NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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1. Elected and sworn in 16 December 1994.
2. Elected and sworn in 3 January 1995.
3. Elected and sworn in 3 January 1995.
4. Elected and sworn in 1 January 1995.
5. Elected and sworn in 3 January 1995.
6. Elected and sworn in 20 January 1995.
7. Elected and sworn in 19 December 1994.
8. Elected and sworn in 27 January 1995.
9. Elected and Sworn in 1 January 1995.
10. Elected and sworn in 1 January 1995.
11. Elected and sworn in 3 January 1995.
12. Elected and sworn in 3 January 1995.
13. Elected and sworn in 16 December 1994.
14. Appointed by Governor James B. Hunt and sworn in 1 February 1995.

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1. Appointed and sworn in 27 January 1995 to replace George L. Wainwright, Jr. who was elected to the Superior Court.
2. Appointed and sworn in 26 January 1995.
3. Elected and sworn in 5 December 1994.
4. Appointed Chief Judge 7 February 1995 to replace Donald R. Huffman who was elected to the Superior Court.
5. Appointed and sworn in 31 January 1995.

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18	Wallace C. Harrelson	Greensboro
26	Isabel S. Day	Charlotte
27A	Kellum Morris	Gastonia
28	J. Robert Hufstader	Asheville

ORDER OF THE COURT

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

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

PETITIONS TO REHEAR

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 4th day of November, 1994 and said persons have been issued certificates of this Board:

HANS G. FLADUNG ..... Raleigh
Applied from the State of Illinois
MARK ANTHONY LA MANTIA ..... Raleigh
Applied from the State of Illinois
PHILIP ALLAN OKREND ..... Raleigh
Applied from the State of New York

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

DAVID ALAN VESEL ..... Raleigh
Applied from the State of New York

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 9th day of December, 1994 and said persons have been issued certificates of this Board:

WILLIAM AMBROSE WHITE ..... Raleigh
Applied from the District of Columbia
MONICA SHIRLEY GFOELLER ..... Pittsboro
Applied from the State of Ohio
GRACE MAYNARD ..... Charlotte
Applied from the State of New York
PETER W. VOGT ..... Charlotte
Applied from the State of Pennsylvania
EASSON MCKENZIE MILLER, JR. ..... Richmond, Virginia
Applied from the State of Virginia
DEIDRE ELLEN HOLMES ..... Monroe
Applied from the State of New York
JOSEPH W. O'REILLY ..... Louisville, Kentucky
Applied from the State of Kentucky
CLAIRE J. RAUSCHER ..... Blackwood, New Jersey
Applied from the State of Pennsylvania
CHARLES ATLEE MADISON ..... Denver, Colorado
Applied from the State of Colorado
SARAH ZARBOCK GARNER ..... Caswell Beach
Applied from the State of Tennessee
STEPHEN RALPH ROMINE ..... Virginia Beach, Virginia
Applied from the State of Virginia
MARK JOHN PLETZKE ..... Wrightsville Beach
Applied from the State of Michigan

N. KAREN METCALF ..... Moore, Oklahoma
Applied from the State of Oklahoma
WILLIAM STIMSON TRIVETTE ..... Greensboro
Applied from the State of Texas
JAY A. LAUER ..... Colorado Springs, Colorado
Applied from the State of Iowa
JOHN RHINEHOLD PASTRYK ..... Charlotte
Applied from the State of Virginia
SUZANNE SMITH ..... Charlotte
Applied from the State of Illinois
TAYLOR D. WARD ..... Winston-Salem
Applied from the State of New York
DAVID BROOKE TAYLOR ..... Charlotte
Applied from the State of New York

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examination of the Board of Law Examiners as of the 4th day of November, 1994, and said person has been issued a license certificate.

July 1994 North Carolina Bar Examination

RICHARD LEON MCCLERIN ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 3rd day of January, 1995.

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

July 1994 North Carolina Bar Examination

STEPHEN O'NEILL BARLOW ..... Tampa, Florida
KIERAN PATRICK BRODERICK ..... Guiderland, New York
JOHN DAVID DOVERSPIKE, SR. ..... Duluth, Georgia
KURT ANDREW EHRSAM ..... Cedar Mountain
VAN W. ELLIS ..... Richmond, Virginia
ERICA DAWN FOSTER ..... Hoover, Alabama
K. RAMON GRIFFIN ..... Durham
DAVID R. LUNDQUIST ..... Winston Salem
GARY EARL MASSEY ..... Winter Springs, Florida

JOHN LAUCHLIN MONROE, JR. . . . . Atlanta, Georgia
KIMBERLY ANN MOORE . . . . . Williamston
BENJAMIN RAY OLINGER, JR. . . . . Asheville
BRIAN JONATHAN PETULA . . . . . Charlotte
GLORIA DENISE RUIZ . . . . . Canton, Ohio
KAREN MCKEITHEN SCHAEDE . . . . . Greensboro
SCOTT WILLIAM SCHATTENFIELD . . . . . Charlotte
KELLY B. STRICKLAND . . . . . Durham
ROY BRUCE THOMPSON, II . . . . . Raleigh
ALAN CURTIS TRIGGS . . . . . Cincinnati, Ohio
KATRINA DAPHINE WATSON . . . . . Charlotte
WILLIAM MOORE WILLIS, IV . . . . . Statesville
LAWRENCE D. WINSON . . . . . Coral Gables, Florida

February 1994 North Carolina Bar Examination

Katharine Ann Salmon . . . . . Raleigh

Given over my hand and seal of the Board of Law Examiners this the 23rd day of January, 1995.

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 17th day of February, 1995 and said person has been issued certificate of this Board:

JOSEPH M. ZIMA . . . . . Fayetteville
Applied from the State of Indiana

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examination of the Board of Law Examiners as of the 17h day of February, 1995 and said person has been issued license certificate.

July 1994 North Carolina Bar Examination

WALTER BROWN RAND . . . . . Chapel Hill

Given over my hand and seal of the Board of Law Examiners this the 10th day of February, 1995.

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. SHERMAN ELWOOD SKIPPER

No. 122A92

(Filed 29 July 1994)

1. Jury §§ 226, 227 (NCI4th)— capital case—death penalty views—equivocal answers—excusal for cause—rehabilitation not allowed

While a juror's answers on voir dire in a capital case were not entirely unequivocal and her views on whether she could consider the death penalty as required by law were not unmistakably clear, the trial court did not err by excusing the juror for cause where her responses revealed that her thoughts and views on the death penalty would substantially impair her ability to follow the instructions of the court as they related to her duty as a juror. Furthermore, the trial court did not err by refusing to permit defendant to attempt to rehabilitate the juror where the prosecution explained in detail the procedure that must be followed in determining a sentence of death; after this explanation, the juror affirmatively responded three times that she would be substantially impaired in following the law because of her beliefs; and there was no indication that further questioning of the juror would have done anything but make the situation more confusing.

Am Jur 2d, Jury §§ 289, 290.

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

2. Jury § 123 (NCI4th)— capital case—voir dire questions—consideration of age, mental impairment, etc.—attempt to stake out jurors

The trial court did not err by refusing to permit defendant to ask prospective jurors in a capital case whether they could "consider" age, mental impairment or retardation, and other specific mitigating circumstances in reaching a decision, since the questions were an impermissible attempt to stake out the jurors. Defendant was given an adequate opportunity to discover any bias on the part of a juror where he was permitted to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, to ask jurors if they would automatically vote for the death penalty in a first-degree murder case, and to ask jurors if they would consider mitigating circumstances when determining defendant's sentence.

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 § 123 (NCI4th)— capital case—jury voir dire—previous criminal record—automatic vote for death penalty—question properly excluded

Defendant's question to a prospective juror as to whether she felt "that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder" was an attempt to determine what kind of verdict the juror would render under certain circumstances not yet in evidence, and the trial court did not abuse its discretion in sustaining the State's objection to this question as phrased where the juror had already stated that she could consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty and that she would not automatically vote for the death penalty for someone convicted of first-degree murder.

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.

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. 43 ALR3d 1081.

4. Jury § 141 (NCI4th)— capital case—jury voir dire—meaning of life imprisonment—possibility of parole—questions properly excluded

The trial court did not err in refusing to permit defendant to question prospective jurors in a capital trial about their views on the meaning of life imprisonment and the possibility of 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.

5. Criminal Law § 395 (NCI4th); Jury § 194 (NCI4th)— capital punishment views—questions by trial judge—no impartiality in favor of State

The trial judge did not act impartially in favor of the State in determining challenges for cause of prospective jurors in a capital trial based on their capital punishment beliefs by the manner in which he questioned a juror who gave equivocal answers about her beliefs or by asking jurors being questioned by defendant if they could follow the law as given to them where the record shows that the trial judge treated jurors challenged by the State and the defense in the same manner by asking the jurors questions to determine if they would in fact be substantially impaired by their views for or against the death penalty and if they could follow the law, and that the trial judge also intervened on occasion to clarify and explain the law when jurors were confused.

Am Jur 2d, Jury §§ 265 et seq.; Trial § 117.

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

6. Homicide § 552 (NCI4th)— first-degree murder—premeditation and deliberation—brain disorder—intoxication—lack of bad relationship—instruction on second-degree murder not required

The evidence of premeditation and deliberation was not equivocal in a prosecution of defendant for two first-degree mur-

ders so as to require the trial court to instruct the jury on second-degree murder where it tended to show that the female victim and defendant did not get along; they had an argument at the female victim's home and she did not want defendant to come to her home again; neither victim did anything to legally provoke defendant, but defendant pulled a semiautomatic rifle from under a car seat and killed the victims with fragmentation bullets known for their destructive power; defendant shot one victim, paused momentarily, stated "you too," and shot the second victim; both victims were wounded multiple times; as defendant left the crime scene, he asked his companion, "did I get them" both; and defendant proceeded to dispose of the gun and ammunition and then left town. Evidence that defendant was mildly retarded and suffered from organic brain disorder was not presented to the jury until the sentencing phase and was thus not a factor that could support a second-degree murder instruction. Furthermore, the evidence did not indicate the lack of a bad relationship between the female victim and defendant which would support an instruction on second-degree murder, and evidence of defendant's intoxication was insufficient to support an instruction on second-degree murder where it established that he was not visibly intoxicated, that defendant chose not to drive a vehicle, and that he had had something to drink that day, but there was no evidence as to how much he had had to drink or over what period of time he had been drinking.

Am Jur 2d, Homicide §§ 525 et seq.

7. Criminal Law § 429 (NCI4th)— capital case—jury argument—defendant's failure to testify—error cured by court's actions

Any possible error created by the prosecutor's jury argument references to defendant's failure to testify in a capital trial was cured when the trial court sustained defendant's objection, the comments were both withdrawn and stricken from the record, the trial court then instructed the jury to "disregard the last argument of the prosecutor," and the trial court charged during its instructions that defendant had a right not to testify and that his silence was not to influence the jury's decision in any way. Assuming *arguendo* that the trial court's actions were insufficient to cure the error, the evidence of defendant's guilt was so overwhelming that the error was harmless beyond a reasonable doubt.

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.

8. Evidence and Witnesses § 3015 (NCI4th)— cross-examination—prior conviction—date of crime—question properly excluded

In a capital trial in which a witness admitted on cross-examination by defense counsel that he had been convicted of four counts of common law forgery, the date he was convicted, that he had received five years' probation, and that he had violated his probation, the trial court did not err by excluding defendant's question as to the date on which the witness had committed a particular act of forgery. Assuming *arguendo* that defendant should have been allowed to ask the witness the date on which he committed a specific crime, the error was harmless because the date could not add any impeachment value to the information the jury already had about the prior conviction. N.C.G.S. § 8C-1, Rule 609(a).

Am Jur 2d, Witnesses §§ 581 et seq.

Comment Note.—Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.

9. Criminal Law § 414 (NCI4th)— defendant's introduction of evidence—loss of right to open and close arguments—no coercion by trial court

The trial court did not coerce defendant into introducing evidence so that he lost his right to open and close the final argument where the prosecutor objected to defendant's use of a photograph to help illustrate a witness's testimony during cross-examination unless it was introduced into evidence; the court sustained the objection and defendant immediately asked to introduce the photograph into evidence; the trial court asked defendant if he understood that he was now offering evidence and defendant responded that he understood; the court allowed the photograph into evidence; the photograph was shown to the jury while the witness answered questions posed by defendant; and defendant used the photograph to impeach the witness. Even

if the photograph had not been admitted into evidence, defendant would still have lost his right to open and close jury argument because he also introduced two depositions and a diagram of the crime scene. Rule 10, General Rules of Practice for the Superior and District Courts.

Am Jur 2d, Trial § 213.

10. Homicide § 489 (NCI4th)— premeditation and deliberation—instructions—lack of provocation

The trial court's instruction that the jury could infer premeditation and deliberation from circumstances such as "lack of provocation" could not have confused the jury because it did not explain the difference between legal and ordinary provocation, did not constitute an impermissible expression of judicial opinion on the evidence, and did not impermissibly shift the burden of proof to defendant.

Am Jur 2d, Homicide § 501.

11. Homicide § 489 (NCI4th)— premeditation and deliberation—instructions—inference from threats—no plain error

The trial court's instruction that "threats" of the defendant may support an inference of premeditation and deliberation, if erroneous because not supported by the evidence, was not plain error where the evidence supported a finding of premeditation and deliberation, and defendant failed to meet his burden of showing that, absent the word "threats" in the instruction on premeditation and deliberation, the jury would probably have reached a different verdict.

Am Jur 2d, Homicide § 501.

12. Evidence and Witnesses § 1694 (NCI4th)— autopsy photographs—relevancy to show premeditation and deliberation

Seven autopsy photographs of the two victims were properly admitted in this first-degree murder prosecution, although it was uncontradicted that the victims were killed by multiple gunshot wounds from a semiautomatic rifle and that defendant was involved in the shooting, since they were not excessive, they helped illustrate a pathologist's testimony, and they were relevant and probative to show premeditation and deliberation. Furthermore, the trial court did not err by finding that the prejudicial effect of the photographs did not outweigh their probative value.

Am Jur 2d, Homicide §§ 417 et seq.

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

13. Homicide § 659 (NCI4th)— instruction on voluntary intoxication—defendant's burden of production—no due process violation

Defendant's due process rights were not violated by his burden of producing evidence that he was so intoxicated that he could not form a premeditated and deliberated intent to kill in order to be entitled to an instruction on the defense of voluntary intoxication since the jurors were not restricted from considering evidence of intoxication in determining whether the State satisfied them beyond a reasonable doubt as to all elements of first-degree murder, including premeditation and deliberation and intent to kill, if defendant failed to satisfy the burden of production necessary for an instruction on voluntary intoxication, and the State's burden of proving first-degree murder beyond a reasonable doubt was in no way reduced by the burden of production defendant must satisfy in order to receive a voluntary intoxication instruction.

Am Jur 2d, Homicide § 517.

14. Homicide § 669 (NCI4th)— voluntary intoxication instruction—insufficient evidence

The evidence in a capital trial was insufficient to require an instruction on voluntary intoxication where it showed only that defendant had been drinking for some time during the day of the murder and that he did not want to drive because he had been drinking, but there was no evidence that defendant looked drunk or that he was having difficulty speaking or walking, and no evidence as to how much defendant had actually drunk.

Am Jur 2d, Homicide § 517.

15. Evidence and Witnesses § 2791 (NCI4th)— question about telling truth—properly excluded

The trial court did not err by refusing to permit defendant to ask a witness on redirect examination in a capital sentencing proceeding whether he was "telling this jury the truth" because the credibility of a witness is for the jury to decide. Even if the trial

court erred by sustaining the objection to this question, the error was harmless because the witness had already affirmed that he would tell the truth, and the question was redundant.

Am Jur 2d, Witnesses §§ 426 et seq.

16. Evidence and Witnesses § 2906 (NCI4th)— redirect examination—exceeding scope of cross-examination—objection sustained—answer not stricken—harmless error

The trial court in a capital sentencing proceeding did not err by sustaining the State's objection to a question defendant asked a witness on redirect as to the name of the church for which he was the minister where this question went beyond the scope of cross-examination, which made no mention of the witness's profession. In any case, there was no error because the witness answered the question, there was no motion to strike or admonishment of the jury to disregard the answer, and defendant thus received the benefit of the evidence sought. Furthermore, any error in sustaining the objection to this question was harmless error because determining the name of the church the witness worked for did not bolster his credibility.

Am Jur 2d, Witnesses § 425.

17. Criminal Law § 1068 (NCI4th)— capital sentencing proceeding—exclusion of testimony—no due process violation

Defendant's due process rights were not violated when the trial court in a capital sentencing proceeding refused to permit defendant to ask a witness on redirect (1) if he was telling the truth, and (2) for what church he was a minister. The questions were incompetent under traditional evidentiary standards, and defendant's due process rights were not implicated because the testimony sought did not directly reflect on defendant's guilt or involvement in the crime for which he had been convicted.

Am Jur 2d, Criminal Law § 598.

18. Criminal Law § 680 (NCI4th)— mitigating circumstances—peremptory instructions—necessity for request

Where defendant requested that peremptory instructions be given only for the mitigating circumstances dealing with mental and emotional impairment and defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the law, the trial court did not err in failing to give peremptory

instructions as to other uncontroverted statutory and nonstatutory mitigating circumstances.

Am Jur 2d, Criminal Law § 628.

19. Criminal Law §§ 860, 1322 (NCI4th)— capital sentencing proceeding—refusal to instruct on parole eligibility and concurrent sentences—jury question during deliberations—proper instruction

The trial court correctly denied defendant's request to include in the jury charge in a capital sentencing proceeding for two murders an instruction that a life sentence means that defendant may be eligible for parole in twenty years and that defendant could be sentenced to consecutive life sentences so that he would not be eligible for parole for forty years. Furthermore, when the jury sent out a question asking about parole eligibility and concurrent sentences, the trial court properly instructed the jury that eligibility for parole is not a proper matter for the jury and that in considering life imprisonment, "you should determine the question as though life imprisonment means exactly what the statute says: imprisonment for life in the state's prison." N.C.G.S. § 15A-2002, which will require the trial court to instruct the jury in a capital sentencing proceeding concerning parole eligibility of a defendant sentenced to life, applies prospectively after its effective date, 1 October 1994, and thus does not apply in this case.

