246PA94

Case below: 114 N.C.App. 272

Petition by petitioner (M-B Industries) for writ of supersedeas allowed 28 July 1994. Petition by petitioner (M-B Industries) for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 28 July 1994.

JACK ECKERD CORP. v. BRENCO, A/P

No. 235P94

Case below: 114 N.C.App. 504

Petition by defendant (Brenco) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994. Petition by defendant (Brenco) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994. Petition by defendant (Wal-Mart) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994. Petition by defendant (Wal-Mart) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994.

JOHNSON v. WALLENSLAGER

No. 269P94

Case below: 114 N.C.App. 665

Petition by defendant (Liberty Mutual Insurance Co.) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

JUDKINS v. JUDKINS

No. 256P94

Case below: 113 N.C.App. 734

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

LEETE v. COUNTY OF WARREN

No. 308A94

Case below: 114 N.C.App. 755

Notice of Appeal by plaintiffs from the North Carolina Court of Appeals pursuant to G.S. 7A-30 is retained 28 July 1994.

MEHOVIC v. KEN WILSON FORD

No. 112P94

Case below: 113 N.C.App. 559

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

MYRICK v. PEEDEN

No. 150P94

Case below: 113 N.C.App. 638

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

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

NATIONWIDE MUTUAL FIRE INS. CO. v. NUNN

No. 286P94

Case below: 114 N.C.App. 604

Petition by defendants (Irvin L. Nunn, et al) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

NEW SOUTH INSURANCE CO. v. KIDD

No. 297P94

Case below: 114 N.C.App. 749

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

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

No. 241P94

Case below: 114 N.C.App. 665

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

SMITH v. WEST HILL LIMITED PARTNERSHIP

No. 229P94

Case below: 114 N.C.App. 269

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

SOUTHERN RAILWAY CO. v. BISCOE SUPPLY CO.

No. 254P94

Case below: 114 N.C.App. 474

Petition by defendant (Biscoe) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

STATE v. FARRAR

No. 248P94

Case below: 114 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

STATE v. FLOYD

No. 270P94

Case below: 114 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

STATE v. HANDY

No. 220P94

Case below: 114 N.C.App. 270

Petition by defendant (Jessie Ernest Handy, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994. Petition by defendant (Rodney Dale King) for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

STATE v. HINTON

No. 271P94

Case below: 113 N.C.App. 837

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994. Petition by defendant for writ of mandamus denied 28 July 1994.

STATE v. HUNT

No. 5A86-5

Case below: Superior Court

Petition by defendant for writ of certiorari to review the decision of the Robeson County Superior Court denied 10 August 1994.

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

STATE v. JENKINS

No. 365P94

Case below: 115 N.C.App. 520

Petition by Attorney General for temporary stay allowed 9 August 1994 pending determination of the Attorney General's petition for discretionary review.

STATE v. MCLEAN

No. 276P94

Case below: 114 N.C.App. 270

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 28 July 1994.

STATE v. NELSON

No. 199A94

Case below: 114 N.C.App. 341

Petition by Attorney General for writ of supersedeas allowed 28 July 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 28 July 1994.

STATE v. RICK

No. 226PA94

Case below: 114 N.C.App. 820

Petition by Attorney General for writ of supersedeas allowed 28 July 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 28 July 1994.

STATE v. ROGERS

No. 165A84-2

Case below: 316 N.C. 203

Motion by defendant (Charles Gene Rogers) for reconsideration of the petition for review of the order of the Wayne County Superior Court denied 28 July 1994.

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

STATE v. SWINSON

No. 281P94

Case below: 114 N.C.App. 666

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

TABRON v. WILSON

No. 304P94

Case below: 115 N.C.App. 174

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

WALTERS v. DIXIE YARNS, INC.

No. 242P94

Case below: 114 N.C.App. 667

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

WESTON v. DANIELS

No. 209P94

Case below: 114 N.C.App. 418

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 28 July 1994.

PETITIONS TO REHEAR

IN RE DELK

No. 249PA93

Case below: 336 N.C. 543

Petition by Mark T. Delk to rehear pursuant to Rule 31 denied 28 July 1994.

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

KAPP v. KAPP

No. 273PA93

Case below: 336 N.C. 295

Petition by plaintiffs to rehear pursuant to Rule 31 denied 28 July 1994.

SMITH v. UNDERWOOD

No. 4A94

Case below: 336 N.C. 306

Petition by plaintiffs to rehear pursuant to Rule 31 denied 12 July 1994.

APPENDIXES

ORDER ADOPTING AMENDMENT
TO GENERAL RULES OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS

REVISED RULES OF MEDIATED SETTLEMENT
CONFERENCES AND AMENDMENTS

AMENDMENTS TO ARTICLE IX OF THE RULES
OF THE NORTH CAROLINA STATE BAR
CONCERNING DISCIPLINARY PROCEDURES

AMENDMENTS TO ARTICLE II OF THE RULES OF
THE NORTH CAROLINA STATE BAR
REGARDING INTERSTATE LAW FIRMS

AMENDMENTS OF THE STANDARDS FOR
CERTIFICATION AS A SPECIALIST
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AMENDMENTS OF THE STANDARDS FOR
CERTIFICATION AS A SPECIALIST
IN FAMILY LAW

AMENDMENTS OF THE STANDARDS
FOR CERTIFICATION AS A SPECIALIST
IN ESTATE PLANNING AND PROBATE LAW

AMENDMENTS OF THE STANDARDS
FOR CERTIFICATION AS A SPECIALIST
IN REAL PROPERTY LAW

AMENDMENTS TO THE RULES OF THE
NORTH CAROLINA STATE BAR TO ESTABLISH
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STATE BAR TO ESTABLISH A PROGRAM
FOR BINDING ARBITRATION OF DISPUTES
BETWEEN LAWYERS ARISING OUT OF THE
OPERATION OR DISSOLUTION OF LAW FIRMS

AMENDMENTS OF THE RULES OF THE NORTH CAROLINA
STATE BAR CONCERNING REGISTRATION OF
PREPAID LEGAL SERVICES PLANS

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE
NORTH CAROLINA STATE BAR REGARDING
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO ARTICLE VI OF THE RULES OF THE
NORTH CAROLINA STATE BAR REGARDING THE
POSITIVE ACTION FOR LAWYERS COMMITTEE

AMENDMENTS OF THE RULES OF THE NORTH CAROLINA
STATE BAR RELATING TO THE APPOINTMENT
OF COUNSEL FOR INDIGENT DEFENDANTS

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of new Rule 24, to read as follows:

PRETRIAL CONFERENCE IN CAPITAL CASES

There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death. No later than ten days after the superior court obtains jurisdiction in such a case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may for good cause shown continue the pretrial conference for a reasonable time.

At the pretrial conference, the court and the parties shall consider:

(1) simplification and formulation of the issues, including, but not limited to, the nature of the charges against the defendant, and the existence of evidence of aggravating circumstances;

(2) timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty; and

(3) such other matters as may aid in the disposition of the action.

The judge shall enter an order that recites that the pretrial conference took place, and any other actions taken at the pretrial conference.

This rule does not affect the rights of the defense or the prosecution to request, or the court's authority to grant, any relief authorized by law, including but not limited to appointment of assistant counsel, in advance of the pretrial conference.

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Adopted by the Court in Conference this 7th day of April, 1994. The amendment shall be effective 1 June 1994, and shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State.

s/Parker, J.

PARKER, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING REVISED RULES OF MEDIATED SETTLEMENT CONFERENCES

WHEREAS, section 7A-38 of the North Carolina General Statutes provides a means for establishing a pilot program of mediated settlement conferences in superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38 enables this Court to implement section 7A-38 by adopting rules and amendments to rules concerning said mediated conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38(d), Rules 1,2,3,6,7 and 8 of the Rules of Mediated Settlement Conferences, 329 N.C. 795, are hereby amended to read as in the following pages. The Amended Rules shall be effective the 1st day of December, 1993.

Adopted by the Court in conference the 9th day of September, 1993. The Appellate Court Reporter shall publish the Rules of Mediated Settlement Conferences in their entirety, as amended through this action, at the earliest practicable time.

Parker, J.
For the Court

RULE 1. ORDER FOR MEDIATED SETTLEMENT CONFERENCE

(a) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any district, or part thereof, authorized to participate in the mediated settlement conference program may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any civil action except habeas corpus proceedings or other actions for extraordinary writs;

(b) Timing of the Order. The Senior Resident Superior Court Judge may issue the order at any time after the time for the filing of answers has expired. Rules 1(c) and 3(b) herein shall govern the content of the order and the date of completion of the conference.

(c) Content of Order. The court's order shall (1) require the mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a form prepared and distributed by the Administrative Office of the Courts.

(d) Motion to Dispense With Mediated Settlement Conference. A party may move the Senior Resident Superior Court Judge, within 10 days after the court's order, to dispense with the conference. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

(e) Motion for Court Ordered Mediated Settlement Conference. In cases not ordered to mediated settlement conference, any or all parties may move the Senior Resident Superior Court Judge to order such a conference. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge

shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(f) Exemption from Mediated Settlement Conferences. In order to evaluate the pilot program of mediated settlement conferences, the Senior Resident Superior Court Judge may be required by the Administrative Office of the Courts to exempt from such conferences a random sample of cases so as to create a control group to be used for comparative analysis.

RULE 2. SELECTION OF MEDIATOR

(a) Selection of Certified Mediator by Agreement of Parties. The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts.

(b) Nomination and Court Approval of a Non-Certified Mediator. The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the parties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate all or some of the issues in the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's

decision. The nomination and approval or disapproval of the court shall be on a form prepared and distributed by the Administrative Office of the Courts.

(c) Appointment of Mediator by the Court. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Administrative Office of the Courts shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

(d) Mediator Information Directory. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Administrative Office of the Courts and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county.

(e) Disqualification of Mediator. Any party may move a Resident or Presiding Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For

good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

(a) Where Conference is to be Held. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference is to be Held. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1(b) shall clearly state a date of completion for the conference. Said date shall not be less than 90 days nor more than 180 days after the issuance of the court's order.

(c) Request to Extend Date of Completion. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the continuance is sought and shall be served by the moving party upon the other parties and the mediator.

The Senior Resident Superior Court Judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. Said order shall be served upon the parties and the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(e) The Mediated Settlement Conference is Not to Delay Other Proceedings. It shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the

filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, REPRESENTATIVES, AND ATTORNEYS

(a) Attendance. The following persons shall physically attend a mediated settlement conference:

(1) All individual parties; or an officer, director or employee having authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and to recommend settlement to the appropriate decision making body of the agency; and

(2) The party's counsel of record, if any; and

(3) For any insured party against whom a claim is made, a representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle the claim.

(b) Finalizing Agreement. Upon reaching agreement, the parties shall reduce the agreement to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(c) Payment of Mediator's Fee. The parties shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND

If a person fails to attend a duly ordered mediated settlement conference without good cause, a Resident or Presiding Judge may impose upon the party or his principal any lawful sanction, including but not limited to the payment of attorneys fees, mediator fees and expenses incurred by persons attending the conference; contempt; or any other sanction authorized by Rule 37(b) of the Rules of Civil Procedure.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

(a) Authority of Mediator.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be followed.

(2) Private Consultation. The mediator may meet and consult privately with any party or parties or their counsel during the conference.

(3) Scheduling the Conference. The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the parties, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(b) Duties of Mediator.

(1) The mediator shall define and describe the following to the parties at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) The facts that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet alone with either of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by Rule 408 of the Evidence Code;

(h) The duties and responsibilities of the mediator and the parties; and

(i) The fact that any agreement reached will be reached by mutual consent of the parties.