Am Jur 2d, Trial §§ 100, 890.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR2d 769.

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

Jury's discussion of parole law as ground for reversal or new trial. 21 ALR4th 420.

20. Criminal Law § 1322 (NCI4th)— capital sentencing proceeding—parole eligibility not mitigating—instruction not required

An instruction on parole eligibility was not necessary as mitigating evidence in light of the prosecutor's argument stressing defendant's potential for future dangerousness because parole eligibility is not mitigating since it does not reflect on any aspect

of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Am Jur 2d, Trial §§ 888 et seq.

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

The trial court did not err by failing to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where the State presented evidence that defendant had been convicted of assault with a deadly weapon inflicting serious bodily injury in 1978, 1982, and 1984; the jury found as an aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to a person; and no rational juror could have found that defendant had no significant history of prior criminal activity.

Am Jur 2d, Criminal Law §§ 598, 599.

22. Criminal Law §§ 1323, 1362 (NCI4th)— statutory mitigating circumstances—instructions—determination of mitigating effect

The statement in the trial court's instructions on the statutory mitigating circumstance of age that "the mitigating effect of the age of the defendant is for you to determine" did not allow the jury to "refuse to consider, as a matter of law," the evidence about age as a mitigating circumstance in violation of *Eddings v. Oklahoma*, 455 U.S. 104, and was not improper. Moreover, the evidence was contradictory as to this mitigating circumstance and the jury's failure to find that this circumstance existed did not show that the jury interpreted this instruction to mean that it could "refuse to consider" this circumstance where there was evidence that defendant, whose chronological age was forty-eight, had the mental age of a six-year-old child, but there was also evidence that defendant had been married, ran his own business, and supported himself and his children.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

23. Criminal Law § 1323 (NCI4th)— nonstatutory mitigating circumstances—instructions—determination of mitigating value

The trial court's instructions which permitted the jury to consider whether nonstatutory mitigating circumstances in fact had mitigating value were not erroneous where the instructions allowed the jury to consider all of the evidence in mitigation.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

24. Criminal Law § 1323 (NCI4th)— mitigating circumstances—consideration of circumstances found by other jurors—instruction not constitutionally required

There is no constitutional requirement that a juror must consider a mitigating circumstance found by another juror to exist. What is constitutionally required is that jurors be individually given the opportunity to consider and give weight to whatever mitigating evidence they deem to be valid. Therefore, the trial court did not err by failing to instruct the jury that once one juror finds a mitigating circumstance to exist, all jurors must consider that circumstance when reaching their sentencing decision, even if a juror did not believe that mitigating circumstance existed.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

25. Criminal Law § 1323 (NCI4th)— consideration of mitigating circumstances—instructions—use of "may"

The trial court's instruction that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances did not allow some jurors to disregard relevant mitigating evidence they had earlier found to exist and fully comported with *McKoy v. North Carolina*, 494 U.S. 433, where the court also instructed that the evidence in mitigation *must* be weighed against the evidence in aggravation.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

26. Criminal Law § 1348 (NCI4th)— capital sentencing—instructions defining mitigating circumstance—jury not improperly restricted

The jury in a capital sentencing proceeding was not restricted from considering any evidence that may have lessened

defendant's sentence, whether it be evidence that was directly based on defendant's character or evidence that related to the actual murders, where the trial court defined a mitigating circumstance as 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," and the trial court also instructed that the jury had a duty "to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death and any other circumstances arising from the evidence which you deem to have mitigating value."

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

27. Criminal Law § 1347 (NCI4th)— capital sentencing—course of conduct aggravating circumstance—sufficiency of evidence

The trial court properly submitted the course of conduct aggravating circumstance to the jury in a capital sentencing proceeding for two murders where the evidence tended to show that defendant pulled a semiautomatic rifle from under the seat of his truck and fired multiple shots at the female victim; he then said "you too" and shot the male victim; as the truck pulled away, defendant asked the driver if he got them both; and the crimes thus occurred within moments of each other at the same location and by use of the same *modus operandi*.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

28. Criminal Law § 1363 (NCI4th)— capital sentencing—requested nonstatutory mitigating circumstances—combining of circumstances

The trial court did not err by failing to submit separately and independently each nonstatutory mitigating circumstance requested in writing by defendant where some of the requested circumstances were combined by the trial court on the written recommendation form; all of the requested circumstances were subsumed by the circumstances submitted; and the jury was

required to address every point brought forward in defendant's written request. Assuming *arguendo* that the trial court erred by not giving the exact instructions requested by defendant, such error was harmless beyond a reasonable doubt where it is clear that the jury was not prevented from considering any potential mitigating evidence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

29. Constitutional Law § 370 (NCI4th)— mentally retarded defendant—death penalty not unconstitutional

Imposition of the death penalty on defendant was not unconstitutional because he has suffered lifelong organic brain damage and is mentally retarded since the U.S. Supreme Court has held that the Eighth Amendment does not categorically prohibit the infliction of the death penalty on a person who is mentally retarded, and the N.C. Supreme Court has affirmed the death penalty in cases where defendants' IQ test scores were similar to or lower than defendant's IQ test score of 69.

Am Jur 2d, Criminal Law § 628.

Propriety of imposing capital punishment on mentally retarded individuals. 20 ALR5th 177.

30. Jury § 261 (NCI4th)— peremptory challenges—death penalty views—constitutionality

It was not unconstitutional to permit the prosecutor in a capital case to peremptorily challenge jurors who expressed reservations about the death penalty.

Am Jur 2d, Jury §§ 233 et seq.

31. Criminal Law § 1327 (NCI4th)— capital sentencing—instruction on duty to recommend death penalty

The Pattern Jury Instruction imposing a duty upon the jury to return death if the mitigating circumstances are insufficient to outweigh the aggravating circumstances is not unconstitutional.

Am Jur 2d, Trial §§ 888 et seq.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

32. Jury § 103 (NCI4th)— capital trial—denial of individual voir dire and sequestration

The trial court did not abuse its discretion in denying defendant's request for individual voir dire and sequestration of prospective jurors in this capital trial.

Am Jur 2d, Jury § 197.

33. Criminal Law § 1318 (NCI4th)— capital trial—preliminary instructions

The trial court did not err by denying defendant's request that the court give specific instructions, written by defendant, about the procedures involved in a capital punishment proceeding prior to the beginning of jury selection where the trial court gave preliminary jury instructions pursuant to the Pattern Jury Instructions.

Am Jur 2d, Trial §§ 888 et seq.

34. Criminal Law § 1298 (NCI4th)— constitutionality of death penalty statute

The North Carolina death penalty statute is not unconstitutional.

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.

35. Criminal Law § 1326 (NCI4th)— mitigating circumstances—burden of proof

The trial court did not err by instructing the jury in a capital sentencing proceeding that defendant had the burden of proving the mitigating circumstances by a preponderance of the evidence.

Am Jur 2d, Trial §§ 888 et seq.

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

Sentences of death imposed upon defendant for two first-degree murders are not excessive or disproportionate to the penalty imposed in similar cases considering both the crimes and the defendant where defendant was convicted of both murders on the theory of premeditation and deliberation; the jury found as

aggravating circumstances that defendant had previously been convicted of a felony involving the use of violence to the person and that the murders were part of a course of conduct that included crimes of violence to others; defendant had been convicted on three previous occasions of inflicting serious injury with a deadly weapon by shooting one person in the back, severing the hand of another with a knife, and shooting another in the chest; and the evidence showed that defendant, without provocation, shot the two victims numerous times with a semiautomatic rifle containing fragmentation bullets, left them lying on the ground, and never attempted to get them any help. Defendant's sentences were not disproportionate because defendant has a low IQ and the jury found that defendant was mentally or emotionally disturbed when the crimes were committed and that his capacity to appreciate the criminality of his conduct was impaired.

Am Jur 2d, Criminal Law § 628.

Chief Justice EXUM concurring in the result.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing two sentences of death entered by Britt, J., at the 4 February 1991 Special Criminal Session of Superior Court, Bladen County. Heard in the Supreme Court 1 February 1994.

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

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

MEYER, Justice.

On 25 August 1990, Ailene Pittman and her grandson Nelson Fipps, Jr., were shot and killed while standing in Ms. Pittman's front yard. The evidence showed that on 25 August 1990, defendant, Sherman Skipper, and Mark Smith drove to Ms. Pittman's home. They both had been drinking. Defendant had been dating Ms. Pittman and wanted to talk to her. Mr. Smith was driving defendant's truck. Defendant and Ms. Pittman talked for fifteen to twenty minutes, standing by the front door to Ms. Pittman's home. Defendant then went back to the truck, got in, and told Mr. Smith to drive away. Ms. Pittman approached the truck and told Mr. Smith not to bring

defendant back to her home. When Mr. Smith began backing the truck out of the driveway, defendant reached under the seat of the truck and pulled out a semiautomatic rifle containing fragmentation bullets. He then proceeded to shoot Ms. Pittman, stopped shooting, said "you too," and then shot Nelson Fipps, who was standing in the driveway. The two men then drove away from the home and spent a week on the run. Mr. Smith finally turned himself in to the police and told them where defendant could be found.

Defendant was found guilty of first-degree murder of both Ms. Pittman and Mr. Fipps and was sentenced to death for each murder. The jury found that defendant had previously been convicted of three assaults with a deadly weapon inflicting serious injury and that he had murdered each of his current victims during a course of conduct involving violence to the other. They also found that he was mentally and emotionally disturbed when the murders were committed and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Defendant sets forth thirty-one assignments of error in a 244-page brief. Additional facts will be addressed as necessary for the disposition of these issues.

JURY SELECTION ISSUES

[1] Defendant begins by arguing that the trial court committed reversible error in excusing Juror Shirley Clark for cause, based on that juror's feelings about the death penalty. Defendant argues that the trial court erred by not allowing defendant to question the juror. He also argues that the trial court failed to adequately question the juror before determining that the juror should be excused for cause. Defendant argues that, because of this, he was denied his rights to a fair and impartial jury, due process of law, and freedom from cruel and unusual punishment.

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." *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128, *cert. denied*, ——U.S. ——, 126 L. Ed. 2d 341 (1993), *reh'g denied*, —— U.S. ——, 126 L. Ed. 2d 707 (1994); *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).

Defendant argues that it did not clearly appear that juror Clark was biased and that some of the juror's answers were equivocal; thus, the prosecutor's challenge for cause should have been denied. This Court has noted 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.' " *Syriani*, 333 N.C. at 370, 428 S.E.2d at 128 (quoting *State v. Davis*, 325 N.C. at 624, 386 S.E.2d at 426) (alteration in original).

The United States Supreme Court has also noted that it is sometimes difficult to establish total bias against the death penalty with "unmistakable clarity."

> [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 a trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Wainwright v. Witt, 469 U.S. 412, 425-26, 83 L. Ed. 2d 841, 852 (1985) (footnote omitted).

The transcript reveals that juror Clark stated that while she thought the death penalty may be necessary in today's society, she had personal convictions and scruples against the death penalty because she was a Christian. The prosecutor asked Ms. Clark many questions, trying to determine if the juror could impose the death penalty in some situations. The prosecutor explained in great detail the procedure that must be followed before a jury could impose the death penalty. After hearing how the law worked in regard to finding aggravating and mitigating circumstances and balancing the circumstances, the juror still stated that she was not sure whether she could impose the death penalty. The juror stated that she would try her best to be fair, but she also told the prosecutor two times that her scruples and Christian beliefs would substantially impair her ability to consider the death penalty. The prosecutor then challenged this juror for cause.

Before dismissing the juror for cause, the trial judge questioned her extensively. Juror Clark stated that she could impose the death

penalty under some circumstances but then said that her scruples were such that she would be prevented or substantially impaired in the performance of her duty as a juror in accordance with her oath and the instruction of the Court. Here, as in *Syriani*, the juror seemed to give conflicting answers; nevertheless, her responses revealed that her thoughts and views on the death penalty would substantially impair her ability to follow the instructions of the court as they related to her duty as a juror. While the juror's view on whether she could consider the death penalty as required by the law was not "unmistakably clear," the juror's responses to the questions were such that the trial judge could determine that the challenge for cause should be permitted. The juror could not affirmatively state that she could follow the instructions given by the court and do her duty as a juror. The trial court did not err in excusing juror Clark for cause.

Defendant also argues that he should have been given the chance to rehabilitate this juror under *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). In *Brogden*, this Court held that when a judge denies a defendant the opportunity to rehabilitate under the mistaken impression that defendant is not permitted to rehabilitate a juror, then the decision of the trial court is reviewable and is not considered under an abuse of discretion standard. *Id.* at 46, 430 S.E.2d at 909. In *Brogden*, we held that further questioning should have been allowed because the juror may have answered the crucial question about whether his views would substantially prevent or impair his duties as a juror differently if rehabilitation had been allowed. In *Brogden*, unlike here, the juror never affirmatively stated that his feelings would substantially impair his ability to do his duty and follow instructions. In this case, the prosecution explained in detail the procedure that must be followed in determining a sentence of death. After this explanation, the juror affirmatively responded three times that she would be substantially impaired in following the law because of her beliefs.

We have noted that while defendants can be given the opportunity to rehabilitate a juror, this is not an entitlement; judges are not required to allow a defendant to attempt to rehabilitate jurors challenged for cause. A trial court in its sound discretion may refuse a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State. *See Brogden*, 334 N.C. at 44, 430 S.E.2d at 908; *State v. Taylor*, 332 N.C. 372, 391, 420 S.E.2d 414, 425 (1992).

We conclude that while juror Clark's answers were not entirely unequivocal, they were sufficiently equivocal to justify her being

excused for cause in the discretion of the trial judge, who heard the questions asked of, and the answers given by, the juror. In addition, we do not believe that defendant was incorrectly denied his right to rehabilitate. The sentencing process had been fully explained to the juror and she had responded in answer to the prosecutor's question that, based on her beliefs, she would be impaired in following this procedure. The judge did not deny the right to rehabilitate based on a misunderstanding that no such right exists, and there was no indication that the questioning of the juror would have done anything but make the situation more confusing.

[2] In defendant's second and fourth assignments of error, he argues that his right to a fair and impartial jury was violated because the trial court sustained the prosecutor's objections to certain questions. In his second assignment of error, defendant argues that he should have been allowed to ask questions regarding how jurors would be affected by evidence of mental impairment, age, and other mitigating circumstances. In his fourth assignment of error, defendant argues that it was error not to allow him to ask two jurors who sat on the jury if they would always sentence a person to death if he had a criminal record and had just been found guilty of first-degree murder.

Defendant argues that under *Morgan v. Illinois*, — U.S. —, 119 L. Ed. 2d 492 (1992), a defendant must be able to specifically inquire of each prospective juror whether that individual juror would be predisposed not to consider relevant mitigating evidence in determining the appropriate sentence.

The State argues that defendant's questions were a blatant attempt to stake out jurors. The State also notes that when defendant asked the jurors questions about certain characteristics without questioning them as to what kind of verdict they would render in a situation involving those certain characteristics, the questions were allowed and defendant was able to elicit the desired information.

First, we note that defendant was permitted to ask jurors if they could, in general, consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty. Defendant was also allowed to ask jurors if they would automatically sentence a person to death and not consider life imprisonment as an option in every case where a person has been convicted of first-degree murder. It is these two particular propositions that are addressed in *Morgan v. Illinois*.

A review of the *voir dire* illustrates that the judge sustained the prosecutor's objection to defendant's asking if a juror would "consider" age, mental impairment, mental retardation, and family and employment background in reaching a decision. However, the record also reveals that defendant was allowed to ask, "If the Court instructs you that you should consider whether or not a person is suffering from a mental or emotional disturbance in deciding whether or not to give someone the death penalty, do you feel like you could follow that instruction?" Additionally, defendant was permitted to inquire generally into a juror's feeling about such issues as mental illness.

On numerous occasions, the court indicated that it would allow the question defendant was trying to ask if it was "rephrased" or if an "appropriate predicate" was set. On one occasion, the judge even told defendant, "[Y]ou may ask the juror if he will accept and follow the law as given to the jury by this Court as it relates to mitigating circumstances." It is clear that the judge would allow defendant to ask if a juror could follow the law but would not allow defendant to ask a hypothetical question regarding if a juror would consider a circumstance, not known to exist at that time, in reaching a decision.

A defendant should not be able

> to elicit in advance what the juror's decision will be under a certain state of the evidence or upon a given state of facts. . . . [S]uch questions tend to "stake out" the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.

State v. Vinson, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1206 (1976). In *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993), we noted that we would not allow questions that were intended to "stake out" jurors. *Id.* at 404, 417 S.E.2d at 772 (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)).

In *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418, we held that the question, "Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the

death penalty?" was impermissible. *Id.* at 621, 386 S.E.2d at 425. We noted that "[n]o evidence of defendant's criminal history had been introduced" during *voir dire*; thus, the question was "hypothetical and the trial court properly could view it as an impermissible attempt to indoctrinate a prospective juror regarding the existence of a mitigating circumstance." *Id.* In *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), the Court held that it was not error to refuse to allow defendant to ask jurors if they would find it impossible to vote for life imprisonment if torture or rape had also taken place during the murder. *Id.* at 541, 434 S.E.2d at 188. The Court noted that defendant was allowed to ask if jurors would automatically vote for death. The Court held that " '[j]urors should not be asked what kind of verdict they would render under certain named circumstances.' " *Id.* at 542, 434 S.E.2d at 188 (quoting *State v. Phillips*, 300 N.C. at 682, 268 S.E.2d at 455).

We recognize that the Supreme Court has held that some specific areas of bias may be explored in depth. In *Ham v. South Carolina*, 409 U.S. 524, 35 L. Ed. 2d 46 (1973), the Court held that a defendant must be able to inquire as to any racial bias a juror may have. However, the Court noted in *Ham* that not all factors for prejudice should be granted such absolute constitutional protection. The question of racial bias was necessary because it derived from a protection inherent in long-standing case law and the Fourteenth Amendment. However, it was not an abuse of the trial court's discretion to refuse to allow inquiry into other areas of bias, such as bias against people with beards. The Court noted its "inability to constitutionally distinguish possible prejudice against beards from a host of other similar prejudices." *Id.* at 528, 35 L. Ed. 2d at 51. In *Mu'Min v. Virginia*, 500 U.S. 415, 114 L. Ed. 2d 493 (1991), the Court again noted that a trial court has significant discretion in allowing inquiry into areas that might tend to show juror bias. *Id.* at 427, 114 L. Ed. 2d at 507. In *Mu'Min*, the Court noted that in order for a question to be constitutionally compelled, the inability to ask the question must render the defendant's trial fundamentally unfair. *Id.* at 425-26, 114 L. Ed. 2d at 506.

We conclude that, in permitting defendant to inquire generally into jurors' feelings about mental illness and retardation and other mitigating circumstances, he was given an adequate opportunity to discover any bias on the part of the juror. The only restriction enforced by the court was whether a juror could "consider" a specific mitigating circumstance in reaching a decision. This restriction

was neither fundamentally unfair nor an abuse of the trial court's discretion. In addition, defendant was allowed to ask jurors if they would automatically vote for the death penalty in a first-degree murder case and if they could consider mitigating circumstances when determining defendant's sentence. We believe this satisfies the constitutional requirements of *Morgan* and does not violate the concerns set forth in *Ham*.

We conclude that there was no error in sustaining the prosecutor's objections to the questions at issue, as the manner in which they were phrased was erroneous and attempted to stake out jurors.

[3] Defendant also argues that the trial court erred when it refused to allow defendant to ask two jurors if they would always sentence a person to death if he has a previous criminal record and has been convicted of first-degree murder. We note first that defendant was prohibited from asking this question of only one juror who sat on the case. While, initially, an objection to the question was sustained in regard to juror Munroe, defendant rephrased the question after laying a foundation, and the question was permitted.

During the questioning of juror Howell, the following colloquy took place:

> MR. GRADY [Defense Counsel]: Do you feel like everyone who has a previous criminal record and who's been convicted of first-degree murder should automatically be put to death?
>
> MR. HICKS [Prosecuting Attorney]: Objection.
>
> COURT: Sustained.
>
> Rephrase, please.
>
> MR. GRADY: Do you feel that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder?
>
> MR. HICKS: Objection.
>
> COURT: Sustained.
>
> Rephrase.
>
> MR. GRADY: Do you feel like a person—Do you feel like you would convict a person—Strike that question.
>
> Do you feel like you would convict a person solely because of their past lifestyle?
>
> JUROR: No.

Defendant now argues that the trial court committed reversible error and abused its discretion by preventing him from asking the specific question concerning a defendant with a prior criminal record. Defendant again begins his argument by stating that this is error under *Morgan v. Illinois*, —— U.S. ——, 119 L. Ed. 2d 492. Defendant argues that the question needed to be asked in order to determine if the juror would automatically vote for the death penalty and if she would consider mitigating evidence. This particular juror had already stated that she could consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty and had also stated in response to a question that she did not feel that "in every case where somebody's been convicted of first-degree murder, that [she] would automatically sentence that person to death and not consider life imprisonment as an option." This is the extent of what is required by *Morgan*. Thus, the trial court did not err in sustaining the State's objection to the question as phrased.

Defendant also argues that the trial court's decision to sustain the objection to this question was arbitrary and an abuse of discretion. We conclude that the question as phrased was not proper; thus, it was not an abuse of discretion to sustain the objection to the question. As noted above, defendant was not barred from asking the question in any form, but instead was asked to "rephrase" the question, indicating that if properly put, it would be permissible. This was further illustrated by the *voir dire* of juror Munroe, who was questioned immediately after juror Howell. An objection to the same question, posed to juror Munroe, was sustained, and defendant was asked to rephrase the question. Defendant then asked the juror if he would consider mitigating circumstances in reaching his decision. The juror said "yes," and defendant next asked, "So even if a person's been convicted of first-degree murder and has a past criminal record, you could still consider mitigating circumstances in deciding whether to vote for life imprisonment or the death penalty; is that correct?" There was no objection, and juror Munroe answered the question.

It seems clear that had defendant proceeded in this manner with juror Howell, he would have been allowed to ask the particular question at issue. However, the manner in which the question was asked here: "Do you feel that a person should always be given the death penalty if he has a previous criminal record and has been convicted of first-degree murder?" was nothing more than an attempt to determine what kind of verdict a juror would render under certain named circumstances not yet in evidence. *See State v. Yelverton*, 334 N.C.

532, 542, 434 S.E.2d 183, 188; *State v. Hill*, 331 N.C. 387, 404, 417 S.E.2d 765, 772. We conclude that there was no reversible error or abuse of discretion in not allowing defendant to ask juror Howell this one particular question in the manner attempted by defendant.

[4] In his third assignment of error, defendant argues that the trial judge should have allowed him to question jurors about their views on the meaning of life imprisonment and the possibility of parole. Defendant notes that he made a motion to be allowed to question jurors concerning parole eligibility.

Defendant concedes that the issue concerning questions and instructions on parole eligibility and the meaning of life imprisonment has repeatedly been decided against him by this Court. *See State v. Green*, 336 N.C. 142, 157, 443 S.E.2d 14, 23 (1994); *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 558 (1994); *State v. Syriani*, 333 N.C. 350, 399, 428 S.E.2d 118, 145; *State v. Robbins*, 319 N.C. 465, 521, 356 S.E.2d 279, 312, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Defendant has failed to assert any convincing reason why this Court should depart from its prior decisions on the issue concerning the questioning of, or informing jurors about, the possible parole eligibility of defendant.

[5] Defendant next argues that the trial court led jurors who were opposed to the death penalty to say that they would be impaired in the performance of their duty and not be able to follow the law so that they could be challenged for cause, and persuaded jurors who favored the death penalty to say that they would not be impaired in the performance of their duties and could follow the law so that these jurors could not be challenged for cause. Defendant argues that this disparate treatment violated his right to an impartial and fair jury and was an abuse of discretion.

Defendant stresses once again that juror Clark should not have been excused for cause because her answers were equivocal as to whether she could impose the death penalty. Defendant argues that the trial judge questioned juror Clark in a way that elicited answers that would allow her to be challenged for cause. Defendant argues that the trial judge used leading questions that suggested a desired answer and tainted the reliability of this and other jurors' responses. Defendant also argues that the trial judge acted unfairly when he intervened during defendant's questioning of jurors who were strongly in favor of the death penalty. Defendant specifically complains of three occasions where the trial court in effect asked jurors being

questioned by the defendant if they could follow the law as given to them.[1] Defendant argues that the trial court's intervention in defendant's questioning defeated his ability to challenge these jurors for cause and thus represented an unevenhanded treatment of defendant.

In *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991), the defendant argued that the trial court acted unfairly during jury selection by allowing the State's challenges for cause without further questioning, while denying defendant's challenges for cause on two occasions after inquiring whether the juror could follow the law as he was instructed. This Court, after determining that the trial court was merely clarifying and explaining the law to confused jurors and noting that the trial court allowed the defendant to continue questioning the juror after the court had intervened, held that such conduct on the trial judge's part was not error. *Id.* at 15, 405 S.E.2d at 188.

In the case at bar, the trial judge intervened on two occasions after the jurors indicated some confusion in understanding the question posed by defense counsel. On the third occasion brought into question by defendant, the trial court did not intervene during defendant's questioning but, after the juror had been challenged by the defendant for cause, asked him if he "would not consider life imprisonment under those circumstances, regardless of the instructions of the Court." The trial court was simply determining if the juror should be stricken for cause. His question to this juror was just as appropriate as those he asked of the jurors who were challenged for cause by the prosecutor. We conclude that in determining challenges for cause, the trial judge treated the prosecution and defense in the same manner and evidenced no partiality for one side or the other.

Our review of the record shows no "gross imbalance in the trial court's responses to defendant's inquiries." *State v. Artis*, 325 N.C. 278, 296, 384 S.E.2d 470, 480 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). The trial court treated jurors challenged by the State and the defense in the same manner, asking the jurors questions to determine if they would in fact be substantially impaired by their views for or against the death penalty and if they could follow the law. The trial

1. One juror was asked if he could "accept and follow the law as given to you by the Court in this case" and if he was saying "that you would not consider life imprisonment under those circumstances, regardless of the instructions of the Court." Another juror was asked, "if the Court instructs you that you're to consider all of the evidence, would you follow those instructions?"

court also intervened on occasion to clarify and explain the law when jurors were confused. We have carefully reviewed the entire record of jury selection for evidence of bias or unfair treatment and hold that there was none and that there was no abuse of discretion on the part of the trial court.

GUILT-INNOCENCE PHASE ISSUES

[6] Next, defendant argues that the trial court erred in not giving an instruction on second-degree murder because the evidence of premeditation and deliberation was equivocal. He argues that *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980), and *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555 (1991), stand for the proposition that a lesser included instruction was required in this case.

Defendant argues that evidence of intoxication, lack of evidence of a bad relationship between the parties, and the fact that he was mildly retarded and had an organic brain disorder establish the necessary elements to support a finding of second-degree murder. We disagree.

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any 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). A trial court may not "premise a second-degree murder instruction on the possibility that the jury will accept some of the State's evidence while rejecting other portions of the State's case." *Id.* at 379, 390 S.E.2d at 322. Neither *Beck v. Alabama* nor *Schad v. Arizona* stands for the proposition that the lesser included offense should be more freely given in capital cases. In fact, they support the proposition that the lesser instruction should not be given indiscriminately. *See State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (language of United States Supreme Court in *Beck* supports the position that lesser offense instructions should not be given indiscriminately or automatically, but only when warranted by the evidence), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

First-degree murder is "the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Bonney*,

329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836.

A careful review of the transcript shows that each and every element of first-degree murder is supported by the evidence and that the evidence would not support a finding of second-degree murder. The evidence showed that defendant and the victim Pittman did not get along. There was evidence that defendant had recently struck Pittman and that she told Mark Smith never to bring defendant back to her house. This indicates that defendant and Pittman were not on friendly terms and had not just had a normal, peaceful conversation at Pittman's home prior to the shooting. In addition, neither victim did anything to legally provoke defendant, yet defendant pulled a semi-automatic weapon from under the seat and killed the victims with fragmentation bullets known for their destructive power. Defendant shot one victim, paused momentarily, stated "you too," and shot the second victim. Both victims were wounded multiple times. Pittman's body had thirty-four wounds, and Fipps' body had two. As defendant and Mark Smith left the crime scene, defendant asked Smith, "did I get them" both. Defendant proceeded to dispose of the evidence of the crime (the gun and ammunition) and then left town. Thus, there was sufficient evidence to show premeditation and deliberation.

Additionally, the evidence would not support an instruction for second-degree murder. First, we note that the evidence that defendant was mildly retarded and suffered from organic brain disorder was not presented to the jury until the sentencing phase, so it was not a factor that could support a second-degree murder instruction. In addition, the evidence did not indicate a lack of a bad relationship between Pittman and defendant. The evidence showed that Pittman and defendant may have had an earlier argument and that Pittman did not want defendant to come to her home again. Finally, the evidence that the defendant was so intoxicated that he could not premeditate or deliberate was based solely on the fact that defendant chose not to drive a vehicle and had had something to drink that day. There was no evidence as to how much he had had to drink that day, nor over what

period of time. The evidence did establish that defendant was not visibly intoxicated. This evidence would not support an instruction for second-degree murder.

We conclude that the trial court did not err by not instructing the jury on the lesser included offense of second-degree murder.

[7] Defendant next argues that the trial court erred in denying defendant's request for a mistrial after the prosecutor made a grossly improper argument referring to defendant's failure to testify.

During the prosecutor's closing argument to the jury, he stated:

> You [the jury] have to decide if you believe [Mark Smith]. He turned himself in. Did Sherman Skipper [defendant] turn himself in? He talked about how he was there. Did Sherman Skipper do that? He talked about the way Ailene Pittman slumped down—

Defendant immediately objected to this argument, and the statement was withdrawn and stricken. Defendant then asked for a mistrial. The trial court denied this request. The trial court then reiterated that defendant's objection was sustained and instructed the jury to "disregard the last argument" of the prosecutor.

Defendant now argues that the trial court erred because, when the court sustained defendant's objection, it did not specifically instruct the jury that defendant has a right not to testify and that defendant's failure to testify cannot be held against him in any way. It is well established that a prosecutor may not refer to defendant's failure to testify because this " 'violates an accused's constitutional right to remain silent.' " *State v. Reid*, 334 N.C. 551, 554, 434 S.E.2d 193, 196 (1991) (quoting *State v. Randolph*, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984)).

When the State comments on a defendant's failure to testify, the improper comment is "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." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). In *McCall*, the Court noted that an instruction to the jury before it began deliberating—that defendants had no burden and were not required to produce evidence, testimony, or witnesses—was insufficiently curative because it was an incomplete statement of the pertinent rule of law in that it neglected to advise the jury that a defendant's failure to testify created no presumption against him. *Id.*

In *State v. Williams*, 305 N.C. 656, 675, 292 S.E.2d 243, 255, *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), this Court concluded that a court's instructions cured any error in a prosecutor's comments about a defendant's failure to testify. In *Williams*, the court immediately sustained the defendant's objection to the prosecutor's comment and instructed the jury not to consider any reference to this proposition. "The court later instructed the jury that defendant's decision not to testify created no presumption against him and was not to influence [its] decision in any way." *Id.*

In the case at bar, the trial court sustained defendant's objection, and the comments were both withdrawn and stricken from the record. The trial court then instructed the jury to "disregard the last argument" of the prosecutor. In addition, unlike *McCall*, during jury instructions, the trial court here also charged that "the defendant in this case has not testified. The law of North Carolina gives him this privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his silence is not to influence your decision in any way."

We conclude that the prosecutor's withdrawal and striking of his statement and the trial court's further instruction cured any possible error created by the prosecutor's statement. *See State v. Williams*, 305 N.C. at 675, 292 S.E.2d at 255; *see also State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975) (improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper, "followed by prompt and explicit instructions to the jury to disregard it"); *State v. Lindsay*, 278 N.C. 293, 295, 179 S.E.2d 364, 365 (1971) (any error caused by prosecutor's remarks regarding defendant's failure to testify was removed by the trial court's "prompt and explicit instructions to the jury to disregard the reference").

Assuming *arguendo*, however, that the trial judge's instructions immediately after he sustained the objection and during the jury instruction were insufficient to cure the error, we conclude that the evidence of guilt in this case was so overwhelming that the error was harmless beyond a reasonable doubt. Defendant attempts to argue that such an error may never be harmless beyond a reasonable doubt. In *State v. Barber*, 317 N.C. 502, 511, 346 S.E.2d 441, 447 (1986), we concluded that even if arguments by a prosecutor regarding a defendant's failure to testify were improper, the trial court's decision to over-

rule the objection was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt. We conclude that the uncontradicted evidence that defendant shot the two victims, disposed of the evidence, and then fled from the state makes the statement of the prosecutor harmless beyond a reasonable doubt.

[8] Defendant next argues that the trial judge erred when he sustained the prosecutor's objections to defendant's cross-examination of a witness regarding the date of the witness' prior criminal conviction, punishment received for the conviction, and whether he had violated the terms of his probationary sentence. A review of the record indicates that the only question defendant asked for which he did not receive an answer at some time in the cross-examination was the date the actual common law forgery occurred.

Rule of Evidence 609(a) allows a party to attack the credibility of a witness with "evidence that he has been convicted of a crime punishable by more than 60 days confinement." N.C.G.S. § 8C-1, Rule 609(a) (1992). However, "[t]he permissible scope of inquiry into prior convictions for impeachment purposes is restricted . . . to the name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). Defendant here attempted to ask on what date the crime occurred.

> Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case.

State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977) (determined to apply to post-Rules cases in *State v. Garner*, 330 N.C. 273, 288-89, 410 S.E.2d 861, 870 (1991)).

A close review of the record indicates that the witness told defense counsel, without objection, that he had been convicted of violating probation and common law forgery. The witness also told defense counsel that he had received five years' probation for the common law forgery crime, which involved four counts of common law forgery. Defendant argues that he sought to elicit the nature of the witness' prior criminal offenses, the dates they were committed, the punishment he received for them, and the witness' compliance with the terms of his probation. However, the record indicates that

the only question defendant asked that the witness never gave an answer to was whether he had committed one particular act of common law forgery on a particular date. Defendant did not ask any specific questions about the nature of the witness' prior criminal offenses, beyond the name of the crimes. Nor did defendant ask the punishment that the witness had received for his probation violation. Also, defendant never asked the terms of the witness' probation.

We conclude that the trial court did not err in sustaining the prosecutor's objection to the question of when a particular act for which the witness was later convicted was committed.

Assuming *arguendo*, however, that defendant should have been allowed to ask the witness the date on which he committed a specific crime, we conclude that the error was harmless beyond a reasonable doubt. The jury knew when the witness was tried for his crime, the date he was convicted, and the name of the crime that he had been convicted of; the jury also knew that the witness had received five years' probation for this crime. We fail to see how the actual date on which one count of the crime occurred could add any impeachment value to the information about the prior conviction. Thus, we conclude that the failure to allow this question was harmless beyond a reasonable doubt.

[9] Defendant next argues that the court erred by coercing him into introducing a piece of evidence, the result of which was that he lost his right to open and close the final argument. We conclude that this argument is without merit.

Rule 10 of the General Rules of Practice for the Superior and District Courts states that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." In *State v. Hall*, 57 N.C. App. 561, 291 S.E.2d 812 (1982), Judge (now Justice) Webb noted:

> [W]e believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of the witness.

Id. at 564, 291 S.E.2d at 814.

Defendant attempted to offer a photograph of the crime scene into evidence to help "illustrate" the witness' testimony during cross-examination. The prosecutor objected to the use of this photograph

before the jury unless introduced into evidence. The court sustained the objection, and defendant immediately asked to introduce the photograph into evidence. The trial court asked defendant if he understood that he was now offering evidence. Defendant responded that he understood, and only then did the court allow the photograph to be received into evidence. A review of the transcript reveals that the trial court in no way coerced defendant to introduce the photograph.