(2) Disclosure. The mediator has a duty to be impartial and to advise all parties of any circumstances bearing on possible bias, prejudice or partiality.

(3) Declaring Impasse. It is the duty of the mediator to timely determine when mediation is not viable, that an impasse exists, or that mediation should end.

(4) Reporting Results of Conference. The mediator shall report to the court in writing whether or not an agreement was reached by the parties. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file such consent judgment or dismissals. The Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by it.

(5) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

RULE 7. COMPENSATION OF THE MEDIATOR

(a) By Agreement. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) By Court Order. When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the Senior Resident Superior Court Judge for all court appointed mediators in the district, upon consultation with the Administrative Office of the Courts.

(c) Indigent Cases. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator appointed or selected pursuant to these rules. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of its obligation to pay its share of the mediator's compensation.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subse-

quent to the trial of the action. The Judge may take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

(d) Payment of Compensation by Parties. Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid: one share by the plaintiffs, one share by the defendants and one share by third-party defendants. Parties obligated to pay a share of the costs shall pay them equally. Payment shall be due upon completion of the conference.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Administrative Office of the Courts may receive and approve applications for certification of persons to be appointed as mediators. For certification, a person must:

(a) Have completed a minimum of 40 hours in a Trial Court Mediation Training Program certified by the Administrative Office of the Courts;

(b) Be a member in good standing of the North Carolina State Bar and have at least five years experience as a judge, practicing attorney, law professor, or mediator, or equivalent experience;

(c) Observe two civil trial court mediated settlement conferences conducted by a mediator certified either in the State of North Carolina or in any other state with comparable certification requirements to those outlined in these rules;

(d) Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

(e) Be of good moral character and adhere to any ethical standards hereafter adopted by this Court;

(f) Submit proof of qualifications set out in this section on a form provided by the Administrative Office of the Courts;

(g) Pay all administrative fees established by the Administrative Office of the Courts; and

(h) Agree to mediate indigent cases without pay.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Director of the Administrative Office of the Courts that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

(a) Certified training programs for mediators of Superior Court civil actions shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Standards of conduct for mediators;

(4) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(5) Demonstrations of mediated settlement conferences;

(6) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(7) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

(b) A training program must be certified by the Director of the Administrative Office of the Courts before attendance at such program may be used for compliance with Rule 8(a). Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Director of the Administrative Office of the Courts if they are in substantial compliance with the standards set forth in this rule.

(c) Payment of all administrative fees must be made prior to certification.

RULE 10. LOCAL RULE MAKING

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these rules is authorized to publish local rules implementing mediated settlement conferences not inconsistent with these rules and G.S. 7A-38.

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING REVISED RULES OF MEDIATED SETTLEMENT CONFERENCES

WHEREAS, section 7A-38 of the North Carolina General Statutes provides a means for establishing a pilot program of mediated settlement conferences in superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38(d) enables this Court to implement section 7A-38 by adopting rules and amendments to rules concerning said mediated settlement conferences;

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38(d), Rules 7 and 8 of the Rules of Mediated Settlement Conferences, 329 N.C. 795, as amended in 336 N.C. 791 and 111 N.C. App. 935 are hereby amended to read as in the following pages. The Amended Rules shall be effective the 1st day of July, 1994.

Adopted by the Court in conference the 7th day of April, 1994. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Parker, J.
For the Court

RULE 2. SELECTION OF MEDIATOR

(c) Appointment of Mediator by the Court. If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on a form prepared and distributed by the Administrative Office of the Courts. The motion shall state whether any party prefers a certified attorney mediator, and if so, the Senior Resident Judge shall appoint a certified attorney mediator. The motion may state that all parties prefer a certified, non-attorney mediator, and if so, the Senior Resident Judge shall appoint a certified non-attorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the Senior Resident Judge may appoint a certified attorney mediator or a certified non-attorney mediator.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules or other written document. Only mediators who agree to mediate indigent cases without pay shall be appointed. The Administrative Office of the Courts shall furnish for the consideration of the Senior Resident Superior Court Judge of any district where mediated settlement conferences are authorized to be held, the names, addresses and phone numbers of those certified mediators who want to be appointed in said district.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

(b) Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she

(i) is a member in good standing of the North Carolina State Bar, and

(ii) has at least five years of experience as a judge, practicing attorney, law professor or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8(b)(1) or Rule 8(b)(2).

(2) A non-attorney may be certified if he or she has completed the following:

(i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Administrative Office of the Courts;

(ii) after completing the 20 hour training required by Rule 8(b)(2)(i), five years of experience as a mediator, having mediated: (a) at least 12 cases in each year, and (b) for at least 20 hours in each year;

(iii) a six hour training on North Carolina legal terminology and civil court procedure, mediator ethics and confidentiality, provided by a trainer certified by the Administrative Office of the Courts;

(iv) provide to the Administrative Office of the Courts three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's mediation experience;

(v) a four year degree from an accredited college or university.

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINARY PROCEDURES

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 13. A. of the Rules of the North Carolina State Bar as approved by the Supreme Court on December 5, 1991, 329 N.C. 821, concerning "Proceedings Before the Grievance Committee," be amended by adding the following sentence to the existing rule: "The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the Chairperson of the Grievance Committee.", so that the entire rule reads as follows:

Section 13. Proceedings Before the Grievance Committee.

A. The grievance committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the grievance committee may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the Chairperson of the Grievance Committee.

. . . .

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 14. H. of the Rules of the North Carolina State Bar as approved by the Supreme Court on December 5, 1991, 329 N.C. 821, concerning "Formal Hearing," be amended by adding the following sentences to the existing rule: "The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.", so that the entire rule reads as follows:

Section 14. Formal Hearing.

. . . .

H. The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR REGARDING INTERSTATE LAW FIRMS

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II of the Rules of the North Carolina State Bar concerning "Membership-Annual Membership Fees" be amended by adding a new Section 8 (formerly Article IX, Section 2.1, as approved by the Supreme Court on December 8, 1982, 328 N.C. 747, and as amended effective August 14, 1991, 329 N.C. 819) as follows:

Section 8. INTERSTATE LAW FIRMS

No law firm or professional organization which maintains an office in North Carolina and has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina or has as its partner, shareholder, or member a law firm or professional organization which has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration. The secretary of the North Carolina State Bar shall issue such a certificate upon satisfaction of the following conditions precedent:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member, or employee of the filing law firm or professional organization or who is a partner, shareholder,

member, or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in (d) above to the filing law firm or professional organization;

(f) the states to which each attorney identified in (d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement, which can be included with the statement referenced in Section 8(3) below, of the filing law firm by a member who is licensed in North Carolina certifying that each attorney identified in Section (1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of each state bar to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization affirming that each attorney identified in Section (l)(d) above who is not licensed to practice law in North Carolina will govern his or her personal and professional conduct with respect to legal matters arising from North Carolina in accordance with the Rules of Professional Conduct of the North Carolina State Bar.

(4) There shall be submitted with each registration statement and supporting documentation a registration fee of $500.00 as administrative cost.

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN BANKRUPTCY LAW

The following amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Section 5. D. of the Standards for Certification as a Specialist in Bankruptcy Law, as approved by the Supreme Court on May 6, 1986, 313 N.C. 760, concerning "Peer Review" be amended by deleting the first sentence and substituting in lieu thereof, "An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references.", so that the entire provision reads as follows:

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be a judge of any Bankruptcy Court.

2. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

3. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty 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 July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN FAMILY LAW

The following amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Section 5. D. of the Standards for Certification as a Specialist in Family Law, as approved by the Supreme Court on May 4, 1989, 323 N.C. 725, concerning "Peer Review" be amended by deleting the first sentence and substituting in lieu thereof, "An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references.", so that the entire provision reads as follows:

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges, who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty 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 July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN ESTATE PLANNING AND PROBATE LAW

The following amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Section 5. D. of the Standards for Certification as a Specialist in Estate Planning and Probate Law, as approved by the Supreme Court on May 6, 1986, 313 N.C. 760, concerning "Peer Review" be amended by deleting the first sentence and substituting in lieu thereof, "An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references.", so that the entire provision reads as follows:

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty 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 July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN REAL PROPERTY LAW

The following amendments to the Rules, Regulations, and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Section 5. D. of the Standards for Certification as a Specialist in Real Property Law, as approved by the Supreme Court on May 6, 1986, 313 N.C. 760, concerning "Peer Review" be amended by deleting the first sentence and substituting in lieu thereof, "An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges who are familiar with the competence and qualifications of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references.", so that the entire provision reads as follows:

D. Peer Review

An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten (10) lawyers or judges, who are familiar with the competence and qualifications of the applicant in the specialty field. Written peer reference forms will be sent by the Board or the Specialty Committee to each of the references. Completed peer reference forms must be received from at least five (5) of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the Board or the Specialty Committee at the direction of the Board of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty 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 July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS TO THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH DISTRICT BAR GRIEVANCE COMMITTEES

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that its rules be amended by adding new rules entitled, "The North Carolina State Bar Rules Governing Judicial District Grievance Committees," as follows:

The North Carolina State Bar
Rules Governing Judicial District Grievance Committees

1. Organization of Judicial District Grievance Committees

A. Judicial Districts Eligible to Form District Grievance Committees

Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district grievance committee (hereafter, "district grievance committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys may establish a district grievance committee with consent of the Council of the North Carolina State Bar.

One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district grievance committee, as set out in section 1(B) herein. Such multi-district grievance committees shall be subject to all of the rules and regulations set out herein and all references to district grievance committees in these rules shall also apply to multi-district grievance committees.

B. Creation of District Grievance Committees

A judicial district may establish a district grievance committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar.

A multi-district grievance committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chair of the multi-district grievance committee shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar. The active members of each participating judicial district may adopt a set of bylaws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chair of the multi-district grievance committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

C. Appointment of District Grievance Committee Members

(1) Each district grievance committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the N.C. State Bar.

In addition to the attorney members, each district grievance committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

(2) The chair of the district grievance committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chair may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district grievance committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chair of the district grievance committee. Alternatively, the district grievance committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district committee, including the chair, shall be appointed for staggered three-year terms, except that the president and chair shall appoint some

of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chair of the committee or as provided in the district bar bylaws as soon as practicable.

2. Jurisdiction & Authority of District Grievance Committees

A. District Grievance Committees Are Subject to the Rules of the North Carolina State Bar

The district grievance committee shall be subject to the rules and regulations adopted by the Council of the North Carolina State Bar.

B. Grievances Filed With District Grievance Committee

The district grievance committee may investigate and consider grievances filed against attorneys who live or maintain an office within the judicial district and which are filed in the first instance with the chair of the district grievance committee. The chair of the district grievance committee will immediately refer to the State Bar any grievance filed locally in the first instance which 1) alleges misconduct against a member of the district grievance committee, 2) alleges that any attorney has embezzled or misapplied client funds or 3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district grievance committee to investigate.

C. Grievances Referred to District Grievance Committee

The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

D. Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee Arbitration

If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chair of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the

complainant may elect to participate in the North Carolina State Bar Fee Dispute Arbitration Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Exhibit A. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Exhibit B. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) Handling Claims Not Involving Fee Dispute

Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in the same manner as any other grievance filed with the district grievance committee.

(3) Handling Claims Not Submitted to Arbitration by Complainant

If the complainant elects not to participate in the State Bar's Fee Dispute Arbitration Program, or fails to notify the chair that he or she elects to participate within 20 days following mailing of the notice referred to in section 2(D)(1), the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) Referral to Fee Dispute Arbitration Program

Where a complainant timely elects to participate in fee arbitration, and the judicial district in which the respondent attorney maintains his or her principal office has a fee arbitration committee, the chair of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee arbitration committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee, the chair of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Arbitration Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in arbitration, no grievance file will be established.

E. Authority of District Grievance Committees

The district grievance committee shall have authority to perform the following actions:

(1) Assist a complainant who requests assistance to reduce a grievance to writing.

(2) Investigate complaints described in sections 2(B) and (C) above by interviewing the complainant, the attorney against whom the grievance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney and other individuals.

(3) Explain the procedures of the district grievance committee to complainants and respondent attorneys.

(4) Find facts and recommend whether or not the State Bar Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct. The district grievance committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyers' Management Assistance Program.

(5) Draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district grievance committee.

(6) Where the district grievance committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct, the district grievance committee shall notify the complainant and the respondent attorney of its recommendation. Where the district grievance committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district grievance committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district grievance committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Exhibit C. Where the district grievance committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Exhibit D. The letter of notification to the complainant shall follow the format set out in Exhibit E.

(7) Maintain records of grievances investigated by the district grievance committee for at least one year from the date on which the district grievance committee makes its final recommendation regarding a grievance to the State Bar.

3. Meetings of the District Grievance Committees

A. Notice of Meeting

The district grievance committee shall meet at the call of the chair upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

B. Confidentiality

The district grievance committee shall meet in private. Discussions of the committee, its records and its actions shall be confidential. The names of the members of the committee shall not be confidential.

C. Quorum

A simple majority of the district grievance committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

D. Appearances by Complainants & Respondents

No complainant nor any attorney against whom a grievance has been filed may appear before the district grievance committee, present argument to or be present at the committee's deliberations.

4. Procedure Upon Institution of a Grievance

A. Receipt of Grievance

A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district grievance committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

B. Acknowledgment of Receipt of Grievance from State Bar

The chair of the district grievance committee shall send a letter to the complainant within 10 working days of receipt

of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Exhibit F, attached hereto. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

C. Notice to State Bar of Locally Filed Grievances

(1) Where a grievance is filed in the first instance with the district grievance committee, the chair of the district grievance committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chair of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Exhibit F, attached hereto.

(3) Grievances filed initially with the district grievance committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed and shall be followed by the number of the judicial district and the letters GR, ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

D. Assignment to Investigating Member

Within 10 working days after receipt of a grievance, the chair shall appoint a member of the district grievance committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Exhibit G, attached hereto.

E. Investigation of the Grievance

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later then 15 working

days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Exhibit H.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

F. Letter of Notice to Respondent Attorney & Responses

(1) Within 10 working days after receipt of a grievance, the chair of the district grievance committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Exhibit I, attached hereto, and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district grievance committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district grievance committee within 15 days of receipt of the letter. The chair of the district grievance committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chair of the district grievance committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District grievance committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district grievance committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

G. District Grievance Committee Deliberations

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district grievance committee in writing.

(2) The district grievance committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material it deems relevant in reaching a recommendation. The district grievance committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district grievance committee shall make a determination as to whether or not it finds that there is probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

H. Report of Committee Decision

(1) Upon making a decision in a case, the district grievance committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar grievance committee enclosing the report shall follow the format set out in Exhibit J, attached hereto.

(2) The district grievance committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district grievance committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason,

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chair of

the district grievance committee shall notify the respondent attorney and the complainant in writing of the district grievance committee's recommendation, as provided in Section 2(D)(6).

5. Record Keeping

The district grievance committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district grievance committee for at least one year. The district grievance committee shall provide such reports and information as are requested of it from time to time by the State Bar.

6. Miscellaneous

A. Assistance & Questions

The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district grievance committee.

B. Missing Attorneys

Where a respondent attorney is missing or cannot be located, the district grievance committee shall promptly return the grievance file to the office of counsel for appropriate action.

7. Conflicts of Interest

A. No district grievance committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district grievance committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

B. A member of a district grievance committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member.

(2) alleged misconduct of a relative of the committee member.

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

EXHIBIT A

Letter to Complainant Where Local Grievance Alleges Fee Dispute Only

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, no grievance file will be opened and the [ ] district bar grievance committee will take no other action against the attorney.

If you do not wish to participate in fee arbitration program, you may elect to have your complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT B

Letter to Complainant Where Local Grievance Alleges Fee Dispute & Other Violations

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, the fee arbitration committee will handle those portions of your complaint which involve an apparent fee dispute. The remaining parts of your complaint which do not involve a fee dispute will be investigated by the [ ] district grievance committee.

If you do not wish to participate in fee arbitration program, you may elect to have your entire complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your entire complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provi-

sions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N. C. State Bar

EXHIBIT C

Letter to Complainant/Respondent Where District Committee Recommends Finding of No Probable Cause

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. [ ]

Dear Mr. Smith:

The [ ] district grievance committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee. The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee. You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may

pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney

PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT D

Letter to Respondent Where District Committee Recommends Finding of Probable Cause

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No.

Dear Ms. Doe:

The [ ] district grievance committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one or more provisions of the Rules of Professional Conduct. Specifically, the [ ] district grievance committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the [ ] district grievance committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the [ ] district committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611
Tel. 919-828-4620

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT E

Letter to Complainant Where District Committee Recommends Finding of Probable Cause

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No.

Dear Mr. Smith:

The [ ] district grievance committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [ ] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may

pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Respondent Attorney

PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT F

Letter to Complainant Acknowledging Grievance

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No.

Dear Mr. Smith:

I am the chair of the [ ] district grievance committee. Your grievance against [respondent attorney] [was received in my office]/[has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [ ] district grievance committee, to investigate your grievance. [ ]'s name, address and telephone number are as follows: [ ].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [ ] district grievance committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After [ ]'s investigation is complete, the [ ] district grievance committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct. Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [ ] district grievance commit-

tee's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [ ] district grievance committee's investigation is concluded.

Neither the investigating attorney nor any member of the [ ] district grievance committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT G

Letter to Investigating Attorney Assigning Grievance

James Roe
[ ] District Grievance Committee Member
Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe Our File No.

Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

EXHIBIT H

Letter to Complainant From Investigating Attorney

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe our File No.

Dear Mr. Smith:

I am the member of the [ ] district grievance committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [ ] district grievance committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [ ] district grievance committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [ ] district grievance committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[ ] Investigating Member
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Chair, [ ] District Grievance Committee

EXHIBIT I

Letter of Notice to Respondent Attorney

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No.

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chair of the [ ] district grievance committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[ ] Chair
[ ] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[ ] Investigating member
[ ] District Grievance Committee

PERSONAL AND CONFIDENTIAL
Director of Investigations
N.C. State Bar

PERSONAL AND CONFIDENTIAL
[ ] Complainant

EXHIBIT J

Letter Transmitting Completed File to North Carolina State Bar

Director of Investigations
N.C. State Bar
P.O. Box 25908
Raleigh, N.C. 27611

Re: Grievance of John Smith
File No. [ ]

Dear Director:

The [ ] district grievance committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant]

2. A copy of the file of the investigating attorney.

3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information. Thank you.

Sincerely yours,

[ ] Chair
[ ] District Grievance 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 July 22, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH A PROGRAM FOR BINDING ARBITRATION OF DISPUTES BETWEEN LAWYERS ARISING OUT OF THE OPERATION OR DISSOLUTION OF LAW FIRMS

The following amendments to the Rules, Regulations, and the Certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 1988.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rules for Binding Arbitration of Disputes Between Lawyers Arising out of the Operation or Dissolution of Law Firms be established as follows:

1. Subject to these rules, the North Carolina State Bar will administer a voluntary binding arbitration program for resolution of disputed issues between lawyers arising out of the dissolution of law firms or disputes within law firms. The purpose of this arbitration procedure is to provide a mechanism for resolving economic disputes between lawyers arising out of the operation or dissolution of law firms.

2. The program is voluntary. The procedure shall be instituted by a written Submission to Arbitration Agreement, executed by all the parties to the dispute, in a form and manner as provided by the executive director of the State Bar.

3. The procedure may be used for the resolution of any dispute if all of the following conditions are met:

(a) The disputed issues submitted to arbitration hereunder shall be solely between or among lawyers who are members of the same law firm;

(b) The dispute arises out of an economic relationship between or among lawyers concerning the operation, dissolution or proposed dissolution of the law firms of which they are members;

(c) At least one of the parties to such dispute resides or maintains an office for the practice of law in the state of North Carolina and is a member of the North Carolina State Bar; and

(d) All parties agree in a written Submission to Arbitration Agreement to submit the issues in dispute to binding arbitration under these Rules.

4. The North Carolina State Bar is the administrator of the arbitration program, through its executive director and his designees, to carry out all administrative functions, including those specified in sections 6 through 11 below.

5. Except as modified herein, all arbitration procedures will be governed by Article 45A of Chapter 1 of the General Statutes of North Carolina (Uniform Arbitration Act). Said Uniform Arbitration Act and any amendments thereto are hereby incorporated by reference and constitute a part of these Rules.

6. The parties shall, in their Submission to Arbitration Agreement, elect to have one (1) or three (3) arbitrators. The administrator shall thereafter provide each party with a list of potential arbitrators who have agreed to serve as hereinafter described.

7. The State Bar shall establish a list of arbitrators, consisting of attorneys or retired judges, who have been members of the North Carolina State Bar for at least ten (10) years and who have indicated a willingness to serve.

8. If three (3) arbitrators are to be selected, then:

(a) Each party to the dispute shall, within ten (10) days after receipt of notice from the administrator, select one arbitrator on the approved list who shall be contacted by the administrator concerning his or her ability to serve and dates of availability. The two (2) arbitrators so chosen shall execute an oath and Appointment of Arbitrator certificate, provided by the administrator. Within fifteen (15) days after certification, the two arbitrators shall choose a third from the administrator's approved list, who shall also execute an Oath and Appointment certificate. Failure of the two (2) arbitrators to choose a third within the allotted time, shall constitute a consent to have the third arbitrator chosen by the administrator; and

(b) If the opposing parties cannot, because of the number of parties involved, settle upon two (2) arbitrators who are to choose the third as set forth above, then the administrator shall notify the parties and appoint all three arbitrators from the approved list.

9. All expenses and the arbitrators' fees shall be paid by the parties. Arbitrators' compensation shall be at the same rate paid to retired judges who are assigned to temporary active

service as provided in G.S. 7A-52 or any successor statutory provision. The administrator may require from each party an escrow deposit covering anticipated fees and expenses.

10. It is the policy of the State Bar to protect the confidentiality of all arbitration proceedings. The parties, the arbitrators, and the North Carolina State Bar shall keep all proceedings confidential, except that any final award shall be enforceable under Chapter 1, Article 45A.

11. The North Carolina State Bar may, from time to time, adopt and amend procedures and regulations, consistent with these rules, and amend or supplement these rules or otherwise regulate the arbitration procedure.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 15, 1988.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE RULES OF THE NORTH CAROLINA STATE BAR CONCERNING REGISTRATION OF PREPAID LEGAL SERVICES PLANS

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 October 18, 1991.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rules concerning Registration of Prepaid Legal Services Plans be established as follows:

1. No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has been registered with the North Carolina State Bar and is in compliance with these Rules.

2. The plan shall be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.

3. Amendments to any plan and to other documents required to be filed upon registration of the plan shall be filed in the office of the North Carolina State Bar no later than thirty days after the adoption of such amendments.

4. Plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of all such plans is revoked and no plan shall advertise, communicate, or represent in any way that the North Carolina State Bar has approved the plan.

5. Subsequent to initial registration, all plans shall be registered annually on or before January 31 on forms supplied by the State Bar.

6. The initial and annual registration fees for each plan shall be $100.

7. The North Carolina State Bar shall maintain an index of the plans registered pursuant to these Rules. All documents filed in compliance with these Rules are considered public documents and shall be available for public inspection during normal business hours.