Additionally, it is clear that the photograph was actually introduced into evidence. As noted above, defendant offered the photograph into evidence because the witness said it would help him illustrate his testimony. The photograph was then shown to the jury while the witness answered questions posed by defendant. In addition, defendant used the photograph to impeach the witness. We conclude that the photograph was actually offered into evidence; thus, defendant lost his right to open and close jury argument. *See State v. Reeb*, 331 N.C. 159, 180, 415 S.E.2d 362, 374 (1992); *State v. Hinson*, 310 N.C. 245, 257, 311 S.E.2d 256, 264, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984); *State v. Knight*, 261 N.C. 17, 30, 134 S.E.2d 101, 109 (1964).

Finally, we note that even if the photograph had not been introduced into evidence, defendant would still have lost his right to open and close jury argument because he introduced three other pieces of evidence during the trial: two depositions and a diagram of the crime scene.

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

[10] In defendant's next assignment of error, he argues that the trial court erred in instructing the jury that it could infer premeditation and deliberation from circumstances such as "lack of provocation of the victim." Defendant argues that this instruction misled the jury because it did not explain the difference between legal and ordinary provocation, it constituted an impermissible expression of judicial opinion on the evidence, and it tended to impermissibly shift the burden of proof to defendant on an element of an offense. We note that defendant did not object to the instruction at trial; thus, this issue will be analyzed under a "plain error analysis." *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

In *State v. Handy*, 331 N.C. 515, 527, 419 S.E.2d 545, 551 (1992), this Court addressed the same issues presented by the defendant here. In *Handy*, we concluded that defendant's assignment of error was without merit; we reach the same conclusion in this case.

First, we note that the trial court in this case properly instructed the jury that the State had the burden of proving beyond a reasonable doubt each and every element of first-degree murder, including the elements of premeditation and deliberation. The trial court never instructed that premeditation should be presumed and never expressed any opinion as to whether the State had proven lack of provocation. *See State v. Fowler*, 285 N.C. 90, 96, 203 S.E.2d 803, 807 (statement that jury may consider evidence of the absence of provocation in determining whether there was premeditation and deliberation does not amount to a judicial expression of opinion that there was no evidence of provocation), *sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1212 (1976).

In this case, the trial court instructed the jury with regard to premeditation pursuant to the Pattern Jury Instructions, stating:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim; the conduct of the defendant before, during, and after the killing; threats and declarations of the defendant; the brutal or vicious circumstances of the killing; and the manner in which or the means by which the killing is done.

In addition, the trial court instructed the jury that defendant did not act with deliberation if his intent to kill was formed "under the influence of some suddenly aroused violent passion."

We conclude that the instructions set forth by the trial court correctly placed the burden of proving premeditation and deliberation on the State. We also conclude that the instruction, that lack of provocation can be considered, could not have confused the jury. The jury could not have been confused about the difference between "adequate" or "legal" provocation and ordinary provocation because defendant was charged only with first-degree murder. No instruction was given as to second-degree murder or voluntary manslaughter; thus, specific definitions for provocation were not before the jury. Contrary to defendant's assertions, the jury could not have mistakenly concluded that defendant acted with premeditation and delibera-

tion simply because the evidence showed that defendant did not act in a heat of passion following adequate or legal provocation. The jury was specifically instructed that it could not find defendant guilty of premeditated and deliberated murder if he formed his intent to kill under the influence of some suddenly aroused violent passion. *See State v. Reid*, 335 N.C. 647, 669, 440 S.E.2d 776, 788 (1994); *State v. Handy*, 331 N.C. at 527, 419 S.E.2d at 551.

[11] Defendant also argues under this assignment of error that the premeditation and deliberation instruction should not have included the statement that "threats" of the defendant may be inferred to indicate premeditation and deliberation, as there was no evidence that defendant ever threatened the victims. We note again that this issue will be analyzed under plain error analysis because no objection was made to the instruction at trial. Thus, "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different verdict." *State v. Thomas*, 332 N.C. 544, 563, 423 S.E.2d 75, 86 (1992).

In *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973), this Court determined that "[a] trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence." *Id.* at 523, 196 S.E.2d at 699. We note that while the evidence here may not have supported the instruction regarding consideration of "threats" of defendant, this was one word in the middle of eleven pages of detailed jury instructions. The evidence here supported a finding of premeditation and deliberation based on the fact that defendant asked Smith to take him to the victims' home, talked to one of the victims, then got in his truck, pulled a semiautomatic rifle loaded with fragmentation bullets from under the seat, killed one victim, stated "you too," and killed the second victim. He then asked Smith, "did I get them," and proceeded to get rid of the evidence.

Defendant has not demonstrated that, absent the word "threats" in the instruction, the jury probably would have reached a different verdict. We hold that defendant has not met his burden under the plain error rule. *See State v. Faison*, 330 N.C. 347, 363, 411 S.E.2d 143, 152 (1991).

In conclusion, we hold that the inclusion of the phrase "lack of provocation" in the instruction on premeditation and deliberation did not confuse the jury, reflect an opinion of the trial court, or impermissibly shift the burden of proof to defendant. Additionally, we con-

clude that if it was error to instruct the jury that "threats" of the defendant may be considered an inference of premeditation and deliberation, it was not plain error.

[12] Defendant next argues that the trial court erred in admitting seven autopsy photographs into evidence over defendant's objection. Defendant argues that the photographs had no probative value as the fact that the victims were killed by multiple gunshots wounds from a semiautomatic rifle and that defendant was involved in the shooting was not controverted. In the alternative, defendant argues that any probative value of the photos is outweighed by the prejudicial effect. We conclude that neither of these arguments is valid.

"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. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Generally, photographs taken during an autopsy are admissible. *State v. Barnes*, 333 N.C. 666, 678, 430 S.E.2d 223, 230, *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 336 (1993). In a first-degree murder case, autopsy photographs are relevant even when such factors as the identity of the victim or the cause of death are not disputed. *See State v. Kyle*, 333 N.C. 687, 701, 430 S.E.2d 412, 420 (1993); *State v. Barnes*, 333 N.C. at 678, 430 S.E.2d at 229; *State v. Bearthes*, 329 N.C. 149, 161, 405 S.E.2d 170, 177 (1991).

"A plea of not guilty places at issue all of the facts alleged in the indictment." *State v. Wall*, 304 N.C. 609, 621, 286 S.E.2d 68, 75 (1982). In this case, the State was attempting to prove first-degree murder by premeditation and deliberation. "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 870, 93 L. Ed. 2d 166 (1986). The nature and number of the wounds and evidence that the murders were done in a brutal manner are circumstances from which premeditation and deliberation can be inferred. *Id.* at 431, 340 S.E.2d at 693.

The State introduced into evidence seven autopsy photographs showing different areas of the bodies where the victims had been struck by bullets. Two of the photographs showed wounds suffered by Ailene Pittman, and five of the photographs showed the wounds of Nelson Fipps. The State introduced the photographs during the testimony of the pathologist who performed the autopsy, to help illustrate

his testimony. Upon being admitted, the photographs were in fact used to illustrate and describe the numerous wounds and to show the tracks of the wounds. We conclude that the photographs were relevant and had substantial probative value.

Concluding that the photographs were relevant and probative, we turn to defendant's second argument, that the prejudicial effect of the photographs outweighed the probative value.

> Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each . . . lies within the discretion of the trial court. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Hennis, 323 N.C. at 285, 372 S.E.2d at 527 (citation omitted).

We have reviewed the photographs and conclude that they were relevant, probative, and not excessive, that they helped to illustrate the pathologist's testimony, and that they could contribute evidence for finding premeditation and deliberation. We conclude that there was no abuse of discretion in the trial court's admitting these photographs. This assignment of error is without merit.

Defendant next argues that the trial court should have instructed the jury regarding voluntary intoxication. Defendant argues that this instruction should be given because there was evidence that defendant had consumed alcohol on the day of the murders.

It is "well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). This Court has repeatedly held that in order to be entitled to an instruction on voluntary intoxication, the defendant must produce evidence that would support a conclusion by a judge that defendant was so intoxicated that he could not form a deliberated and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988); *see also State v. Shoemaker*, 334 N.C. 252, 272, 432 S.E.2d 314, 324 (1993); *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 741 (1989). "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate

and premeditated purpose to kill." *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978) (citations omitted); *see also State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989); *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). Evidence of mere intoxication is not enough to justify the instruction. *State v. Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

[13] Defendant argues that requiring him to meet this burden violates his due process rights because it keeps the jury from considering some evidence that may affect its determination of defendant's ability to premeditate and deliberate. Defendant's argument is without merit. While defendant must satisfy a high burden in order to be given the benefit of the defense of voluntary intoxication, the jurors are not restricted from considering the evidence of intoxication in determining if the State satisfied them beyond a reasonable doubt as to all elements of first-degree murder, including premeditation and deliberation and intent to kill.

Defendant cites *Martin v. Ohio*, 480 U.S. 228, 94 L. Ed. 2d 267 (1987), to support his argument. However, we conclude that *Martin* actually supports the conclusion that there is no due process violation present here. In *Martin*, the Court considered whether it was error to require a defendant to prove self-defense by a preponderance of the evidence. The Court held that it was not error but noted that

> [i]t would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, i.e., that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. Such instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.

Martin v. Ohio, 480 U.S. at 233-34, 94 L. Ed. 2d at 274 (citing *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970)).

In the case at hand, the jury was not instructed that evidence of intoxication could not be considered in determining whether there was reasonable doubt about the State's case. The jury was not told that the intoxication evidence must be set aside for all purposes unless the defendant satisfied the burden of production necessary to instruct on voluntary intoxication. We conclude that the State's burden in proving first-degree murder beyond a reasonable doubt is in no way reduced by the burden of production defendant must satisfy in

order to receive a voluntary intoxication instruction. Thus, there is no due process violation.

[14] As an alternative argument, defendant states that the evidence here justified an instruction on voluntary intoxication as the evidence unquestionably showed that defendant's capacity to think and plan was impaired due to voluntary intoxication. In determining if the instruction should have been given, we review the evidence in the light most favorable to defendant. *State v. Vaughn*, 324 N.C. at 309, 377 S.E.2d at 742. The evidence in this case shows that defendant had been drinking for some time during the day of the murder and that he did not want to drive because he had been drinking. That is the extent of the evidence of intoxication presented in the guilt-innocence phase.[2] There was no evidence that defendant looked drunk or that he was having difficulty speaking or walking. *See id.* (evidence that defendant was intoxicated and had trouble walking, but no evidence that he behaved inappropriately or that his statements were irrational or incoherent or that he was unaware of what was going on around him; evidence insufficient to require instruction on voluntary intoxication). There was also no evidence in this case as to how much defendant had actually drunk.

We conclude that the evidence in this case was not sufficient to require an instruction on voluntary intoxication. *See State v. Baldwin*, 330 N.C. 446, 463, 412 S.E.2d 31, 41 (1992) (evidence that defendant drank five or six beers and consumed marijuana not sufficient to require instruction).

Determining that the standard of production required of defendant before allowing an instruction on voluntary intoxication does not violate due process and determining that the facts of this case did not require an instruction on voluntary intoxication, we conclude that defendant's assignment of error is without merit.

SENTENCING PHASE ISSUES

Defendant argues that the trial court erred when it sustained the prosecutor's objection to two of defendant's questions during the redirect examination of defendant's brother, Kenneth Skipper.

2. In his argument to the Court, defendant states that evidence of defendant's long history of alcohol abuse and his unsuccessful institutionalized treatment for addiction support an instruction on voluntary intoxication. However, a close review of the transcript shows that this evidence was not presented to the jury until the sentencing phase, so it cannot be considered here.

Kenneth Skipper had been shot in the back by the defendant at an earlier date. Evidence of this assault had been introduced by the State earlier in the sentencing proceeding. Kenneth Skipper testified for defendant that he felt at fault for the shooting because he had attacked his brother and that he had forgiven defendant for shooting him. On cross-examination, the prosecutor asked Kenneth Skipper if he had contacted another witness, defendant's ex-wife (who had also been attacked by defendant) and told her to testify that it was her fault that defendant attacked her. Kenneth Skipper denied making this statement to defendant's ex-wife, and no evidence was ever presented that such a statement was in fact made. On redirect examination, defendant attempted to ask the witness (1) if he was telling the truth, and (2) for what church he was a minister.

[15] Defendant argues that he should have been allowed to ask these questions to bolster the witness' credibility, which had been undermined by the State's questions. Defendant argues that by precluding him from asking these questions, the trial court prevented him from offering competent evidence that would have bolstered the mitigating effect of the witness' other testimony. We conclude that defendant's argument is without merit.

The trial correctly sustained the prosecutor's objection to the question, "Are you telling this jury the truth?" because the credibility of a witness is for a jury to decide, *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988). Thus, whether this witness, who was affirmed to tell the truth, was actually telling the truth was something the jury was to decide, not the witness.

[16] In regard to the second question concerning the witness being a minister to a particular church, we note that redirect examination is limited to information elicited in cross-examination. Questions asked on redirect should not go beyond matters discussed during cross-examination. *See State v. Felton*, 330 N.C. 619, 633, 412 S.E.2d 344, 353 (1992); *State v. Jolly*, 332 N.C. 351, 366, 420 S.E.2d 661, 670 (1992). In this case, the second question at issue went far beyond the scope of cross-examination, which made no mention whatsoever of the witness' profession. Thus, the trial court correctly sustained the prosecutor's objection.

In any case, there was no error with regard to the second question because the witness actually answered the defendant's question despite the prosecutor's objection and the trial court's sustaining of the objection. The prosecutor did not move to strike the answer, and

the trial court did not admonish the jury to disregard the answer. "Thus, defendant effectively received the benefit of the evidence sought . . . , and he has no . . . cause for complaint on appeal." *State v. Pinch*, 306 N.C. 1, 14, 292 S.E.2d 203, 216, *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).

[17] Defendant also argues that even if these questions were impermissible under traditional evidentiary standards, they should have been permitted under the relaxed evidentiary standard of the penalty phase of a capital proceeding in order to avoid any violation of defendant's due process rights. We conclude that there is no due process concern here as there was in *State v. Barts*, 321 N.C. 170, 362 S.E.2d 235 (1987), *Green v. Georgia*, 442 U.S. 95, 60 L. Ed. 2d 738 (1979), and *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973). In those cases, the evidence at issue was written and oral hearsay statements that did not fit under traditional hearsay exceptions but which contained some evidence indicating they were credible statements. More importantly for due process consideration, the evidence at issue in these cases all directly reflected on defendant's guilt or involvement in the crime for which he had been convicted. *See Barts*, 321 N.C. at 179, 362 S.E.2d at 240 (confession of other person that he actually killed the person defendant was convicted of killing was at issue); *Green*, 442 U.S. at 96, 60 L. Ed. 2d at 740 (statement of witness that he was told that another person shot and killed the victim after telling defendant to run an errand was at issue); *Chambers*, 410 U.S. at 289, 35 L. Ed. 2d at 305 (evidence at issue was that someone else had made a sworn written confession to crime and told three people he had committed crime for which defendant was convicted). The evidence that defendant addresses in this assignment of error is not of the same degree of importance as the evidence the defendants attempted to present in *Barts*, *Green*, and *Chambers*. We conclude that defendant's due process rights were not violated when the trial court sustained the prosecutor's objections to the particular questions at issue.

Finally, even if the trial court erred by sustaining the objection to these two questions, the error was harmless beyond a reasonable doubt. On redirect, defendant was allowed to elicit the fact that the witness was a minister. The witness had already affirmed that he would tell the truth; thus, the question, "Are you telling this jury the

truth?" was redundant. We also conclude that determining the name of the church that the witness worked for does not bolster the witness' credibility. Thus, any error made by the trial court was harmless beyond a reasonable doubt.

[18] Defendant next argues that the trial court erred when it did not give peremptory instructions on all the mitigating circumstances for which the factual predicate was uncontradicted. Defendant notes that he made a written request that peremptory jury instructions be given as to each mitigating circumstance he submitted to the court. Defendant argues that he should have received peremptory instructions as to all uncontroverted mitigating circumstances, both statutory and nonstatutory.

While we agree that a defendant is entitled to peremptory instructions for uncontradicted mitigating circumstances, whether statutory or nonstatutory, we conclude that defendant requested that peremptory instructions be given only for the mitigating circumstances dealing with mental and emotional impairment and defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the law. As defendant did not request that peremptory instructions be given for any other circumstances, the trial court did not err in not giving such instructions. *See State v. Green*, 336 N.C. 142, 174, 443 S.E.2d 14, 33; *State v. Gay*, 334 N.C. 467, 493, 434 S.E.2d 840, 854 (1993). The trial judge should not "be required to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor. In order to be entitled to such an instruction defendant must timely request it." *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 618-19 (1979).

As noted above, defendant made a general request that peremptory instructions be given as to each mitigating circumstance. However, when the trial court questioned him as to the meaning of this request, defendant responded:

> We are requesting peremptory instructions, especially as to those mitigating factors, the two statutory . . . mitigating factors dealing with mental and emotional impairment and also dealing with the defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to law.

There was then a discussion about the evidence for and against these particular circumstances. At the conclusion of this discussion, the

following colloquy occurred between defense counsel and the trial court:

> COURT: Let me ask you this. Do I understand you correctly that you're asking for a peremptory instruction on the first two mitigating circumstances?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> COURT: You are not asking for a peremptory instruction on the remainder?
>
> [DEFENSE COUNSEL]: No, sir. We recognize we're probably not entitled to it on the other.
>
> COURT: All right. So you're only asking for peremptory instructions on the first two?
>
> [DEFENSE COUNSEL]: Yes, sir.

Defendant did not ask that peremptory instructions be given as to the last statutory mitigating circumstance, regarding defendant's age, nor did he ask that peremptory instructions be given for any of the nonstatutory circumstances. Now, however, defendant argues that peremptory instructions should have been given as to the third statutory mitigating circumstance and for at least eight of the thirteen nonstatutory mitigating circumstances.