8. The North Carolina State Bar shall not approve or disapprove any plan or render any legal opinion regarding any

plan. The registration of any plan under these Rules shall not be construed to indicate approval or disapproval of the plan.

9. The North Carolina State Bar retains jurisdiction of its members who participate in prepaid legal services plans and such members continue to be subject to the rules and regulations governing the practice of law.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 18, 1991.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of September, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

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 5th day of October 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 5th day of October 1994.

PARKER, J.
For the Court

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR REGARDING DISCIPLINE AND DISBARMENT OF ATTORNEYS

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 October 21, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Art. IX of the Rules of the North Carolina State Bar, Section 18(C)(2) concerning discipline and disbarment of attorneys be amended by deleting the phrase "pursuant to sections 8(A)(4) and 14(D)" at the end of the first sentence and by inserting the phrase "(3) and (5)-(6)" at the end of the second sentence as follows:

ARTICLE IX

DISCIPLINE AND DISBARMENT OF ATTORNEYS

. . .

Section 18. Disability Hearings

. . .

C. Disability Proceedings Where Defendant Alleges Disability in Disability Proceeding

. . .

2. The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in section 18(B)(3) and (5)-(6).

. . .

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Art. IX of the Rules of the North Carolina State Bar, section 18(C)(3) concerning discipline and disbarment of attorneys be amended by inserting the sentence "The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of section 3(R)." at the beginning of section 18(C)(3) as follows:

Section 18. Disability Hearings

. . .

C. Disability Proceedings Where Defendant Alleges Disability in Disability Proceeding

3. The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of section 3(R). If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

. . .

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Art. IX of the Rules of the North Carolina State Bar, section 18(D)(1) concerning discipline and disbarment of attorneys be amended by inserting the sentence "The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of section 3(R)." at the end of section 18(D)(1) as follows:

D. Disability Hearings Initiated By a Hearing Committee

1. If during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in section 18(B)(2)-(6). The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of section 3(R).

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of November 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 2nd day of November 1994.

PARKER, J.
For the Court

AMENDMENTS TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR REGARDING THE POSITIVE ACTION FOR LAWYERS COMMITTEE

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 October 21, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that Art. VI of the Rules of the North Carolina State Bar concerning the Positive Action for Lawyers Committee of the Council be amended by deleting sections 5(i)(6) and 5(i)(6)(a) and substituting new sections 5(i)(6) through section 5(i)(7), by renumbering current section 5(i)(6)(b) as section 5(i)(8), by renumbering current section 5(i)(7) as section 5(i)(9) and by amending current section 5(i)(7) to delete the reference to section 5(i)(6)(b) and to add a reference to new section 5(i)(7) as follows:

ARTICLE VI

Meetings of the Council

. . .

Section 5. Standing Committees of the Council.

. . .

i. Positive Action Committee. . . .

(6) If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the Positive Action for Lawyers Committee of the North Carolina State Bar may petition any superior court judge to issue an order in the court's inherent authority, suspending the attorney's license to practice law in this State for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the Executive Director of PALS and the Executive Director of the N.C. State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Section 6(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Section 6(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the N.C. Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the Court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless:

1. The State Bar shall file a petition with supporting affidavits, as provided in Section 6(a)-(c) above.

2. The State Bar petition and supporting affidavits shall demonstrate by clear, cogent and convincing evidence that immediate and irreparable harm, injury, loss or

damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice, before notice can be given and a hearing had on the petition.

3. The State Bar petition specifically seeks the temporary emergency relief of suspending ex parte an attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar petition requests the court to endorse an emergency order entered hereunder with the hour and date of its entry.

4. The State Bar petition will request that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10 day period, the court agrees to extend the order for an additional 10 day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

5. The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(k) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(l) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

(7) Notwithstanding the provisions of subsection 6, the court may enter an order suspending an attorney's license where the attorney consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

(8) All members of the Positive Action for Lawyers Committee participating under this Article shall be deemed to be acting as agents of the North Carolina State Bar, and within the course and scope of the agency relationship.

(9) A subcommittee to the Positive Action Committee shall be formed which shall consist of at least two members of the judiciary of this State. The purpose of this subcommittee will be to implement a program for intervention for members of the judiciary with substance abuse problems which affect their conduct as judges or justices. The subcommittee will be governed by the rules of the Positive Action Committee where applicable. Subsections 5(i)(6) and 5(i)(7) will have no application to this subsection.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of November 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 2nd day of November 1994.

PARKER, J.
For the Court

AMENDMENTS OF THE RULES OF THE NORTH CAROLINA STATE BAR RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

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 October 21, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that the following changes be made regarding rules of the Legal Aid to Indigents Committee:

1. That the "Procedures for the Committee on Legal Aid to Indigents and Referrals," as originally approved by the Supreme Court on November 14, 1966, 268 N.C. 734, and as identified as "Appendix D" to the "Rules, Regulations, and Organization of the North Carolina State Bar" in the 1994 edition of the Michie Publishing Company's Annotated Rules of North Carolina, be repealed in its entirety.

2. That Article VI, Section 5(g) of the Rules of the State Bar be amended by adding the paragraph, "The committee shall aid and assist the judicial districts of the North Carolina State Bar in establishing plans for the representation of indigents in certain criminal cases and lend assistance and advice in the carrying out of these programs in accordance with the laws of the State of North Carolina and the ethics of the legal profession.", to the existing rule so that the entire section reads as follows:

> The Committee on Legal Aid to Indigents shall consist of not less than five councilors (and officers of the Council) selected by the president. The committee shall aid and assist the judicial districts of the North Carolina State Bar in establishing plans for the representation of indigents in certain criminal cases and lend assistance and advise in the carrying out of these programs in accordance with the laws of the State of North Carolina and the ethics of the legal profession.

3. That Article V, Section 5.3 of the Model Plan, entitled "Regulations for Appointment of Counsel in Indigent Cases in the ____ Judicial District," as approved by the Supreme Court on October 29, 1984, 310 N.C. 780, be amended by adding the words, "and the district's public defender, if any," after

the word, "district," and before the word, "are," so that the entire provision reads as follows:

> Section 5.3 The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the ____ Judicial District, and the District Attorney for the ____ Judicial District, and the District's Public Defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1994.

L. THOMAS LUNSFORD II
Secretary-Treasurer

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 2nd day of November 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 2nd day of November 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 4th.

TOPICS COVERED IN THIS INDEX

ANIMALS, LIVESTOCK, OR POULTRY

§ 18 (NCI4th). Criminal liability; stray or at large animals

The State presented substantial evidence of each element of involuntary manslaughter based on culpable negligence where defendant's dogs attacked and killed a jogger. **State v. Powell**, 762

APPEAL AND ERROR

§ 536 (NCI4th). Lower court's disposition of case following appeal

A contention on appeal that the superior court did not follow the mandate of the Court of Appeals in issuing an order that an attorney should appear and show cause why he should not be disciplined was overruled. **In re Delk**, 543.

ASSAULT AND BATTERY

§ 14 (NCI4th). Criminal assault and battery; presumptions and burden of proof

Defendant was not entitled to a new trial with regard to his conviction for assault with a deadly weapon with intent to kill inflicting serious injury based on the trial court's instructions on the doctrine of transferred intent. **State v. Morston**, 381.

§ 23 (NCI4th). Assault with intent to kill or inflicting serious injury; relation to other crimes

Defendant was properly convicted of, and punished for, assault with a deadly weapon with intent to kill inflicting serious injury where the assault victim was struck by bullets in her living room when her husband was shot and killed when he answered the door to their home. **State v. Morston**, 381.

§ 81 (NCI4th). Discharging barreled weapons or firearm into occupied property; sufficiency of evidence

The trial court did not err by failing to dismiss a charge of discharging a firearm into occupied property or arrest judgment where defendant fired at a detective as the detective answered his door and bullets also struck the detective's wife inside the house. **State v. Morston**, 381.

ATTORNEYS AT LAW

§ 67 (NCI4th). Discipline, disbarment, and reinstatement; proceedings of bar and court distinguished

Respondent, an attorney disbarred after being convicted of extortion and conspiracy to commit extortion, correctly argued that the superior court judge who signed an order of disbarment originally entered by another judge incorrectly found the effective date of the order to be thirty days from the first order. **In re Delk**, 543.

§ 71 (NCI4th). Rights of accused generally

There was no error in respondent's disbarment by a judge following his conviction for extortion and conspiracy; the superior court has the inherent power to discipline members of the bar, including requiring attorneys to appear and answer charges based on the records of the court. **In re Delk**, 543.

§ 81 (NCI4th). Grounds for discipline or disbarment; offenses of moral turpitude

The trial court made adequate findings of fact and conclusions of law to support the order disbarring respondent where respondent contends that the order states

ATTORNEYS AT LAW — Continued

no basis for the application of G.S. 84-28 to a disbarment by a court, but the statute does not limit its penalty to cases brought by the State Bar. **In re Delk**, 543.

§ 83 (NCI4th). Procedure for discipline and disbarment; notice and hearing

There was no error in the procedure by which respondent-attorney was disbarred following an extortion and conspiracy conviction where adequate notice was given to respondent to comply with due process. The court proceeded against respondent using its inherent power to discipline attorneys and was not bound by the rules of the State Bar. **In re Delk**, 543.

§ 89 (NCI4th). Stay of order pending appeal; standard of review

Although defendant argues that G.S. 84-28(d) prohibits disbarment while the criminal charge for which the person is to be disbarred is on appeal, there was more than one order of disbarment in this case. This appeal is from a disbarment which occurred after the Court of Appeals had found no error in the respondent's conviction. **In re Delk**, 543.

BURGLARY AND UNLAWFUL BREAKINGS

§ 43 (NCI4th). Indictment; criminal intent

A first-degree burglary indictment was sufficient even though it did not specify the felony defendant intended to commit when he entered the victim's apartment. **State v. Worsley**, 268.

§ 58 (NCI4th). Sufficiency of evidence; burglary with intent to commit rape or related sexual offenses

There was sufficient evidence to support submission of first-degree burglary to the jury where there was sufficient evidence to support the jury's finding that defendant attempted to rape the victim. **State v. Worsley**, 268.

CONSTITUTIONAL LAW

§ 28 (NCI4th). Other powers of General Assembly; power of taxation

The use of supplier refunds in establishing a natural gas expansion fund does not constitute a tax that violates the requirements of Article V, Section 2 of the North Carolina Constitution because the monies making up the supplier refunds consist of payments made pursuant to rates set by the Utilities Commission in accordance with statutorily controlled standards and the capture of the refunds is not a charge levied upon the general citizenry for the general maintenance of the government. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

§ 34 (NCI4th). Delegation to State administrative agencies and bodies; power to promulgate rules and regulations

The natural gas expansion fund legislation is a proper delegation of legislative authority to an administrative agency because there are extensive procedural safeguards designed to ensure that the Utilities Commission carries out the expansion of natural gas facilities in a way that is consistent with the intent of the legislature and in furtherance of stated policies. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

CONSTITUTIONAL LAW — Continued

§ 49 (NCI4th). Standing to challenge constitutionality of statutes generally; requirement of direct injury

CUCA's contention that the Commission's transfer of supplier refunds to a natural gas expansion fund pursuant to G.S. 62-158 amounts to an unconstitutional taking and a violation of due process was overruled because neither CUCA nor its members have an interest in the refunds sufficient to entitle them to constitutional protection from legislative action impacting upon the refunds. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

§ 90 (NCI4th). Right to equal protection of law; rationality of classification and statutory purpose

G.S. 62-158 clearly bears a sufficient relationship to the legitimate goal of expanding natural gas facilities to unserved areas of the state to withstand a challenge that it violates the Equal Protection Clauses of the United States and North Carolina Constitutions. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

§ 135 (NCI4th). Other exclusive emoluments, privileges, perpetuities, and monopolies

Legislation creating a natural gas expansion fund did not confer anexclusive emolument or privilege in violation of Article I, Section 32 of the North Carolina Constitution where the General Assembly clearly stated that the purpose of natural gas expansion is to "promote the public welfare throughout the State" and it is not difficult to see how the legislature could have concluded that expansion of natural gas facilities into previously unserved areas would be in the public interest. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

§ 166 (NCI4th). Rights of persons accused of crime; ex post facto laws; court decisions

The test set forth in *Teague v. Lane*, 489 U.S. 288, is adopted as the test of retroactivity for new federal constitutional rules of criminal procedure on state collateral review. **State v. Zuniga**, 508.

§ 183 (NCI4th). Former jeopardy; identity of offense; conspiracy and consummation of conspiracy

Defendant was properly convicted of, and punished for, both conspiracy to commit first-degree murder and first-degree murder; the crime of conspiracy is a separate offense from the accomplishment or attempt to accomplish the intended result. **State v. Morston**, 381.

§ 228 (NCI4th). Former jeopardy; new trial after appeal or post-conviction attack

There was no double jeopardy in a first-degree murder resentencing where some of the mitigating circumstances found at the original hearing were not found at this hearing. **State v. Jones**, 229.

§ 290 (NCI4th). What constitutes denial of effective assistance of counsel; miscellaneous

An attorney's statement to a deputy sheriff that defendant had come into his office to turn himself in for a shooting did not constitute ineffective assistance of counsel where the statement was made by direct authorization of defendant and did not violate the attorney-client privilege. **State v. McIntosh**, 517.

§ 318 (NCI4th). Effectiveness of assistance of counsel on appeal generally

An appellant's attorney should ask the appellate court to search the record for errors pursuant to *Anders v. California* only if he believes the whole appeal is without merit. **State v. Mason**, 595.

CONSTITUIONAL LAW — Continued

§ 349 (NCI4th). Right to call witnesses and present evidence; cross-examination of witnesses

There was no prejudicial error in a first-degree murder prosecution where a State's witness who had been present at the murder was allowed to describe the murder but invoke the Fifth Amendment testimonial privilege in response to questions on cross-examination concerning his drug dealing, but defendant was able to get his contentions before the jury. **State v. Ray**, 463.

§ 354 (NCI4th). Self-incrimination; when privilege may be invoked

There was no prejudicial error in a first-degree murder prosecution where a State's witness who had been present at the murder was allowed to describe the murder but invoke the Fifth Amendment testimonial privilege in response to questions on cross-examination concerning his drug dealing. Although defendant was able to get his contentions before the jury, drug dealing was more than a collateral matter that went only to the credibility of this witness and the trial court should have either required the witness to answer questions or have stricken all or part of his direct testimony after allowing him to assert the privilege. **State v. Ray**, 463.

§ 371 (NCI4th). Prohibition on cruel and unusual punishment; first-degree murder

The North Carolina death penalty statute is constitutional. **State v. Jones**, 229.

CRIMINAL LAW

§ 76 (NCI4th). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

Where the first trial judge changed the venue of defendant's murder trial from Harnett County to Johnston County upon motion by defendant for a change of venue based on local publicity, and defendant asked the second trial judge to return the case to Harnett County on the ground that he had only one attorney for his capital trial at the time his original motion was granted, any error by the second trial judge in returning the case to Harnett County was invited by defendant's request that the second judge vitiate the action of the first judge, and once the case was returned to Harnett County, a third trial judge did not err by denying defendant's motion for a change of venue. **State v. Eason**, 730.,

§ 78 (NCI4th). Circumstances insufficient to warrant change of venue

The trial court properly denied defendant's motion for a change of venue of his murder trial based on a newspaper article detailing the history of the case and quoting a statement by the district attorney about the case. **State v. Moseley**, 710.

§ 104 (NCI4th). Information subject to disclosure by State; documents and tangible objects

Where a pathologist testified in a murder trial that he simply opened a knife that had belonged to the defendant, looked at the blade, and measured it, this was not the type of test results that must be given to the defendant pursuant to G.S. 15A-903(e), and the pathologist was properly permitted to testify that the knife was consistent with the wounds inflicted upon the victim even though defendant was not informed of any tests on the knife. **State v. Moseley**, 710.

"get two for the price of one" if he was given life rather than death for two killings. **State v. Green**, 142.

§ 454 (NCI4th). Argument of counsel; comments in capital cases, generally

The prosecutor's jury argument in a capital sentencing proceeding that when he said his prayers after the conclusion of the case, he would tell the Lord that he did his best, and that the jurors' decision should enable them to feel satisfied that they had done justice was not an improper appeal for the jury to take religion into account when considering the sentence. **State v. Ingle**, 617.

The prosecutor's jury argument in a capital sentencing proceeding that defendant "authored and wrote his own death warrant. We're simply asking that you affix your signature as jurors and representatives of the citizens of Cleveland County" could not have improperly led the jury to believe that it was not responsible for determining the appropriateness of defendant's sentence. **Ibid.**

§ 455 (NCI4th). Argument of counsel; deterrent effect of death penalty

Even if the prosecutor's argument to the jury in a capital sentencing proceeding could be construed as an argument about the general deterrent effect of the death penalty, it was not so grossly improper as to warrant ex mero motu intervention by the trial court. **State v. Robinson**, 78.

There was no error in a sentencing hearing for first-degree murder where defendant contended that the dominant theme of the prosecution was that the jury needed to kill the defendant to protect themselves and their loved ones. **State v. Jones**, 229.

§ 458 (NCI4th). Argument of counsel; possibility of parole, pardon, or executive commutation

When defense counsel argued to the jury in a capital sentencing proceeding, "If you give him a life sentence, he spends the rest of his life down there," it was improper for the prosecutor to raise the possibility of parole by his objection to "the implication that he will be there for the rest of his life," but this error was not prejudicial. **State v. Ingle**, 617.

§ 460 (NCI4th). Argument of counsel; permissible inferences

The prosecutor's jury argument in a capital sentencing proceeding for two murders that speculated how the victims' seven-year-old grandson would look back on the day when he discovered their dead bodies and found that he could not kiss his grandparents because defendant had bludgeoned them to death was sufficiently based on the facts and circumstances shown by the evidence and was not an argument of facts not in evidence. **State v. Ingle**, 617.

§ 465 (NCI4th). Argument of counsel; explanation of applicable law

The prosecutor's closing argument in a first-degree murder case about the irrelevancy of any anger or emotion by defendant was not a misstatement of the law of premeditation and deliberation but was a proper argument urging the jury not to return a verdict of guilty of second-degree murder. **State v. Sexton**, 321.

Assuming the prosecutor's definition of reasonable doubt in his jury argument was erroneous to the extent that it required an improperly high degree of doubt for acquittal, the trial court did not err by failing to immediately correct this erroneous definition where the court followed the prosecutor's argument with proper instructions correctly defining the term "reasonable doubt." **State v. Jones**, 490.

age of the victim caused the victim to be more vulnerable to the crime than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. **State v. Farlow**, 534.

The Court of Appeals erred in its application of the Fair Sentencing Act by holding that the trial court erred in aggravating a sentence for second-degree sexual offense based on the victim's age (11), which was an element of the joined offense of indecent liberties. **Ibid.**

The trial court erred when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property by improperly aggravating these offenses with evidence the State had previously used to prove an element of the offenses. **State v. Morston**, 381.

§ 1100 (NCI4th). Aggravating factors; prohibiting same evidence to support more than one aggravating factor

The trial court erred when sentencing defendant for conspiracy to commit murder by finding in aggravation that "[t]he offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws" and that "[t]he offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws" based on the same item of evidence, that defendant had conspired to murder a law enforcement officer who was interfering with the drug trade. **State v. Morston**, 381.

§ 1120 (NCI4th). Nonstatutory aggravating factors; impact of crime on victim

The trial court did not err when sentencing defendant for indecent liberties by finding the nonstatutory aggravating factor that the victim suffered severe mental and emotional injury in excess of that usually associated with offenses of that nature. **State v. Farlow**, 534.

§ 1125 (NCI4th). Nonstatutory aggravating factors; course of criminal conduct

The trial court did not err when sentencing defendant for indecent liberties by finding the nonstatutory aggravating factor that defendant engaged in a course or pattern of conduct extending over a period of many years, including the commission of sexual offenses against very young children. **State v. Farlow**, 534.

§ 1133 (NCI4th). Statutory aggravating factors; position of leadership or inducement of others to participate generally

A letter written by the female defendant to the male defendant and her minor daughter was sufficient evidence to support the trial court's finding as an aggravating factor for crime against nature and sexual activity by a substitute parent that the female defendant induced others to participate in the commission of the offenses. **State v. McCarroll**, 559.

§ 1162 (NCI4th). Statutory aggravating factors; age of victim; element of offense

The Court of Appeals erred in holding that, because evidence of the victim's age was necessary to establish the offense of taking indecent liberties, such evidence should not have been used as proof of an aggravating factor; where age is an element of the offense, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. **State v. Farlow**, 534.

The Court of Appeals erred in its application of the Fair Sentencing Act by holding that the trial court erred in aggravating a sentence for second-degree

sexual offense based on the victim's age (11), which was an element of the joined offense of indecent liberties. **Ibid.**

§ 1177 (NCI4th). Statutory aggravating factors; position of trust or confidence generally

The trial court did not err when sentencing defendant for second-degree sexual offenses and indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence. **State v. Farlow**, 534.

§ 1183 (NCI4th). Statutory aggravating factors; prior convictions; alternative methods of proof

The trial court's finding of defendant's previous conviction as an aggravating factor was shown to have been supported by the evidence where an addendum to the record contained a certified copy of the judgment and commitment from the previous conviction and a sworn affidavit by the prosecutor that this was the same evidence presented to the trial court as proof of that conviction. **State v. Eason**, 730.

§ 1302 (NCI4th). Procedure for determining sentence in capital cases; necessity of a jury hearing, generally

The trial court in a capital trial did not err by denying defense counsel's motion to withdraw, or in the alternative to select a new jury after the guilty verdicts, on the ground that the jurors' rejection of the defense theory and counsel's role in presenting it would have precluded their rational consideration of evidence submitted in mitigation. **State v. Sexton**, 321.

§ 1309 (NCI4th). Procedure for determining sentence in capital cases; competence of evidence generally

Testimony that a certain bar was a "gay club" and that a man in a group of persons with defendant was a "gay person" was properly admitted in a capital sentencing hearing to corroborate a witness's testimony concerning defendant's activities and location on the night prior to the crime. **State v. Robinson**, 78.

The trial court did not err in a sentencing hearing for a first-degree murder at a convenience store by admitting into evidence a videotape which included audio and video tracks and showed the robbery and shooting. **State v. Jones**, 229.

Defendant's constitutional rights were not violated in a capital sentencing proceeding for the first-degree murder of a kidnapping and rape victim by the admission of evidence of the victim's character for marital fidelity when all of the evidence in the guilt-innocence phase was resubmitted to the jury. **State v. Sexton**, 321.

§ 1310 (NCI4th). Procedure for determining sentence in capital cases; necessity of prejudice from admission or exclusion of evidence

Defendant is precluded from predicating error upon the trial court's sustaining of the State's objection to questions about defendant's father's treatment of defendant's sisters and defendant's wife's comprehension of the nature of a capital sentencing proceeding where defendant made no offer of proof at trial to preserve the answers of the witnesses. **State v. Robinson**, 78.