We conclude that defendant did not request that peremptory instructions be given for any circumstances except the circumstances that defendant was under the influence of a mental or emotional impairment when he committed the murder and that defendant was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. We will not require the trial judge "to determine on his own which mitigating circumstance is deserving of a peremptory instruction in defendant's favor." *Johnson*, 298 N.C. at 77, 257 S.E.2d at 618-19. Therefore, we hold that the trial judge did not err when he gave peremptory instructions pursuant only to defendant's specific request.

[19] Defendant next argues that the trial court erred by not instructing the jury that defendant would not be eligible for parole for twenty years if given a life sentence and that defendant could serve two life sentences consecutively, and thus not be eligible for parole for forty years. Defendant notes that he made a written request during the charge conference that such an instruction be given during the

jury instructions. Defendant also argues that such an instruction definitely should have been given when the jury sent a note to the judge asking how long defendant would serve before he would be eligible for parole if given life and whether he would serve two life sentences concurrently.

To begin, the trial court correctly denied defendant's request to include in the jury charge the instruction that life means that defendant may be eligible for parole in twenty years and that the court has the discretion to determine that defendant's sentences be served consecutively. This Court has held that a jury may be instructed about the question of parole and meaning of life imprisonment, if such question arises during jury deliberation. *State v. Robinson*, 336 N.C. 78, 123, 443 S.E.2d 306, 329 (1994). However, we have not held that a jury should be instructed upon these issues absent such an inquiry. Such an instruction to the jury "would unnecessarily present the issue of parole to the jury, absent any indication that the jury was considering that possibility." *Id.* at 124, 443 S.E.2d at 329.

In this case, the jury sent out a question asking about parole eligibility and concurrent sentences. The trial court specifically instructed the jury pursuant to *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955), and *State v. Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, telling the jury that eligibility for parole is not a proper matter for the jury and that in considering life imprisonment, "you should determine the question as though life imprisonment means exactly what the statute says: imprisonment for life in the state's prison." The trial court also correctly instructed that concurrence of sentences is not a proper matter for the jury to consider.

We conclude that defendant has failed to assert a convincing basis for this Court to abandon its prior decisions stating that instructions about parole eligibility should not be given. *See State v. Green*, 336 N.C. at 157, 443 S.E.2d at 23. It is true that 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. N.C.G.S. § 15A-2002 (Act of 23 March 1994, ch. 21, sec. 5, 1994 N.C. Extra Sess. Serv. 71). This statute is to become effective 1 October 1994. Act of 26 March 1994, ch. 24, sec. 14(b), 1994 N.C. Extra Sess. Serv. 106. However, the General Assembly has decided that the legislation is to be applied prospectively; thus, it does not apply in this case. *See* N.C.G.S. § 15A-2002 official commentary.

We are aware of the recent United States Supreme Court decision in *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133, (1994), which held that it was error to refuse to give a proposed jury instruction that under state law, defendant was ineligible for parole. We do not consider that case apposite because defendant in this case, if given a life sentence, would eventually have been eligible for parole under North Carolina law. *See* N.C.G.S. § 15A-1371(a1) (1988).

[20] Defendant also argues that in light of the prosecutor's argument stressing defendant's potential for future dangerousness, the instruction on parole eligibility was especially necessary as mitigating evidence. We note that "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.' " *State v. Green*, 336 N.C. at 158, 443 S.E.2d at 23 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L. Ed. 2d 1, 6 (1986)).

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

[21] Defendant next argues that the trial court erred in not submitting the mitigating circumstance that defendant had no significant history of prior criminal activity. Defendant requested on three occasions that the instruction not be given. The State presented evidence that defendant had been convicted of assault with a deadly weapon inflicting serious bodily injury in 1978, 1982, and 1984.

A "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). The trial court has no discretion as to whether to submit statutory mitigating circumstances when evidence is presented in a capital case which may support a statutory circumstance. *State v. Lloyd*, 321 N.C. 301, 311, 364 S.E.2d 316, 323, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 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). However, the trial court is not required to instruct on a mitigating circumstance unless substantial evidence supports the circumstance. *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert.*

denied, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991).

We conclude that defendant's record of three violent felonies, similar in nature to the crime for which he was being sentenced, in the twelve years preceding this particular crime illustrated that defendant did have a significant record. We note that "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." *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 490, 470.

In many cases, we have held that the trial court did not err in failing to submit this circumstance *ex mero motu*. *See State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56-57 (1994) (defendant used illegal drugs, broke into a convenience store six or seven times, and broke into a pawn shop and stole guns); *State v. Robinson*, 336 N.C. 78, 119, 443 S.E.2d 306, 326 (defendant used and dealt drugs, had pled guilty to a robbery, carried a pistol, and used another man's driver's license as identification); *State v. Stokes*, 308 N.C. 634, 653-54, 304 S.E.2d 184, 196 (1983) (defendant engaged in five incidents of theft and possessed, used, and sold marijuana).

"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." *State v. Robinson*, 336 N.C. at 119, 443 S.E.2d at 326. We hold that based on the evidence of defendant's continuous involvement in violent criminal activities, similar to that for which he was sentenced in this case, no rational juror could have found that defendant 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 a person. We fail to see how a rational juror could have then found that this criminal history was also a mitigating circumstance. The trial court did not err in failing to submit this circumstance for the jury's consideration.

[22] Next, defendant argues that the trial court erred when giving its instructions regarding the statutory mitigating circumstance of age. The trial court instructed the jury:

> (3) Consider whether the age of the defendant at the time of this murder is a mitigating factor.

The mitigating effect of the age of the defendant is for you to determine from all the evidence and circumstances which you find from the evidence.

If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreman write, "Yes," in the space provided after this mitigating circumstance on the issues and recommendation form.

If none of you finds this circumstance to exist, you would so indicate by having your foreman write, "No," in that space.

These instructions are pursuant to the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 150.10 (1993). Defendant, however, argues that these instructions allowed the jury to give the statutory mitigating circumstance no weight in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982). Defendant bases his argument on the language that "the mitigating effect of the age of the defendant is for you to determine." We conclude that defendant's argument is without merit.

We begin by noting that in regard to statutory mitigating circumstances, jurors are instructed that if they find a statutory mitigating circumstance to exist, then they must consider the circumstance in their balancing of aggravators and mitigators. However, jurors are instructed to indicate a finding of a particular circumstance only if the preponderance of the evidence persuades a juror that the circumstance exists. *See State v. Kirkley*, 308 N.C. 196, 224, 302 S.E.2d 144, 160 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988); N.C.P.I.—Crim. 150.10. Additionally, the actual weight that a juror chooses to give to such a circumstance is up to the particular juror. *State v. Craig*, 308 N.C. 446, 460, 302 S.E.2d 740, 749, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The only requirement is that the jury may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. at 114, 71 L. Ed. 2d at 11. The jurors "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114-15, 71 L. Ed. 2d at 11.

We conclude that, in this case, the language "mitigating effect" did not allow the jury to "refuse to consider, *as a matter of law*," the evidence about age as a mitigating circumstance. The instruction clearly states that age should be considered. However, the weight to

be given such circumstance is for the jury to decide based on its consideration of all the facts and circumstances found from the evidence.

Defendant argues that it is clear that the jury interpreted this instruction to mean that it could have "refuse[d] to consider" this circumstance because the evidence in support of the circumstance was so strong, yet the jury did not find that the circumstance existed. We conclude that this analysis is erroneous.

Defendant's chronological age was forty-eight. Chronological age standing alone is usually not determinative of the existence of this circumstance. *State v. Hill*, 331 N.C. 387, 414, 417 S.E.2d 765, 778 (chronological age of fifty-four standing alone does not entitle defendant to have this (age) mitigating circumstance submitted). In this case, evidence was presented that defendant had a mental age of a six-year-old. However, there was also evidence that defendant had been married, ran his own business, and supported himself and his children. We conclude that based on these facts, the jury was not required to find that this circumstance existed. *See State v. Turner*, 330 N.C. 249, 268, 410 S.E.2d 847, 858 (1991) (jury not required to accept circumstance where defendant was twenty-two years old; evidence of very bad childhood affecting his development; and evidence that defendant married, maintained employment, and had a prior criminal history indicating maturity). We also note that defendant acknowledged that the evidence as to this circumstance was controverted. Defendant's counsel told the trial court that he did not believe a peremptory instruction would be appropriate for this circumstance.

Holding that the instruction given to the jury was correct and that the evidence was contradictory as to this mitigating circumstance, we conclude that defendant's assignment of error is without merit.

[23] Next, defendant argues that the trial court erred when instructing as to nonstatutory mitigating circumstances because its instructions let the jury decide if the nonstatutory circumstance had mitigating value. Defendant argues that the nonstatutory mitigating circumstances that he presented to the jury had inherent mitigating value, as evidenced by the fact that the trial court decided to submit them in the first place. Thus, defendant argues that the jury has to consider the circumstances under *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1, and *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978).

The trial court instructed the jury that

> [i]f one or more of you finds by a preponderance of the evidence that this [nonstatutory] circumstance exists and also is deemed mitigating, you would so indicate by having your foreman write, "Yes," in the space provided.

This Court has repeatedly determined that nonstatutory mitigating circumstances do not necessarily have mitigating value. *See State v. Green*, 336 N.C. 142, 173, 443 S.E.2d 14, 32; *State v. Robinson*, 336 N.C. 78, 117, 443 S.E.2d 306, 325; *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854; *State v. Fullwood*, 323 N.C. 371, 397, 373 S.E.2d 518, 533 (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). In *State v. Fullwood*, the Court held that it is "for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value." 323 N.C. at 396, 373 S.E.2d at 533. "[B]efore the jury 'finds' a nonstatutory mitigating circumstance, it must make two preliminary determinations: (1) that the evidence supports the existence of the circumstance *and* (2) that the circumstance has mitigating value." *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (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). This proposition has recently been reiterated in *State v. Green*, 336 N.C. at 173, 443 S.E.2d at 32 (jurors may reject nonstatutory mitigating circumstances if they do not deem them to have mitigating value).

In addition:

> 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.

State v. Robinson, 336 N.C. at 117, 443 S.E.2d at 325. As recently noted by the United States Supreme Court,

> "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."

Johnson v. Texas, — U.S.—, —, 125 L. Ed. 2d 290, 302 (1993) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456, 108 L. Ed. 2d 369, 389 (1990) (Kennedy, J., concurring in judgment)). The instruction at issue here allows the jury to consider all the evidence in mitigation, and it allows the jury to consider whether nonstatutory mitigating circumstances in fact have mitigating value. The instruction does not allow the jury to ignore the evidence.

We find no reason to alter our previous decisions and conclude that the trial court did not err in its instructions on nonstatutory mitigating circumstances in this case.

[24] Next, defendant argues that the trial court's instructions to the jury were erroneous because they did not allow all the jurors to consider any issue of mitigation when weighing the aggravators and mitigators in determining the death sentence. Defendant argues that such instructions violate *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369.

The trial court instructed the jury:

> 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 juror determined to exist by a preponderance of the evidence in Issue Two.
>
> . . . .
>
> Issue Four is, Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?
>
> 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 the juror determined to exist by a preponderance of the evidence.

Defendant argues that these instructions were erroneous because they precluded those jurors who had not earlier found a mitigating

circumstance to exist from considering that mitigating circumstance, even if it was found by another juror, when determining defendant's sentence. Defendant seems to believe that the jury should be instructed that once one juror finds a mitigating circumstance to exist and have value, *all* twelve jurors must consider that circumstance when reaching their decision, even if a juror did not believe that the mitigating circumstance existed.

We conclude that defendant's desired instruction is inconsistent with the procedure dictated by the North Carolina capital sentencing scheme and is not what was required or contemplated by the United States Supreme Court in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, or *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384 (1988), upon which *McKoy* relied. "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." *State v. Lee*, 335 N.C. 244, 287, 439 S.E.2d 547, 570.

The purpose of *Mills* and *McKoy* was to allow individualized determination of mitigating circumstances.

> *Mill*s requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence . . . .

McKoy v. North Carolina, 494 U.S. at 442-43, 108 L. Ed. 2d at 381. Justice Blackmun noted in *McKoy* that

> it is understood that different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie their verdict.

Id. at 449, 108 L. Ed. 2d at 384-85 (Blackmun, J., concurring) (footnotes omitted). *McKoy* does not invalidate "a jury instruction that does not require unanimity with respect to mitigating circumstances but requires a juror to consider a mitigating circumstance only if he or she is convinced of its existence by a preponderance of the evidence." *Id.* at 444, 108 L. Ed. 2d at 382 (White, J., concurring).

We conclude that there is no constitutional requirement that a juror must consider a mitigating circumstance found by another juror

to exist. What is constitutionally required is that jurors be individually given the opportunity to consider and give weight to whatever mitigating evidence they deem to be valid. The instructions given by the trial court in this case gave each juror this individualized opportunity. Thus, the instructions of the trial court are valid. Defendant's assignment of error is without merit.

[25] In a related issue, defendant argues that the trial court erred by instructing the jury that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances. Specifically, the trial judge instructed the jury:

> 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 juror determined to exist by a preponderance of the evidence in Issue Two.
>
> . . . .
>
> 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 the juror determined to exist by a preponderance of the evidence.

(Emphasis added); *see* N.C.P.I.—Crim. 150.10.

Defendant contends that this instruction violated the Eighth and Fourteenth Amendments to the United States Constitution and principles set forth in *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 11. Defendant argues that the use of the word "may" allowed some jurors to disregard relevant mitigating evidence they had earlier found to exist.

We have recently addressed this issue, reviewing the exact instruction challenged here and finding it to be without error. *State v. Lee*, 335 N.C. at 286-87, 439 S.E.2d at 569. Specifically, we held in *Lee* that "[f]ar 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." *Id.* at 287, 439 S.E.2d at 570. We

continue to believe that the Pattern Jury Instructions as given here are correct. *See State v. Green*, 336 N.C. at 175, 443 S.E.2d at 33-34; *State v. Robinson*, 336 N.C. at 121, 443 S.E.2d at 327. Thus, this assignment of error is without merit and is overruled.

[26] Next, defendant argues that the trial court erred in its instruction on mitigating circumstances because the instruction was too narrow and created an unacceptable risk that the jury failed to consider relevant mitigating information.

The trial court instructed the jury:

> Members of the jury, 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.

This Court has approved this definition in numerous cases. *See State v. Hill*, 331 N.C. 387, 420, 417 S.E.2d 765, 782; *State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985); *State v. Moose*, 310 N.C. 482, 499, 313 S.E.2d 507, 518 (1984); *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981); *see also* N.C.P.I.—Crim. 150.10.

In addition, the trial court instructed the jury that

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

This instruction is consistent with language from *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L. Ed. 2d 1, 8, and *Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990, discussing what evidence a sentencer must be able to consider when determining a sentence of life versus death. *See State v. Irwin*, 304 N.C. at 104, 282 S.E.2d at 447; *see also* N.C.P.I.—Crim. 150.10.

Reviewing the instructions given to the jury in their entirety, we conclude that the jury was not restricted from considering any evidence that may have lessened defendant's sentence, whether it be evi-

dence that was directly based on defendant's character or evidence that related to the actual murders. The trial court gave a valid instruction consistent with our case law, the North Carolina Pattern Jury Instructions, and United States Supreme Court case law. We conclude that defendant's assignment of error is without merit.

[27] Next, defendant argues that the trial court erred in submitting the aggravating circumstance that the murders were part of a course of conduct in which defendant engaged and which course of conduct included the commission by the defendant of crimes of violence against another person or persons. N.C.G.S. § 15A-2000(e)(11) (1988).

Defendant acknowledges that the trial court instructed the jurors consistent with the Pattern Jury Instructions:

> A murder is part of such a course of conduct if it and the other crimes of violence are part of a pattern of the same or similar acts which establish that there existed in the mind of the defendant a plan, scheme, system, or design involving both the murder and those other crimes of violence.

Defendant argues that this circumstance should not have been submitted because it was not supported beyond a reasonable doubt by the evidence. We note:

> In determining the sufficiency of the evidence to *submit* an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State.

State v. Syriani, 333 N.C. 350, 392, 428 S.E.2d 118, 140 (emphasis added). " 'If there is substantial evidence of each element of the [aggravating] issue under consideration, the issue must be submitted to the jury for its determination.' " *State v. Moose*, 310 N.C. at 494, 313 S.E.2d at 516 (quoting *State v. Stanley*, 310 N.C. 332, 347, 312 S.E.2d 393, 401 (1984) (Martin, J., dissenting)).

When determining if there is evidence to prove the existence of the course of conduct circumstance, the sufficiency of the evidence "depends upon a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated on other grounds*, 498 U.S. 802, 112

L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, —U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S.—, 129 L. Ed. 2d 888, *on remand*, 337 N.C. 756, 448 S.E.2d 827 (1994), *pet. for cert. filed* (U.S. 17 Jan. 1995) (No. 94-7672). "[T]he closer the incidents of violence are connected in time, the more likely that the acts are part of a plan, scheme, system, design or course of action." *State v. Cummings*, 332 N.C. 487, 510, 422 S.E.2d 692, 705 (1992). "[I]n order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together." *Id.*

In this case, there was substantial evidence to support the submission of this circumstance. As noted previously, the evidence established that defendant pulled a semiautomatic rifle from under the seat of his truck and fired multiple shots at Ailene Pittman, inflicting thirty-four wounds. He then said "you too" and shot Nelson Fipps. As the truck pulled away from the scene of the crime, defendant asked the driver, "did I get them" both. There was no evidence that the victims had provoked defendant.

Determining that the crimes occurred within moments of each other at the same location and that the same *modus operandi* was used in each killing, we hold that the facts clearly establish that the two crimes were committed as a part of a course of conduct in which defendant engaged and which included the commission by defendant of a crime of violence against another person. We conclude that the trial court did not err when it submitted this circumstance to the jury. Defendant's assignment of error is without merit.

[28] Next, defendant argues that the trial court erred when it refused to independently submit specific nonstatutory mitigating circumstances requested by defendant in writing. Defendant argues that the instructions given by the trial court kept the jury from considering relevant mitigating evidence and diluted and diminished the written instructions that were given in place of the requested instructions.