§ 1312 (NCI4th). Procedure for determining sentence in capital cases; evidence of prior criminal record or other crimes

The trial court did not err in a sentencing hearing for first-degree murder by submitting evidence of a prior attempted rape conviction, submitting the ag-

gravating circumstance of a prior felony involving violence, or in its instructions where the State submitted evidence that defendant had been convicted by General Court Martial of attempted rape. **State v. Green**, 142.

§ 1314 (NCI4th). Procedure for determining sentence in capital cases; evidence of aggravating and mitigating circumstances

The trial court did not err in a first-degree murder resentencing by failing to strike plea agreements in which the State accepted guilty pleas to felony murder only since the agreement did not have the effect of suppressing an aggravating circumstance supported by the evidence. **State v. Green**, 142.

§ 1322 (NCI4th). Capital sentencing; instructions; parole eligibility

The trial court did not err when instructing the jury during a first-degree murder resentencing hearing by not instructing the jury as to parole eligibility even though the issue was raised during jury selection and in the prosecutor's closing arguments. **State v. Jones**, 229.

§ 1323 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances generally

The submission of the aggravating circumstances that a murder was committed to avoid arrest and while engaged in a kidnapping was not redundant because the circumstances were supported by different evidence. **State v. Sanderson**, 1.

The trial court did not err in its instructions in a resentencing hearing for first-degree murder on nonstatutory mitigating circumstances; determining whether there is mitigating value in the evidence remains the province of the jury. **State v. Jones**, 229.

The trial court did not commit plain error in a first-degree murder sentencing hearing when instructing the jury on sympathy and mercy. **Ibid.**

The trial court did not err by instructing the jury in a capital sentencing proceeding that it should find whether each nonstatutory mitigating circumstance existed and then whether that circumstance had mitigating value. **State v. Robinson**, 78.

The trial court did not err in a sentencing hearing for a first-degree murder by instructing the jury that they "may" rather than "must" find mitigating circumstances. **State v. Green**, 142.

The trial court did not err in a first-degree murder resentencing in its instruction regarding mitigating circumstances. **State v. Jones**, 229.

§ 1325 (NCI4th). Capital sentencing; instructions; unanimous decision as to mitigating circumstances

The trial court did not err by instructing the jury in Issue Four of a capital sentencing proceeding that "each juror may consider any mitigating circumstance that juror determined to exist by a preponderance of the evidence." **State v. Robinson**, 78.

The trial court's capital sentencing instructions which informed the jury at Issue Three and Issue Four that it "must" weigh any mitigating circumstances it found to exist against the aggravating circumstances and that each juror "may" consider any mitigating circumstances that juror determined to exist did not allow jurors to disregard properly found mitigating circumstances. **Ibid.**

Any error in the trial court's instruction in Issue Three of a capital sentencing proceeding that each juror may consider any mitigating circumstance that the "jury," rather than "juror," determined to exist by a preponderance of the evidence

CRIMINAL LAW -- Continued

There was sufficient evidence to support submission of the aggravating circumstance that the murder of an elderly man by beating him to death with an axe handle was especially heinous, atrocious, or cruel. **State v. Ingle**, 617.

The trial court properly submitted to the jury the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where the victim was sexually assaulted with a blunt object, beaten, stabbed, tortured, and manually strangled. **State v. Moseley**, 710.

§ 1348 (NCI4th). Definition of mitigating circumstances

The trial court's instructions defining mitigating circumstance in a capital sentencing proceeding were a correct statement of the law of mitigation and did not preclude the jury from considering any aspect of defendant's character which he may have presented as a basis for a sentence less than death. **State v. Robinson**, 78.

There was no error in a first-degree murder sentencing hearing in the part of the charge which defined a mitigating circumstance where defendant contended that the charge given by the court failed to give him the full benefit of relevant mitigating evidence. **State v. Jones**, 229.

§ 1349 (NCI4th). Submission of mitigating circumstances

Where evidence is presented by the defendant or the State in a capital sentencing proceeding that supports a statutory mitigating circumstance, the circumstance must be submitted for the jury's consideration absent defendant's request or even over defendant's objection. **State v. Ingle**, 617.

§ 1352 (NCI4th). Consideration of mitigating circumstances; unanimous decision

The trial court did not err in a resentencing hearing for first-degree murder in its instructions on nonstatutory mitigating circumstances where the instruction did not indicate a requirement of unanimity by the jury on any of the nonstatutory circumstances. **State v. Jones**, 229.

The decision of *McKoy v. North Carolina*, which invalidated the unanimity requirement for finding mitigating circumstances in a capital sentencing proceeding, is to be applied retroactively on state post-conviction review to capital cases which became final before *McKoy* was decided. **State v. Zuniga**, 508.

§ 1355 (NCI4th). Particular mitigating circumstances; lack of prior criminal activity

The trial court in a capital sentencing proceeding did not err by refusing to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Robinson**, 78.

The trial court did not err during jury selection for a first-degree murder resentencing hearing by not submitting the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. **State v. Jones**, 229.

The trial court did not err by failing to submit to the jury in a capital sentencing proceeding the mitigating circumstance that defendant had no significant history of prior criminal activity where the evidence showed that defendant had been convicted of assault on a female by choking her less than a year before the strangulation of the victim in this case. **State v. Sexton**, 321.

The trial court erred when sentencing defendant for a first-degree murder committed in 1979 by admitting convictions in 1986 as relevant to the mitigating circumstance of no significant history of prior criminal activity; "history of prior criminal activity" in G.S. 15A-2000(f)(1) pertains only to that criminal activity committed before the murder. **State v. Coffey**, 412.

CRIMINAL LAW — Continued

Evidence of defendant's criminal activity was slight enough for the submission of the no significant history of prior criminal activity mitigating circumstance to the jury where the evidence showed that defendant used illegal drugs and that warrants had been taken out on him for communicating threats and trespassing. **State v. Ingle**, 617.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The trial court properly refused to allow the jury in a capital sentencing proceeding to consider as mitigation three consecutive sentences totaling eighty years imposed on defendant for crimes arising from the same transaction as the capital crime. **State v. Robinson**, 78.

Defendant was not prejudiced by the trial court's erroneous refusal to submit in a capital sentencing proceeding the mitigating circumstance that "in a structured prison environment, [defendant] is able to conform his behavior to the rules and regulations and performs tasks he is required to perform" where defendant introduced evidence concerning his conduct in prison and the court submitted two other mitigating circumstances dealing with that conduct. **Ibid.**

The trial court did not err in a sentencing hearing for first-degree murder by refusing to allow introduction of or to submit to the jury as a mitigating circumstance the fact that defendant had been sentenced to a total of sixty years in prison on armed robbery and assault charges to which he had pled guilty. **State v. Jones**, 229.

The trial court did not err in a sentencing hearing for first-degree murder by failing to give peremptory instructions on the nonstatutory mitigating circumstance that the defendant had pled guilty to both murder charges. **State v. Green**, 142.

There was no prejudicial error in a sentencing hearing for first-degree murder where the trial court refused to submit the mitigating circumstance that defendant will continue to adjust well to prison life and be a model prisoner. **Ibid.**

The trial court did not err in a first-degree murder sentencing hearing by not submitting the nonstatutory mitigating circumstance that defendant was "a quiet student in school and was not a discipline problem" where it was uncontroverted that defendant was expelled from high school due to fighting and for that reason joined the army. **Ibid.**

The trial court did not err during a sentencing hearing for first-degree murder by failing to submit the nonstatutory mitigating circumstance that defendant did not kill after premeditation and deliberation. **Ibid.**

There was no prejudicial error in a first-degree murder prosecution where the court refused to submit as possible nonstatutory mitigating circumstances that the defendant did not intend to take the life of the victims and did not enter the building where they were killed with the weapon which he used to take their lives. **Ibid.**

The trial court did not err in a resentencing hearing for first-degree murder by refusing to submit the nonstatutory mitigating circumstance that defendant has been confined for a considerable amount of time prior to his sentencing. **State v. Jones**, 229.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

The aggravating circumstances for a death sentence for a first-degree murder arising from a convenience store robbery were supported by the record, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary

factor, and the sentence was not excessive or disproportionate to the penalty imposed in other first-degree murder cases. **State v. Jones**, 229.

A sentence of death imposed upon defendant for a first-degree murder of a restaurant manager during an armed robbery was not disproportionate to the penalty imposed in similar cases considering the crime and the defendant. **State v. Robinson**, 78.

A death sentence for two murders during a robbery was not disproportionate. **State v. Green**, 142.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where defendant brutally strangled the random victim in the course of a kidnapping, rape, and sexual offense, and defendant was convicted upon theories of both premeditation and deliberation and felony murder. **State v. Sexton**, 321.

Sentences of death imposed upon defendant for two first-degree murders were not excessive or disproportionate where the evidence showed that defendant consecutively bludgeoned two elderly persons in their home with an axe handle and that the murders were committed without provocation and for no apparent motive other than defendant's pleasure in committing the crimes. **State v. Ingle**, 617.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant sexually assaulted, tortured, beat, strangled, and stabbed the victim until she was dead, and defendant inflicted far more injuries to the victim than were necessary to cause death. **State v. Moseley**, 710.

A sentence of death for a first-degree murder was not disproportionate. **State v. Fisher**, 684.

§ 1442 (NCI4th). Credit against sentence; credit allowed, generally

Defendant was entitled under G.S. 15-196.1 to credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated. **State v. Farris**, 552.

DECLARATORY JUDGMENT ACTIONS

§ 5 (NCI4th). Effect of failure to exhaust administrative remedies

Plaintiff hospitals were not precluded from seeking a declaratory judgment of the validity of an Industrial Commission rule pertaining to hospital charges for employees in workers' compensation cases on the ground that they failed to exhaust their administrative remedies. **Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.**, 200.

§ 13 (NCI4th). Availability of remedy; validity of statutes, ordinances, and regulations

Plaintiff hospitals stated a controversy justiciable under the Declaratory Judgment Act as to the validity of a per diem rule adopted by the Industrial Commission for hospital charges for services rendered to employees in workers' compensation cases and the concomitant repeal of the Blue Cross and Blue Shield of North Carolina rule. **Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.**, 200.

DIVORCE AND SEPARATION

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES — Continued

§ 132 (NCI4th). Rape victim's sexual behavior; admissible evidence; false accusations

Assuming that the trial court in a prosecution for rape and other sexual offenses allegedly committed by a mother and her boyfriend against the mother's daughter erred by excluding under Rule 412 testimony by the victim's brother tending to show that the victim had falsely stated that she had had oral sex with her brother, this error was harmless beyond a reasonable doubt. **State v. McCarroll**, 559.

§ 162 (NCI4th). Threats made by defendant generally

The trial court did not err in a first-degree murder prosecution by admitting evidence of threats defendant made during an escape from jail. **State v. McDougald**, 451.

§ 264 (NCI4th). Character or reputation of persons other than witness; victim

Where the defendant in a murder, kidnapping, rape and sexual offense trial testified not only that the victim was the instigator of consensual sexual acts but also that the victim stated that she wanted to cheat on her husband, defendant's attack on the victim's character for marital fidelity went beyond his consent defense and opened the door to the admission of rebuttal evidence about the victim's general good moral character, devotion to family, and reputation for marital fidelity. **State v. Sexton**, 321.

§ 318 (NCI4th). Other crimes, wrongs, or acts; admissibility to show identity; homicide offenses

In a prosecution of defendant for the first-degree murders of an elderly couple by beating them to death with an axe handle, evidence that defendant beat another elderly couple to death with a tire iron six weeks later was relevant to corroborate defendant's confession and to assist in the determination of a number of facts in the present case, including the central fact of the identity of the victims' assailant. **State v. Ingle**, 617.