All the circumstances requested by defendant were put on the written recommendation form; however, some of the written instructions were combined. The instruction that defendant cannot read and the instruction that defendant cannot write were combined to read that defendant was functionally illiterate and cannot read or write. The instruction that defendant pled guilty to criminal charges in 1984, the instruction that defendant pled guilty to criminal charges in 1981,

and the instruction that defendant pled guilty to criminal charges in 1977 were combined to read that the defendant pled guilty to criminal charges in 1984, 1981, and 1977. The instruction that defendant was under the influence of alcohol at the time of the offense was changed to read that defendant had consumed alcohol at the time of the offense. Finally, the instruction that defendant loves and respects his mother and the instruction that defendant loves and respects his father were combined to read that defendant loves and respects his parents.

In *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), this Court held that

> where a defendant makes a timely *written* request for a listing *in writing* on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form.

Id. at 324, 389 S.E.2d at 80. We concluded that such a practice was necessary because "common sense teaches us that jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. [If] . . . the circumstances [were] written on the form, the trial judge and the jury would . . . [be] required to directly address each of them." *Id.* at 325, 389 S.E.2d at 81.

We conclude that in this case the instructions requested by defendant were given to the jury in written form. While the language was not exactly that requested by defendant, the jury was required to directly address every point brought forward by defendant in his written request. For example, the jury was instructed to consider whether defendant loves and respects his parents. In addressing this issue, the jury must consider both whether defendant loves and respects his mother and whether defendant loves and respects his father. In essence, the requested instructions were subsumed into the given instruction. *See State v. Benson*, 323 N.C. 318, 327, 372 S.E.2d 517, 522 (1988) (no error when trial court fails to submit a mitigating circumstance that was subsumed into another mitigating circumstance).

The refusal of a trial judge to submit proposed circumstances separately and independently is not error. *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 443 (1989) (court may incorporate requested circumstances within given instructions and the catchall circumstance), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603

(1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991); *State v. Fullwood*, 323 N.C. 371, 393, 373 S.E.2d 518, 531 (court did not err in refusing to submit nonstatutory mitigating circumstance that had been incorporated into statutory mitigating circumstance that was submitted to jury); *State v. Lloyd*, 321 N.C. 301, 313-14, 364 S.E.2d 316, 324-25 (court did not err in refusing to submit two nonstatutory mitigating circumstances regarding defendant's criminal record where a submitted statutory mitigating circumstance allowed jury to consider defendant's criminal record as a whole).

Assuming *arguendo* that the trial court erred by not giving the exact instructions requested by defendant, we conclude that such error was harmless beyond a reasonable doubt. A trial court's error in failing to submit a nonstatutory mitigating circumstance is harmless "where it is clear that the jury was not prevented from considering any potential mitigating evidence." *State v. Green*, 336 N.C. 142, 183, 443 S.E.2d 14, 38; *see State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780.

We conclude that the trial court correctly brought to the jury's attention all of defendant's requested instructions that were supported by the evidence. Assuming *arguendo*, however, that the trial court did err, such error was harmless beyond a reasonable doubt.

[29] Next, defendant argues that imposition of the death penalty here is unconstitutional because defendant has suffered lifelong organic brain damage and is mentally retarded. To begin, we note that defendant did not object to the imposition of the death penalty on these grounds at trial. Nor did defendant make this an assignment of error in the record. Accordingly, the issue is deemed waived by defendant. *State v. Upchurch*, 332 N.C. 439, 456, 421 S.E.2d 577, 587 (1992). Nevertheless, we have considered defendant's argument.

We first note that the United States Supreme Court has held that the Eighth Amendment does not categorically prohibit the infliction of the death penalty on a person who is mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 340, 106 L. Ed. 2d 256, 292 (1989). In addition, this Court has affirmed the death penalty in cases where defendants' IQ test scores were similar to or lower than this defendant's IQ test score of 69. *State v. McCollum*, 334 N.C. 208, 248, 433 S.E.2d 144, 166 (1993) (Exum, C.J., concurring in part and dissenting in part) (IQ tests scores of 61 and 69), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895 (1994); *State v. Artis*, 325 N.C. 278, 311, 384 S.E.2d 470, 489 (IQ test score of 67); *State v. Hunt*, 323 N.C. 407, 435,

373 S.E.2d 400, 418 (1988) (codefendant Barnes' IQ test score of 68), *sentence vacated on other grounds sub nom. Barnes v. North Carolina*, 499 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 330 N.C. 104, 408 S.E.2d 843 (1991); *State v. Pinch*, 306 N.C. 1, 57, 292 S.E.2d 203, 240 (1982) (Exum, J., dissenting) (IQ test score of 66).

The imposition of the death penalty on this defendant is not unconstitutional, and defendant's assignment of error has no merit.

PRESERVATION ISSUES

[30] Defendant brings forward six issues for preservation purposes. First, defendant contends that it is unconstitutional to permit the prosecutor to peremptorily challenge jurors who express any reservation about the death penalty. We have previously decided this issue against defendant. *State v. Allen*, 323 N.C. 208, 222, 372 S.E.2d 855, 863 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 775, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993).

[31] Second, defendant contends that the Pattern Jury Instruction imposing a duty upon the jury to return death if the mitigating circumstances are insufficient to outweigh the aggravating circumstances is unconstitutional. This Court has previously decided this issue adversely to defendant. *State v. McDougall*, 308 N.C. 1, 26, 301 S.E.2d 308, 324, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 33-34, 292 S.E.2d 203, 227.

[32] Third, defendant contends that the trial court erred in denying his request for individual *voir dire* and sequestration of prospective jurors. This Court has consistently denied other defendants relief on this basis. *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 357 (1987); *State v. Wilson*, 313 N.C. 516, 524, 330 S.E.2d 450, 457 (1985); *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). "The decision whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion." *State v. Wilson*, 313 N.C. at 524, 330 S.E.2d at 457. A review of the transcript and record shows no such abuse of discretion in this case.

[33] Fourth, defendant contends that the trial court erred by denying defendant's request that the trial court give specific instructions, written by defendant, about the procedures involved in a capital punishment proceeding prior to the beginning of jury selection. The trial

court did give preliminary jury instructions pursuant to the Pattern Jury Instructions. This Court has previously considered such a contention and decided it adversely to defendant. *State v. Artis*, 325 N.C. 278, 294-96, 384 S.E.2d 470, 478-79.

[34] Fifth, defendant argues that the North Carolina death penalty statute is unconstitutional. This Court has repeatedly held that the North Carolina death penalty statute is not unconstitutional. *State v. Roper*, 328 N.C. 337, 370, 402 S.E.2d 600, 619, *cert. denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991); *State v. McLaughlin*, 323 N.C. 68, 102, 372 S.E.2d 49, 71 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991); *State v. Barfield*, 298 N.C. 306, 353-54, 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).

[35] Sixth, defendant argues that the trial court erred by instructing the jury that defendant had the burden of proving the mitigating circumstances by a preponderance of the evidence. We have previously considered this contention and have decided it adversely to defendant. *State v. Roper*, 328 N.C. at 368, 402 S.E.2d at 618; *State v. Barfield*, 298 N.C. at 353, 259 S.E.2d at 543; *State v. Johnson*, 298 N.C. 47, 75-76, 257 S.E.2d 597, 617-18.

In summary, all of defendant's contentions as to the preservation issues have been decided contrary to defendant in the past. Upon our review of the issues, we find no reason to alter our previous decisions and determine that all of these assignments of error are without merit.

PROPORTIONALITY REVIEW

[36] Finding no error in either the guilt-innocence phase or the capital sentencing proceeding, 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) Had the defendant been previously convicted of a felony involving the use of violence to the person? [N.C.G.S. § 15A-2000(e)(3) (1988).]

. . . .

(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons? [N.C.G.S. § 15A-2000(e)(11).]

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

As noted earlier, we have already concluded that the aggravating circumstance that the murder was part of a course of conduct that included other crimes of violence was supported by the evidence. We also conclude that the jury's finding of the other aggravating circumstance was clearly supported by the evidence. During the sentencing phase, the State presented evidence that defendant had pled guilty on three separate occasions to assault with a deadly weapon inflicting serious injury.

After conducting a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we further conclude that the jury did not sentence 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 excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

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). Proportionality review is necessary to serve "[a]s 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). In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *over-*

ruled on other grounds by State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).

We begin our analysis by comparing the instant case with those seven cases in which this Court has determined that the sentence of death was disproportionate: *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517; *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; *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 defendant was convicted of first-degree murder based solely upon the theory of felony murder; the victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. This Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant was simply attempting to rob the victim, 323 N.C. at 329, 372 S.E.2d at 523, and defendant "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 defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder under the theory of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. This Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." 319 N.C. at 27, 352 S.E.2d at 667.

In *State v. Rogers*, the defendant was convicted of first-degree murder based on a shooting of the victim in a parking lot during an argument. Only one aggravating circumstance was found, that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." 316 N.C. at 234, 341 S.E.2d at 731.

In *State v. Young*, the defendant stabbed and robbed a man. The Court noted that in armed robbery cases where death is imposed, the jury has found the aggravating circumstance that the defendant was

engaged in a course of conduct that included the commission of violence against another person and/or that the crime was especially heinous, atrocious, or cruel. 312 N.C. at 691, 325 S.E.2d at 194. Neither of these circumstances was found by the jury in *Young*.

In *State v. Hill*, the defendant shot a police officer while engaged in a struggle near defendant's automobile. This Court found the death sentence disproportionate:

> 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 . . . .

311 N.C. at 479, 319 S.E.2d at 172.

In *State v. Bondurant*, the defendant shot his victim after defendant had spent the night drinking; there was no motive for the killing, and immediately after the victim was shot, defendant made sure the victim was taken to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83.

In *State v. Jackson*, the victim had been shot twice in the head. The defendant had earlier flagged down the victim's car, telling his companions that he intended to rob the victim. This Court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with McAulay [the victim]." 309 N.C. at 46, 305 S.E.2d at 717.

We conclude that this case is not similar to any of the above cases, where death was found to be a disproportionate sentence. Most notably, in all of the cases where the death sentence has been determined to be disproportionate, only one person has been murdered by the defendant. In this case, two people were murdered by defendant, in front of an eyewitness who could relate exactly what happened. Defendant here, without provocation, shot Ailene Pittman and Nelson Fipps numerous times with a semiautomatic rifle containing fragmentation bullets. He left his two victims dying on the front lawn and never attempted to get them any help. Defendant had already been convicted on three other occasions of inflicting serious injury with a deadly weapon, on three different victims.

In reviewing the proportionality of a sentence, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). However, we "will not undertake to discuss or cite all of those cases" we have reviewed. *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164. In examining the pool, we review cases with similar facts and with similar aggravators and mitigators.

Here, defendant was convicted of two first-degree murders on the theory of premeditation and deliberation. In addition, the jury found the existence of the two aggravating circumstances submitted in this case: defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3); and the murders were part of a course of conduct that included crimes of violence to others, N.C.G.S. § 15A-2000(e)(11). The jury also found five of the sixteen submitted mitigating circumstances to exist.[3] The mitigating circumstances found were: the murder was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); at the time of the offense defendant had consumed alcohol; defendant was an alcohol abuser; and any other circumstance or circumstances arising from the evidence which one or more of the jurors deems to have mitigating value, N.C.G.S. § 15A-2000(f)(9) (1988). The following circumstances were submitted to the jury but not found: the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7) (1988); defendant was a hard worker and had a good employment record; defendant's IQ is in the mental retardation range; defendant pled guilty to the earlier criminal charges with which he was charged, occurring on 31 May 1984, 15 December 1981, and 6 December 1977; defendant suffered the death of two children during the last five years within a six-week period of each other; defendant loves and respects his parents; defendant provided love, financial assistance, and care for his children; defendant only completed the eighth grade in school; defendant was cooperative with law enforcement at the time of his arrest; defendant is functionally illiterate and

3. Two issues and recommendation sheets were given to the jury, one for Ailene Pittman and one for Nelson Fipps. The sheets contained the same aggravators and mitigators, and the jury found the same aggravators and mitigators to exist in both cases.

cannot read or write; defendant was a kind, friendly, and compassionate person who developed strong emotional ties to his close friends.

Defendant argues that the prime reasons that his sentence is disproportionate are his low IQ and the fact that the jury found him to be mentally or emotionally disturbed when the crime was committed, and that defendant's capacity to appreciate the criminality of his conduct was impaired. This Court has affirmed death sentences even when the jury has found the two noted statutory mitigators. *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308; *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). As noted earlier in this decision, this Court has also affirmed the death sentences in cases where defendants have made similar scores on IQ tests.

We have reviewed cases involving the two statutory aggravators found in this case and have noted that in many of these cases, the defendant received death. *See State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308. We have also reviewed cases where there have been other crimes of violence committed during a premeditated and deliberated murder. We have noted that while many of these defendants received life sentences, most of these cases involved only a single killing. *But see State v. Austin*, 320 N.C. 276, 357 S.E.2d 641 (three victims), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987).

Defendant argues that the fact that this case involved a multiple killing does not automatically make it proportionate and sets forth cases where defendants have received life sentences for multiple murders. We note that "our responsibility in proportionality review is to evaluate each case independently, considering 'the individual defendant and the nature of the crime or crimes which he has committed.' " *State v. Quesinberry*, 325 N.C. 125, 145, 381 S.E.2d 681, 693 (1989) (quoting *State v. Pinch*, 306 N.C. 1, 36, 292 S.E.2d 203, 229), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). "Early in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared . . . [is not] '. . . the last word on the subject of proportionality' " but merely serves as an initial point of inquiry. *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47 (quoting *State v. Williams*, 308

N.C. 47, 80-81, 301 S.E.2d 335, 356). The issue of whether the death penalty is proportionate in a particular case must rest in part on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances. *Id.* In addition, "the decision of the jury [is given] great deference in determining whether a death sentence is disproportionate." *State v. Quesinberry*, 325 N.C. at 145, 381 S.E.2d at 694.

This case involves a man who had previously assaulted and seriously injured three other people, by shooting one in the back, severing the hand of another with a knife, and shooting another in the chest. He had pled guilty and been convicted of all three of these previous assaults. However, defendant continued to inflict injuries on other people, ultimately killing two people in a single incident with a semiautomatic rifle. Therefore, based upon our review of the cases in the pool and the experienced judgment of members of this Court, 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 the trial and sentencing proceeding as well as the record and 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 a fair sentencing proceeding free of prejudicial error before an impartial judge and jury. The conviction 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.

Chief Justice EXUM concurring in the result.

I concur in the result reached by the majority on both the guilt-innocence proceeding and the capital sentencing proceeding. I write separately to address defendant's contention that to impose the death penalty upon him is violative of the State constitution because he is mentally retarded. Had the evidence that defendant was mentally retarded been uncontradicted and manifestly credible, then I believe a strong argument could have been made that to execute defendant would violate our State's constitutional prohibition against cruel or unusual punishment. *State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144

(1993) (Exum, C.J., concurring in part and dissenting in part) *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (1994).

Here, however, the evidence that defendant is mentally retarded is not uncontradicted, and the jury rejected defendant's nonstatutory mitigating circumstance based on his being mentally retarded.

The generally accepted definition of mental retardation is that it afflicts the person in question with (1) a significant subaverage intellectual functioning (2) which exists concurrently with deficits in adaptive behavior and (3) which disability has manifested itself during the person's developmental period. American Association on Mental Deficiency [now Retardation], *Classification in Mental Retardation* 1 (H. Grossman ed. 1983). General intellectual functioning is measured by IQ (intelligent quotient) tests. These tests vary; however, to be classified as mentally retarded, a person generally must score below 70, which would place the person among only three percent of the population. Amici Curiae Brief in Support of Petitioner at 5 n.2, *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989).

Evidence presented at trial tended to show that defendant had a significantly subaverage general intellectual functioning. He dropped out of school during the eighth grade because he was unable to learn and was having difficulty staying awake during a large portion of the school day. Dr. Antonio Puente, a neuropsychologist retained by defendant, tested defendant by means of the Academic Wide-Range Achievement Test and determined defendant's mathematical skills were in a fourth-grade level and that his reading and writing skills were at a level between first and second grade. Defendant's IQ tested at 69.

Dr. Puente found defendant functionally unable to read or write and placed defendant's mental age at six-and-one-half years. Dr. Puente further found defendant to be suffering from "somewhere between a moderate and severe" organic brain syndrome, a defective condition of the brain causing behavioral problems. The cause of this condition was believed to be severe head injuries suffered as a child, including a skull fracture after being dropped on his head as an infant, and hypertension, which caused him to have a facial stroke. In Dr. Puente's opinion, defendant's intellectual deficits left him with a poor ability to learn or remember and a limited ability to plan, carry out or reflect upon the serious issues in his life.

Notwithstanding Dr. Puente's testimony, there was evidence before the jury indicating, among other things, that defendant was well able to function acceptably in society. For example, the evidence indicated that defendant was married and was the father of four children, two of whom were still living. Additionally, defendant helped his father by keeping his father's cattle and repairing his father's vehicles. Defendant's brother testified defendant was always employed and that he fully provided for his children. Other testimony revealed that defendant successfully operated a junkyard, one of the larger businesses in the community.

Although evidence that defendant's IQ tested at 69 was uncontroverted, there was positive evidence before the jury that defendant's IQ did not result in a significant deficit in his adaptive behavior. This evidence, if believed, was sufficient to preclude defendant from being classified as mentally retarded and was enough to support the jury's rejection of mental retardation as a nonstatutory mitigating circumstance. Because the evidence on the issue of defendant's mental retardation is in conflict and because the jury rejected mental retardation as a nonstatutory mitigating circumstance, I concur with the majority's conclusion that to execute this defendant does not violate our State's constitutional prohibition against cruel or unusual punishment on the ground that he is mentally retarded.

STATE OF NORTH CAROLINA v. ROBERT BACON, JR.