Evidence that defendant had murdered a woman in Stokes County three months prior to the murder of a woman in Forsyth County was admissible to show the identity of defendant as the perpetrator of the Forsyth County murder. **State v. Moseley**, 710.

§ 334 (NCI4th). Other crimes, wrongs, or acts; admissibility to show intent generally; animus or quo animo

In a prosecution for first-degree murder committed by choking the victim, evidence that defendant had recently choked another victim was relevant to show his intent. **State v. Sexton**, 321.

§ 351 (NCI4th). Other crimes, wrongs, or acts; admissibility to show motive, reason, or purpose; homicide offenses generally

The trial court did not err in the first-degree murder prosecution of defendant for killing his girlfriend by allowing two of the State's witnesses to testify concerning the issuance of a warrant for assault on a female against defendant in the early morning hours of the day the killing occurred. **State v. Fisher**, 684.

§ 541 (NCI4th). Escape

The trial court did not err in a first-degree murder prosecution by allowing the State to introduce evidence of defendant's escape from the Hoke County Jail. **State v. McDougald**, 451.

EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

§ 1219 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; fact that defendant under arrest or seizure

A confession by a defendant in a burglary, rape, and murder prosecution was admissible where defendant had been arrested in his home without a warrant, even assuming that the arrest was illegal, where defendant was fully advised of his rights at the police station. **State v. Worsley**, 268.

§ 1227 (NCI4th). Confessions and other inculpatory statements; matters affecting admissibility or voluntariness; impropriety of prior or subsequent confession

The Supreme Court declined to reconsider its prior ruling upholding the admission of a second confession following a coerced confession. **State v. Jones**, 229.

§ 1250 (NCI4th). Right to counsel generally; absence of counsel

Defendant's incustody statement was not improperly obtained after defendant invoked his right to counsel where there was ample evidence to support the trial court's finding that defendant never requested an attorney after he had been given the *Miranda* warnings. **State v. Eason**, 730.

§ 1260 (NCI4th). Invocation of right to counsel; post-invocation communication initiated by defendant

Any error in the admission of defendant's incustody statement without a finding that he reinitiated the questioning following invocation of his right to silence was harmless in light of the overwhelming evidence of defendant's guilt. **State v. Eason**, 730.

§ 1346 (NCI4th). Confessions by criminal defendant; mental or physical capacity to waive rights

The evidence on voir dire did not show that defendant lacked the mental capacity to waive his rights and confess, and the trial court did not err by concluding that defendant knowingly and understandingly waived his rights and that defendant's inculpatory statements were admissible in his murder trial. **State v. Ingle**, 617.

§ 1685 (NCI4th). Circumstances where number of photographs held not excessive

Two sets of slides used by an expert witness to illustrate his testimony concerning the similarities of wounds suffered by the victim in this murder trial and another woman murdered by defendant were not unnecessarily repetitive, graphic and misleading. **State v. Moseley**, 710.

§ 1693 (NCI4th). Photographs of homicide victims, generally

An enlarged photograph of the victim's naked body taken at the crime scene was properly admitted in a murder, kidnapping, and rape trial to illustrate one officer's testimony about the location of defendant's hairs recovered from the victim's body and to illustrate a second officer's testimony about body areas from which he took swabs. **State v. Sexton**, 321.

§ 1700 (NCI4th). Photographs of crime victims; to illustrate testimony as to cause of death; pathologist

The trial court did not err in a first-degree murder prosecution by admitting autopsy photographs of the victim's body and the testimony of the pathologist concerning these photographs. **State v. Fisher**, 684.

EVIDENCE AND WITNESSES — Continued

§ 2642 (NCI4th). Attorney-client relationship; examination of attorney as to communication

Any error was not prejudicial where defendant was charged with the first-degree murder of a detective; an attorney who had initially represented another participant in the conspiracy and murder testified as to a conversation he had had with his client; the State introduced that testimony to corroborate the testimony of the client, who had been allowed to plead guilty to second-degree murder in return for his testimony; the attorney indicated on cross-examination that he had authority from his client to testify only as to what the client had told him about the murder and invoked attorney-client privilege as to whether the benefits of a deal with the State had been discussed; and the client had already testified that he had been permitted to plead guilty to second-degree murder and conspiracy in exchange for his testimony. **State v. Morston**, 381.

§ 2889 (NCI4th). Cross-examination as to particular matters; mentality

Cross-examination of defendant as to whether he had a driver's license, graduated from high school, or had consumed drugs at the time of a kidnapping, rape, and murder was relevant to show that defendant was a person of normal intelligence who was clearheaded at the time of the crimes. **State v. Sexton**, 321.

§ 2917 (NCI4th). Methods of impeachment; questions to witness

Assuming that cross-examination of a witness in a capital sentencing proceeding about whether, when he negotiated a plea, he was told the sentence he could have received in this case and whether he was advised that any breach of the law would be a violation of his parole should have been permitted to show bias, defendant was not prejudiced by the exclusion of this testimony where it was made clear that the State had no leverage over the witness to cause him to testify against defendant. **State v. Robinson**, 78.

§ 2972 (NCI4th). Basis for impeachment; character generally

There was prejudicial error in a prosecution for rape and sexual offenses against a child where the child's teacher testified to specific acts of the child which were indicative of truthfulness. **State v. Baymon**, 748.

§ 2973 (NCI4th). Basis for impeachment; character for truthfulness or untruthfulness

The trial court erred in allowing the State to cross-examine the female defendant as to whether she had an affair with a man who the victim said had previously molested her because this evidence was not probative of the witness's truthfulness or untruthfulness and was not relevant to any element of the crimes for which she was being tried, but this error was not prejudicial. **State v. McCarroll**, 559.

§ 3015 (NCI4th). Scope of inquiry when witness admits conviction; on cross-examination

In a first-degree murder prosecution in which defendant admitted that he had previously been convicted of assaulting his girlfriend, the prosecutor's cross-examination of defendant as to whether he had choked his girfriend was admissible to show defendant's intent where the murder was committed by choking the victim. **State v. Sexton**, 321.

EVIDENCE AND WITNESSES — Continued

§ 3158 (NCI4th). Corroborating evidence; character and reputation; specific acts of conduct

There was prejudicial error in a prosecution for rape and sexual offenses against a child where the child's teacher testified to specific acts of the child which were indicative of truthfulness. **State v. Baymon**, 748.

EXECUTORS AND ADMINISTRATORS

§ 35 (NCI4th). Personal representatives; selfdealing

Where a will gave one of the executors the option to purchase a tract of land owned by the testatrix, the executor could exercise the option to purchase without violating his fiduciary duty as executor. **Kapp v. Kapp**, 295.

FIDUCIARIES

§ 1 (NCI4th). Fiduciaries generally

The trial court's charge on undue influence could not have misled the jury to believe that it would have to find undue influence in order to find a fiduciary relationship. **Kapp v. Kapp**, 295.

§ 2 (NCI4th). Evidence of fiduciary relationship

Where testatrix gave one of her executors an option to purchase a tract of land within six months after her death and directed in her will that her executors comply with this option, evidence that the executors did not make the option part of the estate file, undervalued the land, and did not inform the beneficiaries of the will of the option until it was exercised was not relevant to show a fiduciary relationship between the optionee-executor and testatrix at the time the option was executed. **Kapp v. Kapp**, 295.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 37 (NCI4th). Confidential or fiduciary relationship

There was no presumption of fraud in the testatrix's execution of a document giving an executor of her estate the option to purchase a tract of land during her lifetime and for six months after her death where the jury found that there was no fiduciary relationship between the executor and the testatrix at the time the option was executed. **Kapp v. Kapp**, 295.

HOMICIDE

§ 67 (NCI4th). Involuntary manslaughter; death resulting from intentional violation of statute

The trial court did not err in a prosecution for involuntary manslaughter arising from the killing of a jogger by dogs by denying defendant's request for a jury instruction regarding the elements of involuntary manslaughter in cases involving domestic animals where there is no safety statute or ordinance because a safety ordinance was involved. **State v. Powell**, 762.

§ 242 (NCI4th). Sufficiency of evidence of first-degree murder; killing with firearm

The State's evidence was sufficient to support defendant's conviction of first-degree murder by shooting the victim during an argument over money allegedly owed to defendant by the victim. **State v. Mason**, 595.

HOMICIDE -- Continued

§ 279 (NCI4th). Sufficiency of evidence of murder in perpetration of felony; burglary, felonious breaking and entering, felonious larceny, and similar crimes

There was sufficient evidence to submit felony murder to the jury where the evidence of the underlying felony of burglary was sufficient. **State v. Worsley**, 268.

§ 281 (NCI4th). Sufficiency of evidence; murder in perpetration of felony; rape or other sex crimes

There was sufficient evidence to submit felony murder to the jury where the evidence of the underlying felony of rape was sufficient. **State v. Worsley**, 268.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

Although the defendant in a first-degree murder trial presented evidence of provocation, the State presented sufficient evidence that defendant was not provoked to support the trial court's instruction that premeditation and deliberation could be inferred from a lack of provocation. **State v. Eason**, 730.

§ 521 (NCI4th). Mental state; intent and malice; effect of intoxication

The trial court did not err in a first-degree murder and conspiracy prosecution by not submitting second-degree murder to the jury where the evidence was insufficient to support an instruction by the trial court on voluntary intoxication. **State v. Morston**, 381.

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder generally; lack of evidence of lesser crime

The trial court did not err in a prosecution for first-degree murder by denying defendant's request to submit second-degree murder to the jury where the evidence tended to show that defendant willingly conspired to murder a detective and the evidence that defendant was the person who actually killed the detective and that he did so by driving to the detective's home and inflicting multiple gunshot wounds after more than ample time and opportunity to consider and reject killing the victim was essentially uncontroverted. **State v. Morston**, 381.

There was no error in a noncapital first-degree murder prosecution where the trial court did not charge the jury on second-degree murder but there was evidence supporting each and every element of first-degree murder. **State v. Arrington**, 592.

Testimony by defendant's expert witness in a first-degree murder prosecution that defendant was in a psychotic state and was unable to distinguish between right and wrong at the time of the murder was insufficient to require the trial court to submit the lesser charge of second-degree murder where the witness never indicated that at the time of the murder defendant was unable to premeditate or deliberate his actions. **State v. Ingle**, 617.

The trial court in a first-degree murder prosecution did not err by failing to submit second-degree murder to the jury where defendant only offered evidence of alibi and other evidence that he did not commit the offense. **State v. Moseley**, 710.

§ 694 (NCI4th). Instructions; unconsciousness generally

The trial court did not err in a first degree murder prosecution by refusing defendant's request to instruct the jury on the defense of unconsciousness where defendant did not meet his burden of proving the affirmative defense of unconsciousness. **State v. Fisher**, 684.

INDEMNITY

§ 7 (NCI4th). Losses, damages, and liabilities covered

The trial court properly denied a crossclaim by defendant Church where the YMCA and the Church had entered into a joint venture for the operation of a day care, one of the Church vans used by the day care was involved in an accident, the case was settled within the insurance coverage, and the insurance proceeds were joint venture property. **Jones v. Shoji**, 581.

INSURANCE

§ 530 (NCI4th). Underinsured coverage; reduction of insurer's liability

The trial court erred by not allowing the insurer to reduce the amount of UIM coverage by the workers' compensation benefits paid to plaintiff where the same insurer provided both coverages. **Brantley v. Starling**, 567.

A provision in an underinsured motorist policy stating that the policy did not apply to the direct or indirect benefit of any insurer under any workers' compensation law did not preclude a reduction in UIM coverage by the amount of workers' compensation benefits paid to plaintiff where the UIM coverage in the policy was not applied to the benefit of the insurer under any workers' compensation law. **Ibid.**

§ 945 (NCI4th). Sufficiency of evidence to establish insurer's liability to insured generally

A claim for negligent misrepresentation was improperly dismissed where the insured purchased life insurance and named his wife as beneficiary, subsequently changed the beneficiary, called his agent on two occasions some years later to inquire as to the identity of the beneficiary, and was given erroneous information. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 49.