No. 209A91

(Filed 29 July 1994)

1. Criminal Law § 109 (NCI4th)— first-degree murder—defense psychiatrist—written report—required to be disclosed to prosecutor

The trial court did not err in a resentencing for first-degree murder by requiring a defense psychiatrist to compile a written report of his evaluation of defendant and submit it to the district attorney where the court's order provided no more than the reciprocal discovery requirements under N.C.G.S. § 15A-905(b). The trial court merely addressed the district attorney's concern that the expert would examine the defendant and never prepare a written report, thus hindering the State's ability to cross-examine

the expert, and the court ensured fairness to both sides in the preparation of their case by stating that defense counsel must prepare a report if the expert's examination was to be used at trial. N.C.G.S. § 15A-903(e).

Am Jur 2d, Depositions and Discovery §§ 462 et seq.

2. **Constitutional Law § 342 (NCI4th)— first-degree murder—bench conferences—defendant represented by counsel—mechanical aspects of proceeding**

Defendant failed to demonstrate that his rights under Article I, Section 23 of the North Carolina Constitution as well as the Sixth and Fourteenth Amendments to the United States Constitution were violated at a resentencing hearing for first-degree murder where the court had granted an amended defense motion to record conferences or discussions in chambers when the defense indicated it was necessary and the record indicates that the trial judge conducted numerous bench conferences with counsel in which defendant did not participate. However, nothing indicates that defendant was not present in the courtroom, the court received no evidence during these conferences, most of these conferences concerned mechanical aspects of the proceedings, defendant could observe the context of each conference and inquire of his counsel concerning the substance of the conferences, nothing in the record demonstrates how defendant's presence would have served any useful purpose, and defendant does not demonstrate how the conferences impinged upon his opportunity to defend.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

Accused's right, under Federal Constitution, to be present at his trial—Supreme Court cases. 25 L. Ed. 2d 931.

3. **Criminal Law § 483 (NCI4th)— first-degree murder—resentencing hearing—communications between bailiff and clerk and jury—administrative**

There was no error in a resentencing hearing for first-degree murder where the court ordered the bailiff to engage in unrecorded communications with the prospective jurors and the trial jury and the clerk also communicated with the jury. The challenged communications were of an administrative nature, did not relate to the consideration of defendant's guilt or innocence, the subject

matter in no way implicated defendant's confrontation rights, and defendant's presence did not bear a reasonably substantial relation to his opportunity to defend.

Am Jur 2d, Trial §§ 1568-1572.

4. Constitutional Law § 344 (NCI4th)— first-degree murder—jury selection—court's communication with prospective juror

There was no prejudicial error during jury selection for a resentencing hearing in a first-degree murder prosecution where the trial judge engaged in an unrecorded communication with a prospective juror. The record indicates not only that the trial court reconstructed the substance of the bench conference with the prospective juror, which involved deferment of her service, but also that defense counsel consented to the bench conference and that he did not object to the court's decision to excuse the juror.

Am Jur 2d, Criminal Law §§ 695, 696.

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

5. Evidence and Witnesses § 2873 (NCI4th)— first-degree murder—resentencing—defense psychiatrist—cross-examination—opinion that defendant dangerous

The trial court did not err during a resentencing hearing in a first-degree murder prosecution by allowing the district attorney to cross-examine defendant's expert psychiatrist as to whether defendant was dangerous where the psychiatrist had testified on direct examination that defendant suffered from an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and that defendant stabbed the victim while under the influence of a mental or emotional disturbance. Defendant had introduced videotaped depositions of defendants' friends who depicted defendant as someone who would not kill another human being and defendant subsequently requested and the court submitted a nonstatutory mitigator that the character, habits, mentality, propensities, and activities of the defendant indicate that he is unlikely to commit another violent crime. North Carolina Rules of Evidence permit

broad cross-examination of expert witnesses and the cross-examination here plainly rebuts the evidence in support of the nonstatutory mitigator concerning the likelihood that defendant would not commit another violent crime. N.C.G.S. § 8C-1, Rule 611(b).

Am Jur 2d, Witnesses §§ 471 et seq.

6. Evidence and Witnesses § 2954 (NCI4th); Criminal Law § 441 (NCI4th)— first-degree murder—defense psychiatrist—cross-examination—compensation

The trial court did not err during a resentencing hearing in a first-degree murder case by allowing the district attorney to cross-examine a defense psychiatrist concerning his compensation or by permitting the district attorney to argue that the jury should view the expert's testimony with caution because of the financial arrangement. The district attorney properly cross-examined the psychiatrist concerning his forensic practice, his possible bias, and his status as a paid witness, and properly argued to the jury the importance of that testimony from the State's perspective.

Am Jur 2d, Witnesses §§ 471 et seq., 554.

7. Criminal Law § 818 (NCI4th)— first-degree murder—resentencing—defense psychiatrist—interested witness instruction

There was no plain error in a resentencing hearing for a first-degree murder in which the defense presented the testimony of a psychiatrist and where the court gave an interested witness instruction because there were several other reasons the two statutory mitigating circumstances noted by defendant might not have been found.

Am Jur 2d, Trial §§ 855 et seq.

8. Constitutional Law § 314 (NCI4th)— first-degree murder—resentencing—effectiveness of counsel—references to parole

Defense counsel did not act unreasonably and ineffectively in a resentencing for first-degree murder by presenting videotaped depositions from defendant's former friends and neighbors that contained explicit or implicit references to parole. The testimony in question involved the witnesses' willingness to welcome

defendant into their home or community if he was convicted and later paroled, and was in the context of defendant's friends and their unchanged favorable view of defendant.

Am Jur 2d, Criminal Law §§ 752, 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

9. Jury § 141 (NCI4th)— first-degree murder—resentencing—jurors not examined concerning parole—no error

The trial court did not err in a resentencing hearing for a first-degree murder by refusing to allow defendant to examine prospective jurors concerning their views on parole. Such questioning is irrelevant under the facts of this capital resentencing.

Am Jur 2d, Jury § 197.

10. Constitutional Law § 314 (NCI4th)— first-degree murder—resentencing—evidence of prior death sentence—not ineffective assistance of counsel

Defense counsel did not provide ineffective representation in a resentencing for first-degree murder where counsel mentioned in defendant's closing argument that defendant comes from a loving family and that the courtroom contained several family members during his first sentencing, but that the same family members were not able to attend this hearing due to financial considerations and work conflicts, and that it should be no surprise that defendant's mother was not present because she had had to hear the judge impose a death sentence at the first hearing. This argument was a matter of trial tactics to explain the absence of defendant's mother; moreover, mere knowledge by the jurors of the prior death sentence demonstrates no prejudice to the defendant.

Am Jur 2d, Criminal Law §§ 752, 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

11. Criminal Law § 436 (NCI4th)— first-degree murder—resentencing—prosecutor's closing argument—future dangerousness—brutality—no error

There was no error in a resentencing for first-degree murder where the prosecutor argued the brutal nature of the killing and

that defendant is dangerous despite the fact that the especially heinous, atrocious or cruel aggravating circumstance could not be considered because it had been submitted and not found by the jury at the first trial. The district attorney's argument that defendant was dangerous was based on testimony by defendant's own psychiatrist; the district attorney plainly stated that there was only one aggravating circumstance, pecuniary gain; the trial court instructed on and submitted only pecuniary gain; and neither the district attorney nor the trial judge ever mentioned the especially heinous, atrocious, or cruel aggravator.

Am Jur 2d, Trial §§ 218 et seq.

Prejudicial effect of prosecutor's comment on character or reputation of accused, where accused has presented character witnesses. 70 ALR2d 559.

12. Criminal Law § 454 (NCI4th)— first-degree murder—resentencing—prosecutor's argument—death sentence justified by act of murder

A prosecutor's closing argument in a first-degree murder resentencing was not so grossly improper as to require the trial judge to intervene *ex mero motu* where the prosecutor asked the jurors "Can you say he doesn't deserve the same thing that he imposed?" and "Do you think that he deserves any less for what he did now that he's had a fair trial than the sentence that he imposed and should he get any less than that?"

Am Jur 2d, Trial § 229.

13. Criminal Law § 452 (NCI4th)— first-degree murder—resentencing—prosecutor's argument—weighing of factors

There was no error in a resentencing for a first-degree murder where defendant contended that the district attorney asked rhetorical questions about each of the mitigating circumstances and improperly suggested that the jury weigh the aggravating circumstance against the mitigating circumstances one on one and not consider the aggravating circumstances as a group. The district attorney's approach was to argue each mitigating circumstance separately, the district attorney explained to the jury that viewing the mitigating and aggravating circumstances is not a counting process and that the aggravating circumstance is to be weighed against the mitigating circumstances, and the trial court

correctly charged the jury regarding the weighing process it was required to undertake.

Am Jur 2d, Trial § 229.

14. Criminal Law § 454 (NCI4th)— first-degree murder—resentencing—prosecutor's argument—impaired capacity

There was no error in a resentencing hearing for first-degree murder where the district attorney argued that the jury should not find the impaired capacity mitigating circumstance. It is for the jury to decide how much weight to give each mitigating circumstance and the district attorney may argue the evidence that the jury should consider when determining whether to find a certain mitigating circumstance.

Am Jur 2d, Trial § 229.

15. Criminal Law § 439 (NCI4th)— first-degree murder—resentencing—prosecutor's argument—psychiatric testimony—no error

There was no prejudicial error in the district attorney's argument concerning defendant's psychiatric testimony in a first-degree murder resentencing where the psychiatrist testified that 90% of the patients he examines in his forensic work have psychiatric problems and the district attorney stated in his argument that the witness found that 90 percent of the people he examines have some kind of a psychiatric problem. This misstatement, if it is a misstatement, was harmless in light of the trial court's instruction that counsel's statements were not evidence.

Am Jur 2d, Trial §§ 218 et seq.

16. Criminal Law § 425 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—professional organizations of defense expert

There was no error in a first-degree murder resentencing where, although defendant contended that the district attorney spoke of facts not in evidence when he stated that many of the organizations to which the witness belonged require only a membership fee, the prosecutor properly drew the jurors' attention to the failure to establish any membership qualifications for these organizations.

Am Jur 2d, Trial §§ 258, 259.

17. Criminal Law § 464 (NCI4th)— first-degree murder—resentencing—prosecutor's closing argument—lack of evidence of early admission or cooperation

There was no gross impropriety in the closing argument of a resentencing hearing for first-degree murder where the prosecutor stated that there was no evidence to support the mitigating circumstance that defendant had admitted his involvement at an early stage in the proceedings or had cooperated with law enforcement officers when defendant had made an inculpatory statement following the killing. The argument was not grossly improper and the trial court charged the jurors that closing statements do not constitute evidence.

Am Jur 2d, Trial §§ 258, 259.

18. Criminal Law § 464 (NCI4th)— first-degree murder—resentencing—prosecutor's closing argument—no history of violent behavior—no prejudice

There was no prejudice in a resentencing hearing for first-degree murder where the prosecutor argued that the jury should refrain from finding that defendant had no history of violent behavior by referring to a defense psychiatrist's testimony that defendant had told him about an earlier conflict. The trial court cautioned the jurors to consider the evidence only for the purpose of explaining or supporting the psychiatrist's opinion and the jury found the mitigating circumstance.

Am Jur 2d, Trial §§ 258, 259.

19. Criminal Law § 447 (NCI4th)— first-degree murder—resentencing—reference to victim—not grossly improper

A prosecutor's closing argument in a resentencing for first-degree murder was not grossly improper where the prosecutor argued that only one side of the story had been told because the victim had not testified and that the jurors should consider what the victim would have said if he had been able to testify.

Am Jur 2d, Trial §§ 280 et seq.

20. Evidence and Witnesses § 15 (NCI4th)— first-degree murder—resentencing hearing—federal statutes—judicial notice

The trial court properly took notice of and instructed upon federal law in a resentencing hearing for first-degree murder

where the only aggravating circumstance submitted was pecuniary gain, the district attorney asked the court during trial to take judicial notice of two United States Code provisions dealing with servicemen's group life insurance and a death gratuity payment, and the court instructed the jury that the provisions of the United States Code are to be accepted as true by the jury. Although defendant contended that the court should have instructed the jury in accordance with N.C.G.S. § 8C-1, Rule 201(g) that it could, but was not required to, accept as conclusive any fact judicially noticed, the United States Code Sections are not adjudicative facts and the trial court properly took notice of and instructed upon federal law.

Am Jur 2d, Evidence §§ 116 et seq.

21. Criminal Law § 1322 (NCI4th)— first-degree murder—resentencing—instructions on parole eligibility not given—no error

The trial court did not err in a resentencing hearing for first-degree murder by not instructing the jury concerning parole eligibility where defendant argued that the instruction should have been given because of the reference to parole in questions directed to character witnesses. Neither the State nor defendant at any time argued parole eligibility as a consideration in the capital sentencing determination, it has been held consistently that the possibility of parole is not a relevant issue during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding, and the instruction desired by defendant would have brought greater attention to the parole issue. The recent United States Supreme Court decision in *Simmons v. South Carolina*, —— U.S. ——, is not controlling because this defendant, if given a life sentence, would eventually have been eligible for parole under North Carolina law.

Am Jur 2d, Trial §§ 100, 890.

22. Criminal Law § 1341 (NCI4th)— first-degree murder—resentencing—aggravating factor—pecuniary gain—evidence sufficient

The trial court did not err at a resentencing for first-degree murder by submitting the aggravating circumstance of pecuniary gain where, taken in the light most favorable to the State, the evi-

dence was sufficient to show that defendant knew of the insurance covering the victim's life. N.C.G.S. § 15A-2000(e)(6).

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

23. Criminal Law § 1341 (NCI4th)— first-degree murder—resentencing—pecuniary gain—instruction

The trial court did not commit plain error in a first-degree murder resentencing hearing in its instruction on the aggravating circumstance of pecuniary gain where the instruction given is in accordance with the Pattern Jury Instruction except for the sentence "the defendant expected to share in the life insurance proceeds on the life of the victim." The judge added clarity to the pattern instruction by emphasizing motivation for the murder when he charged the jury that "This aggravating circumstance examines the motive of the defendant rather than his acts." The instruction, taken as a whole, does not suggest that the jury could find the aggravating circumstance merely based on an expectation of receiving money. The wording of the issues and recommendation form further supports the conclusion that the trial court did not commit plain error in its instruction.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

24. Criminal Law § 1363 (NCI4th)— first-degree murder—resentencing—mitigating circumstances—apprehension of another felon—insufficient evidence

The trial court did not err in a resentencing hearing for first-degree murder by refusing to submit the mitigating circumstance that defendant aided in the apprehension of another capital felon, even though the case had been remanded for failure to submit this circumstance, because the State introduced less testimony and defendant decided not to include additional evidence that might have required submission of this circumstance. There was insufficient evidence to support a reasonable finding by the jury that defendant aided in Bonnie Sue Clark's apprehension. N.C.G.S. § 2000(f)(8).

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

25. Criminal Law §§ 1357, 1360 (NCI4th)— first-degree murder—resentencing—mental or emotional disturbance—impaired capacity—instructions

The trial court did not commit plain error during a resentencing hearing for first-degree murder in its instructions on the mitigating circumstances of impaired capacity and mental or emotional disturbance where defendant contended that the trial judge should have included in its instruction a defense psychiatrist's testimony regarding defendant's psychological makeup, conjoined with the needs of the coconspirator and that of their relationship. North Carolina law does not require a judge to recapitulate the evidence presented at trial; it is for the jury to consider the evidence it has heard during the sentencing proceeding. N.C.G.S. § 15A-1232.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

26. Criminal Law § 1323 (NCI4th)— first-degree murder—resentencing—weighing aggravating and mitigating circumstances—instructions

The trial court did not commit error when resentencing defendant for a first-degree murder in its instructions concerning the jury's duty to weigh the aggravating and mitigating factors. The charge did not improperly emphasize the pecuniary gain aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

27. Criminal Law § 1348 (NCI4th)— first-degree murder—resentencing—sympathy instruction refused—no error

The trial court did not err when resentencing defendant for first-degree murder by refusing to instruct the jury on sympathy.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

28. Jury § 141 (NCI4th)— first-degree murder—resentencing—jury selection—questions concerning parole—not allowed

The trial court did not err when resentencing defendant for first-degree murder by refusing to permit defendant to inquire of prospective jurors whether they possessed any misconceptions

concerning the parole eligibility of persons convicted of first-degree murder.

Am Jur 2d, Jury § 197.

29. Criminal Law § 455 (NCI4th)— first-degree murder—resentencing—prosecutor's closing argument—deterrence

The trial court did not err in a resentencing hearing for a first-degree murder by allowing the prosecutor to make a specific deterrence argument.

Am Jur 2d, Trial § 229.

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

30. Jury § 226 (NCI4th)— first-degree murder—resentencing—jury selection—rehabilitation not allowed

The trial court did not err during a resentencing hearing for a first-degree murder by not allowing defense counsel to rehabilitate prospective jurors during the death qualification process.

Am Jur 2d, Jury §§ 289, 290.

31. Jury § 262 (NCI4th)— first-degree murder—resentencing—jurors with reservations about death penalty—State's use of peremptory challenges

The trial court did not err in a resentencing hearing for first-degree murder by allowing the State to peremptorily challenge jurors who were not subject to a challenge for cause but who expressed reservations about the imposition of capital punishment.

Am Jur 2d, Jury §§ 289, 290.

32. Jury § 243 (NCI4th)— first-degree murder—jury selection—peremptory challenge of prospective juror—preservation issue

The trial court did not err in a first-degree murder prosecution by sustaining the peremptory challenge of a prospective juror.

Am Jur 2d, Jury §§ 233 et seq.

33. Criminal Law § 477 (NCI4th)— first-degree murder—resentencing—jury selection—entering jury room

There was no prejudicial error in a resentencing hearing for a first-degree murder where a prospective juror was allowed to enter the jury room at a time when it could still have been occupied by other prospective jurors.

Am Jur 2d, Trial §§ 1612-1614.

34. Jury § 183 (NCI4th)— first-degree murder—jury selection—challenge of prospective juror for cause—preservation issue

The trial court did not err in a first-degree murder prosecution by sustaining the challenge of a prospective juror for cause.