JUDGES, JUSTICES, AND MAGISTRATES

§ 36 (NCI4th). Censure or removal; conduct prejudicial to the administration of justice; particular illustrations

A district court judge was not guilty of conduct prejudicial to the administration of justice or willful misconduct in office by hearing motions in a domestic relations case after he had previously recused himself on the ground that he could not believe any testimony by the defendant and could not give defendant a fair and impartial hearing, or by investigating defendant's living arrangements to assist him in his determination of visitation with a minor child not represented by counsel. **In re Bullock**, 586.

JUDGMENTS

§ 36 (NCI4th). Out of county, district, or term

An order requiring an attorney to appear and show cause why he should not be disciplined was sufficient to give the Superior Court of Graham County jurisdiction even though the order was signed in Mecklenburg County. The rule that a judge may not enter an order substantially affecting a right of a party outside the county in which the case is to be heard without the consent of the parties does not apply to show cause orders. **In re Delk**, 543.

JUDGMENTS — Continued

§ 314 (NCI4th). Judgments in criminal prosecutions as bar to civil action generally

The superior court was not precluded from disbarring respondent where respondent was a licensed attorney, he was convicted of extortion and conspiracy to commit extortion in a trial over which Judge Hyatt presided, Judge Hyatt later entered an order disbarring respondent pursuant to a show cause order, the Court of Appeals vacated the order on jurisdictional grounds, the State Bar requested a second show cause order, Judge Hyatt refused, and defendant contended that Judge Hyatt should have ruled on the question of disbarment when defendant was convicted and that the matter is now res judicata. **In re Delk**, 543.

JURY

§ 64 (NCI4th). Effect of statements made during jury selection; propriety of granting new trial

There was no error during jury selection for a first-degree murder sentencing hearing where defendant moved that the entire panel be excused for misconduct after two prospective jurors were excused for reading a newspaper in the waiting area, but no juror who heard the case could have heard the motion. **State v. Green**, 142.

§ 82 (NCI4th). Excusing jurors; hardship

The trial court did not err in excusing a juror ex mero motu where she asked to speak to the judge, expressed her concern for her two-year-old daughter who was ill with a fever, and stated that her child care had only been worked out with some hardship. **State v. Fisher**, 684.

§ 96 (NCI4th). Voir dire examination; effect of judge having questioned jury on matters sought to be examined by counsel

The trial court's ruling that counsel would not be permitted to ask any question of a prospective juror that had previously been asked of and answered by the juror violated the provision of G.S. 15A-1214(c) which prohibits the trial court from preventing the prosecution or defense from asking a question of a prospective juror merely because the question had previously been asked by the court, but defendant was not prejudiced by this statutory violation. **State v. Jones**, 490.

§ 103 (NCI4th). Examination of veniremen individually or as group; sequestration of venire generally

The trial court did not err when it denied defendant's motion for individual voir dire and sequestration of jurors in a capital sentencing proceeding. **State v. Robinson**, 78; **State v. Jones**, 229.

§ 111 (NCI4th). Examination of veniremen individually or as group; prejudice or preconceived opinions resulting from exposure to pretrial publicity

The trial judge in a capital trial did not abuse his discretion in denying defendant's request for individual voir dire when a panel of jurors indicated that they recalled media coverage of the crimes where the trial judge stated that he felt the situation could be handled by proper questions. **State v. Sexton**, 321.

The trial court did not abuse its discretion in the denial of defendant's motion for individual voir dire and sequestration of prospective jurors in a capital trial based on jury responses to questions regarding whether they had read a certain newspaper article. **State v. Moseley**, 710.

LIMITATIONS, REPOSE, AND LACHES — Continued

§ 33 (NCI4th). What constitutes improvement to real property

Upon installation, vinyl flooring became an improvement to plaintiffs' real property within the meaning of the real property improvement statute of repose, and the phrase "any person furnishing materials" refers to a materialman who furnished materials to the job site either directly to the owner or to a contractor or subcontractor on the job. **Forsyth Memorial Hospital v. Armstrong World Industries**, 438.

§ 37 (NCI4th). Fraud or mistake generally

A counterclaim against an insurance company for negligent misrepresentation of the identity of the beneficiary of an insurance policy was not barred by the statute of limitations of G.S. 1-52(5); the claim does not accrue until the claimant suffers harm because of the misrepresentation and the claimant discovers the misrepresentation. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 49.

MASTER AND SERVANT

§ 75 (NCI3d). Workers' compensation; medical and hospital expenses

A per diem rule adopted by the Industrial Commission for reimbursement of hospital charges for services rendered to workers' compensation patients is inconsistent with the "prevailing charge" standard of G.S. 97-26 and thus exceeds the Commission's statutory authority to review and approve such charges. **Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.**, 200.

The Commission's authority under G.S. 97-90(a) is limited to review and approval of hospital charges to insure (1) that the employer is charged only for reasonably required services and (2) that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. **Ibid.**

The Industrial Commission did not exceed its statutory authority when it repealed the Blue Cross and Blue Shield of North Carolina rule. **Ibid.**

MUNICIPAL CORPORATIONS

§ 148 (NCI4th). Source and extent of powers

The proper rule of construction of grants of powers to municipalities is the broad rule set forth in G.S. 160A-4, and such grants of power should thus be construed to include any additional or supplementary powers that are reasonably necessary or expedient to carry them into execution or effect. **Homebuilders Assn. of Charlotte v. City of Charlotte**, 37.

§ 346 (NCI4th). Power of municipality to appropriate, expend, and allocate revenue generally

The City of Charlotte had the authority to charge reasonable user fees to cover the costs of regulatory services provided by the City since the fees were reasonably necessary or expedient to the execution of the City's express power to regulate the land development activities for which the services are provided. **Homebuilders Assn. of Charlotte v. City of Charlotte**, 37.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 101 (NCI4th). Sufficiency of evidence of possession of controlled substances; marijuana

To prove defendant guilty of felony possession of marijuana, the state must offer evidence that the measured weight of the marijuana exceeded one and one-half ounces or show that the quantity of marijuana was so large that it could be reasonably inferred that its weight exceeded one and one-half ounces. **State v. Mitchell**, 22.

The quantity of marijuana introduced into evidence was insufficient to permit the jury reasonably to infer that it weighed more than one and one-half ounces so as to support defendant's conviction of felonious possession or that it weighed more than one-half ounce so that the jury's verdict could be considered a conviction of the general misdemeanor, and the case is remanded for resentencing as if defendant had been convicted of simple possession. **State v. Mitchell**, 22.

§ 136 (NCI4th). Maintaining dwelling or vehicle for purpose of keeping and selling controlled substance

The statute which prohibits the maintaining of a vehicle for "keeping or selling" controlled substances does not prohibit the mere temporary possession of marijuana within a vehicle. **State v. Mitchell**, 22.

The State's evidence was insufficient to show that defendant's vehicle was "used for keeping or selling" a controlled substance and thus failed to support his conviction for unlawfully maintaining a vehicle in violation of G.S. 90-108(a)(7). **Ibid.**

QUASI CONTRACTS AND RESTITUTION

§ 31 (NCI4th). Sufficiency of evidence to show unjust enrichment

The trial court did not err by failing to submit an issue of unjust enrichment where the evidence showed that defendant executor exercised an option given to him by the testatrix to purchase a tract of land for a total price of $35,705, the executor later sold the land for $1,423,000, and testatrix was a competent person who determined the price of her own free will. **Kapp v. Kapp**, 295.

RAPE AND ALLIED OFFENSES

§ 15 (NCI4th). First-degree rape by infliction of serious personal injury; resistance

In order to find a defendant guilty of first-degree rape based upon the infliction of serious personal mental injury, there is no requirement that the mental injury arise from an act of the defendant not ordinarily present in a forcible rape; rather, it is required that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape. **State v. Baker**, 58.

§ 82 (NCI4th). Sufficiency of evidence; first-degree rape generally

There was sufficient evidence to support submission of first-degree rape to the jury. **State v. Worsley**, 268.

§ 96 (NCI4th). Sufficiency of evidence of first-degree rape based on serious physical or bodily injury

There was sufficient evidence of serious mental or emotional harm to the victim to support defendant's conviction of first-degree rape based upon the infliction of serious personal injury on the victim. **State v. Baker**, 58.

UNFAIR COMPETITION

§1 (NCI3d). Unfair trade practices in general

An insurance company did not commit an unfair practice within the meaning of G.S. 58-63-15(1) where it incorrectly advised the deceased as to the identity of the beneficiary of a insurance policy on his life after the policy had been sold. G.S. 58-63-15(1) is directed at false statements connected with the sale of insurance policies. **Jefferson-Pilot Life Ins. Co. v. Spencer**, 49.

UTILITIES

§ 27 (NCI4th). Natural gas facilities; compelling creation of expansion fund

The Utilities Commission did not act under a misapprehension of applicable law and acted pursuant to a proper interpretation of its authority and discretion under G.S. 62-158 when it granted a petition to establish a natural gas expansion fund financed by supplier refunds to local distribution companies for the purpose of facilitating the expansion of natural gas service to areas where it would not otherwise be feasible. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

A review of the record as a whole in a Utilities Commission proceeding which established a natural gas expansion fund reveals that there is substantial evidence to support the Commission's findings concerning the economic development prospects for Public Service Company's franchised but unserviced areas and the potential benefits to existing customers in unserviced areas. **Ibid.**

The Utilities Commission did not err in entering an order establishing a natural gas expansion fund where CUCA contended that the Commission lacked evidentiary support for the decision to create the fund and for the level of initial funding for the fund. **Ibid.**

§ 210 (NCI4th). Proceedings before the Utilities Commission generally

The Utilities Commission did not have the authority to determine the constitutionality of G.S. 62-2(9) or G.S. 62-158 and properly declined to do so. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

§ 286 (NCI4th). Sufficiency of findings and conclusions generally

The Utilities Commission did not err in an order establishing a natural gas expansion fund by not including a summary of CUCA's argument and the Commission's rejection of that argument. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.**, 657.

The Utilities Commission did not err in an order establishing a natural gas expansion fund by not including a summary and rejection of CUCA's arguments concerning the amount of the fund or the amount of initial funding. **Ibid.**

WORKERS' COMPENSATION

§ 285 (NCI4th). Scheduled and unscheduled injuries arising out of same accident generally

Where an employee qualifies for both permanent partial disability benefits under G.S. 97-31 and permanent total benefits under G.S. 97-29, the legislature intended that the employee have the benefit of the more favorable remedy. **Vernon v. Steven L. Mabe Builders**, 425.

§ 339 (NCI4th). Voluntary settlements between employer and employee; requirement of approval of agreement by Industrial Commission

The Industrial Commission is statutorily required to make a full investigation and determination that a Form 26 compensation agreement is fair and just in order to approve the agreement so as to assure that an employee qualifying for disability compensation under both G.S. 97-29 and G.S. 97-31 have the benefit of the more favorable remedy. **Vernon v. Steven L. Mabe Builders**, 425.

The Industrial Commission failed to act in a judicial capacity to determine the fairness of a Form 26 compensation agreement for permanent partial disability under G.S. 97-31 where plaintiff's physician rated plaintiff as having a 15% permanent disability of the back and stated that he did not think plaintiff could return to work, plaintiff may have been entitled to permanent total disability benefits under G.S. 97-29, and an employee of the Industrial Commission claims department simply checked the rating form against the medical report attached thereto, verified the payment information, and approved the agreement. **Ibid.**

WORD AND PHRASE INDEX

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