Am Jur 2d, Jury §§ 213 et seq.

35. Evidence and Witnesses § 729 (NCI4th)— first-degree murder—insurance paper listing beneficiary—admission not prejudicial

There was no prejudicial error in a first-degree murder prosecution in the admission of testimony that an "insurance paper" was found among the victim's wife's effects after the murder listing her as the beneficiary.

Am Jur 2d, Appeal and Error §§ 797-801, 803.

36. Criminal Law § 1323 (NCI4th)— first-degree murder—resentencing—nonstatutory mitigating circumstance—mitigating value

There was no prejudicial error in a resentencing hearing for a first-degree murder where the court instructed the jury that it must find a nonstatutory mitigating circumstance to have mitigating value before finding the existence of that circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

37. Criminal Law § 1341 (NCI4th)— first-degree murder—resentencing—aggravating factors—pecuniary gain

The trial court did not err in a resentencing for first-degree murder by submitting pecuniary gain as an aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 888 et seq.

38. Constitutional Law § 365 (NCI4th)— death penalty—constitutional

Imposing the death penalty upon a first-degree murder defendant was not unconstitutional.

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.

39. Jury § 183 (NCI4th)— first-degree murder—jury selection—challenge of prospective juror for cause—preservation issue

The trial court did not err in a first-degree murder prosecution by sustaining the challenge of a prospective juror for cause.

Am Jur 2d, Jury §§ 213 et seq.

40. Evidence and Witnesses § 1411 (NCI4th)— first-degree murder—resentencing—testimony from first trial—unavailability of witnesses—sufficiency of evidence

The trial court did not err by permitting the State to offer into evidence at defendant's resentencing for first-degree murder the testimony of two witnesses from the first trial. Under *State v. Grier*, 314 N.C. 59, all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses.

Am Jur 2d, Evidence §§ 914 et seq.

Sufficiency of efforts to procure missing witness' attendance to justify admission of his former testimony—state cases. 3 ALR4th 87.

41. Criminal Law § 1373 (NCI4th)— first-degree murder—resentencing—one aggravating factor—pecuniary gain—death penalty not disproportionate

A death sentence was not disproportionate where there was one aggravating circumstance, pecuniary gain, the evidence supported the finding of that circumstance, nothing in the record suggests that the jury sentenced defendant to death under the influence of passion, prejudice, or any other arbitrary factor, and the imposition of the death sentence is not disproportionate to other similar cases. Although defendant contends that the re-

ported decisions involving only the "pecuniary gain" aggravating circumstance indicate that the death sentence is disproportionate, the single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence; death sentences have been affirmed based on four of the eleven aggravating circumstances when only one aggravating circumstance was submitted to and found by the jury. Furthermore, although defendant contends that the same essential facts resulted in a sentence of life imprisonment for the victim's wife, defendant's co-conspirator, there were facts which manifestly distinguish the conduct of the co-participants and justify the disparate sentences. It cannot be said that the death sentence in this case was excessive or disproportionate, considering both the crime and the defendant.

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.

42. Criminal Law § 1372 (NCI4th)— first-degree murder—sentencing—proportionality review—pool of cases

The composition of the "proportionality pool" used in reviewing death sentences reflects post-conviction relief. A post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is found guilty of a lesser included offense results in the removal of that case from the "pool"; when a post-conviction proceeding results in a new capital trial or sentencing proceeding, which in turn results in a life sentence for a death-eligible defendant, the case is treated as a life case; the case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated; and, finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing, which is subsequently affirmed by the N.C. Supreme Court, is treated as a death affirmed case.

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.

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

Justice MEYER concurring in the result.

Chief Justice EXUM dissenting.

Justice FRYE joins in this dissenting opinion.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Fullwood, J., at the 4 February 1991 Criminal Session of Superior Court, Onslow County. Heard in the Supreme Court 8 September 1992; opinion filed 30 June 1993, withdrawn 17 August 1993 for reconsideration of proportionality review issue.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was convicted of common law conspiracy to commit murder and first-degree murder at the 18 May 1987 Criminal Session of Superior Court, Onslow County. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. The trial court sentenced accordingly, and further, imposed a sentence of three years for the conspiracy. Defendant appealed to this Court.

On defendant's direct appeal, this Court concluded that as to the guilt phase defendant received a fair trial free of prejudicial error; however, as to the sentencing proceeding, the trial court's failure to submit a statutory mitigating circumstance constituted prejudicial error. The Court thus remanded for a new capital sentencing proceeding. *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990) (hereinafter *Bacon I*).

Following the new sentencing proceeding, the jury again recommended that defendant be sentenced to death, and the trial court sentenced accordingly. For the reasons discussed herein, we conclude that defendant received a fair sentencing proceeding, free of prejudicial error, and that the sentence of death is not disproportionate.

Except where necessary to develop and determine the issues arising from defendant's resentencing, we will not repeat the evidence supporting defendant's convictions, as that evidence is adequately summarized in *Bacon I*.[1]

Defendant presented further testimony at the resentencing proceeding from numerous friends and family members that he was an affable, pleasant person; a good student who never gave any trouble; giving and a leader; always there to help; not one to hurt anybody; popular in school and involved in sports-related activities; a clean-cut kid and a fine young man; a very trustworthy young man who had the ability to excel in anything that he wanted to start as far as life at school or business; and an upright citizen with unquestionable character.

Dr. Billy Royal, a psychiatrist, described defendant as "pleasant," of "average intelligence," and relatively unemotional, with "a very limited view of himself and not a very good self image in terms of being very successful in life." Dr. Royal opined that the murder resulted from the meshing of the psychological needs of defendant and coconspirator Bonnie Sue Clark. Defendant "had a history . . . of becoming involved [with] people that were in need of assistance" and tried "to help rescue Ms. Clark from her reported abuse by her husband." It was the racial slurs, however, directed at defendant by Sergeant Clark in the car that "resulted in his [losing] control." The murder was thus an "impulsive act," and even though defendant stabbed Sergeant Clark some sixteen times, defendant was "a very angry frustrated person at the time." Dr. Royal concluded that defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" at the time of the killing was impaired and the murder was committed while defendant was "under the influence of [a] mental or emotional disturbance."

The jury found the one aggravating circumstance submitted—that the murder was committed for pecuniary gain. It found nine mitigating circumstances—that defendant had no significant history of prior criminal activity; acted under the domination of another person; had no history of violent behavior; had character, habits, mentality, propensities and activities indicating that he was unlikely to com-

1. The testimony of several witnesses for the State and defendant was presented through a reading of their testimony at defendant's first trial. The testimony of thirteen witnesses for defendant was presented through what amounted to a video-taped deposition. Dr. Royal presented live testimony.

mit another violent crime; had committed the murder as the result of circumstances unlikely to recur; had established that his co-defendant, Bonnie Sue Clark, had received a life sentence; had shown remorse since his arrest; and had a family who loved him, continued to visit him while he has been incarcerated, and would continue to do so if he were sentenced to life in prison. It refused to find that the murder was committed while defendant was under the influence of a mental or emotional disturbance; that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; that his age had mitigating value; that he admitted his involvement at an early stage in the proceedings and/or cooperated with law enforcement officers; that he was gainfully employed and worked regularly at the time of the crime; that he was known as a kind, friendly, and compassionate person who developed strong attachments and friends in the community in which he grew up; that his educational background, homelife, and sobriety had mitigating value; that he was known as a good student, a leader and organizer of recreational activities, and had graduated from high school; that his friends and family could not believe it when they heard he had been involved in a first-degree murder; that they felt that life imprisonment was the appropriate punishment; and that there were other circumstances deemed to have mitigating value.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstance, and that the aggravating circumstance was sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

SENTENCING ISSUES

[1] Defendant first contends that the trial court improperly required Dr. Billy Royal, a psychiatrist employed to assist in the preparation and presentation of defendant's defense, to compile a written report of his evaluation and submit it to the district attorney. Defendant contends that the trial court's action violated his right to be free from compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

Defendant concedes that there is no evidence in the record that the district attorney made explicit use of any report compiled by Dr. Royal during the prosecution's cross-examination of him. Defendant further concedes that preparation of a report was not forced upon defendant and that his counsel voluntarily turned over the report. In

discussing the issue of the report at the pretrial hearing, defense counsel stated:

> We won't determine until we have the examination done whether we'll use that testimony. At the point in which we'll decide to use the testimony, we'll ask our expert to prepare a report[,] then we'll furnish it to the District Attorney. We don't want to be in a position of having him examined and not consider that as favorable evidence.

Judge George M. Fountain, who presided over the pretrial hearing on defendant's request for funds to employ the expert, responded: "If you're not going to use it—you don't need a report if you're not going to use it." Counsel replied: "To the extent, Your Honor, we intend to use evidence and the report, at that point we would make a decision to use the evidence and then we would have a report made[;] we would certainly furnish that to [the district attorney]." The trial court then entered a written order finding "that the State [is] entitled to a copy of the results of any mental examination of the defendant if the defendant intends to call the psychiatrist or psychologist as a witness in this case." The record reflects that on the first day of the evidentiary portion of the resentencing proceeding, defendant's counsel submitted the report to the prosecution upon determination that they were going to use Dr. Royal as a witness.

Judge Fountain noted at the pretrial hearing that prior to the original trial, the defense filed a motion for discovery of reports of examinations and tests under N.C.G.S. § 15A-903(e) (1988), with a continuing obligation upon the State to respond. Therefore, because the court had previously granted relief sought by defendant under N.C.G.S. § 15A-903(e),

> the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations . . . within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony.

N.C.G.S. § 15A-905(b) (1988).

Here, the trial court's order provided no more than the reciprocal discovery requirements under N.C.G.S. § 15A-905(b). The trial court merely addressed the district attorney's concern that the expert

would examine the defendant and never prepare a written report, thus hindering the State's ability to cross-examine the expert. By stating in its order that defense counsel must prepare a report if the expert's examination was to be used at trial, the trial court was ensuring fairness to both sides in the preparation of their case. This assignment of error is overruled.

[2] Defendant next alleges that the trial court committed prejudicial error by conducting proceedings out of defendant's presence, in violation of Article I, Section 23 of the North Carolina Constitution as well as the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

Defense counsel filed a pre-trial motion for complete recordation of all proceedings. They amended the motion so as to assume the burden of telling the court when they wanted particular conferences or communications recorded. In speaking to the motion for recordation, they said: "I think you can maybe put the burden on us to do that and we will remember to ask the court to reconsider that motion each time we believe it's necessary." Subsequently, the trial court held that:

> The Court grants the motion with the modification indicated by counsel for the defendant[,] that modification being that the defendant will bring it to the Court's attention at such time as the defendant desires that bench conferences or any discussions in chambers should be recorded.

In *State v. Buchanan*, 330 N.C. 202, 208-24, 410 S.E.2d 832, 835-45 (1991), this Court addressed the issue of a criminal defendant's right to personal presence as guaranteed by both the United States Constitution and the North Carolina Constitution. It noted that Article I, Section 23 of the North Carolina Constitution extends further than federal Fifth and Fourteenth Amendment protections. *Id.* at 217-18, 410 S.E.2d at 841. After a thorough review of both federal and North Carolina case law, it concluded that even unrecorded bench conferences with counsel for both parties, conducted with the defendant in the courtroom, do not violate the defendant's right to be present unless the conference implicates the defendant's confrontation rights or is such that the defendant's presence would have a reasonably substantial relation to his opportunity to defend. *Id.* at 223-24, 410 S.E.2d at 844-45. Defendant bears the burden of demonstrating the usefulness of his presence. *Id.*

The record indicates that the trial court conducted numerous bench conferences with counsel in which defendant did not partici-

pate. However, nothing in the record indicates that defendant was not present in the courtroom during these discussions. The trial court received no evidence during any of these bench conferences, and most of the discussions concerned mechanical aspects of the proceedings, including lunch breaks, presentation of proposed instructions by the trial court to counsel for their comments, and argument of technical motions or objections out of the jury's hearing. Defendant was represented by counsel during each of these conferences. Defendant could observe the context of each conference and inquire of his counsel at any time concerning the substance of the conferences. Nothing in the record demonstrates how defendant's presence would have served any useful purpose, nor does defendant demonstrate how the conferences impinged upon his opportunity to defend. We conclude that defendant has failed to demonstrate any violation of his constitutional protections. *See Buchanan*, 330 N.C. at 224, 410 S.E.2d at 845.

[3] Defendant also contends that the trial court erred in ordering the bailiff to engage in unrecorded communications with prospective jurors and the trial jury. For example, the trial court instructed the bailiff to "have the jurors fill out the [jury voir dire] questionnaires and then duplicate them." Also, the trial court instructed the bailiff to "put the jurors in the jury room on break" and to "have them to return back to the jury room" at some specified time. The actions of the clerk that defendant contends were error involved the clerk's administrative duties of calling the jury roll and explaining to the jurors what time they needed to arrive at court.

We conclude that these challenged communications were of an administrative nature and did not relate to the consideration of defendant's guilt or innocence. The subject matter in no way implicated defendant's confrontation rights, nor would defendant's presence have had a reasonably substantial relation to his opportunity to defend. Defendant has failed to demonstrate how his presence would have been useful to his defense in these instances, and we thus conclude that no constitutional violation has occurred. *See id.* at 223-24, 410 S.E.2d at 844-45.

[4] Finally, under this assignment of error, defendant contends that the trial court erred by engaging in an unrecorded communication with a prospective juror. The communication occurred after the court asked the prospective juror a series of questions as to her fitness to serve due to her employment situation. The potential juror asked the

court if she could approach the bench and speak to the court quietly. Defendant's counsel responded, "We do not object." After the communication at the bench, the court asked the prospective juror more questions in open court and ultimately excused her. At the end of the day, the court made a record of the communication, stating:

> Let me—I need to state for the record that the juror . . . who was impaneled Number 2 who approached the bench and asked to have her service deferred and counsel consented to have—counsel for the defendant consented to have her to come up to the bench; that she didn't say anything to the Court at that time except repeat what she said in open court. I need to have the record to reflect that.

The record indicates not only that the trial court reconstructed the substance of the bench conference with the prospective juror, but also that defense counsel consented to the bench conference and did not object to the court's decision to excuse the juror. With defendant present, defense counsel consented to this juror being deferred; therefore, we conclude that no prejudicial error has been shown. *See State v. Ali*, 329 N.C. 394, 404-06, 407 S.E.2d 183, 190 (1991).

[5] Defendant next contends that the trial court improperly permitted the district attorney to cross-examine defendant's expert psychiatrist as to whether defendant was dangerous. He contends that this alleged error violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution. He argues that dangerousness is not a statutory aggravating circumstance listed in N.C.G.S. § 15A-2000(e) and that it therefore cannot be admitted into evidence unless it is used to rebut a mitigating circumstance. Defendant contends that the trial court did not submit any nonstatutory mitigating circumstance that the evidence of dangerousness could rebut or weaken. He argues that the State cannot introduce evidence of dangerousness to rebut a statutory mitigating circumstance. Further, he submits that the trial court's allowance of the testimony contributed to the jury's refusal to find the two statutory mitigating circumstances that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2) (1988), and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (1988).

Dr. Billy W. Royal testified as an expert in forensic psychiatry. During direct examination, Dr. Royal testified that he evaluated

defendant at the behest of defense counsel. In response to defense counsel's questioning, Dr. Royal gave his opinion that on 1 February 1987, defendant suffered from an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and that defendant stabbed the victim while under the influence of a mental or emotional disturbance. During cross-examination by the district attorney, Dr. Royal acknowledged that, at the time defendant killed Sergeant Clark, defendant knew he was stabbing Clark and knew that such conduct was wrong. Dr. Royal noted that the killing constituted an impulsive act on defendant's part, which he would have committed even in the view of a uniformed police officer. Dr. Royal stated that he considered defendant dangerous.

At the beginning of his sentencing evidence, defendant introduced videotaped depositions by his friends from Ayer, Massachusetts, where he had lived before moving to North Carolina. The taped depositions depicted defendant as someone who would not kill another human being. All the witnesses described defendant as a well-mannered, even-tempered person. The witnesses also stated that this crime was totally out of character for defendant. Subsequently, defendant requested, and the trial court submitted, a nonstatutory mitigator that the character, habits, mentality, propensities, and activities of the defendant indicate that he is unlikely to commit another violent crime.

North Carolina Rules of Evidence permit broad cross-examination of expert witnesses. N.C.G.S. § 8C-1, Rule 611(b) (1992). The State is permitted to question an expert to obtain further details with regard to his testimony on direct examination, to impeach the witness or attack his credibility, or to elicit new and different evidence relevant to the case as a whole. " 'The largest possible scope should be given,' and 'almost any question' may be put 'to test the value of his testimony.' " 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 42 (3d ed. 1988) (footnotes omitted) (citations omitted). The district attorney's cross-examination of Dr. Royal was proper rebuttal on the two mitigating circumstances enumerated in N.C.G.S. § 15A-2000(f)(2) and (f)(6). The jury's responsibility is to find any mitigating circumstance supported by the evidence and then to determine how much weight to give to the mitigating circumstance. *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (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); *State v. Kirkley*, 308

N.C. 196, 220, 302 S.E.2d 144, 158 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 251, 367 S.E.2d 639, 644 (1988).

Additionally, the district attorney's cross-examination of Dr. Royal, including the elicited response relating to defendant's dangerousness, plainly rebuts the evidence in support of defendant's nonstatutory mitigator concerning the likelihood that he would not commit another violent crime. This assignment of error is overruled.

[6] Defendant next argues that the trial court violated his due process rights by allowing the district attorney to cross-examine Dr. Royal concerning the compensation that Royal would receive from his participation in the case. He asserts that this error was compounded when the trial court permitted the district attorney to argue during his closing argument that the jury should view the expert's testimony with caution because of this financial arrangement. Moreover, defendant contends that the interested-witness instruction given by the court during jury instruction was prejudicial and unconstitutionally influenced the jury's decision not to find two statutory mitigating circumstances, specifically, that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2), and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," N.C.G.S. § 15A-2000(f)(6). Defendant asserts that the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution were violated by this interested-witness instruction.

During cross-examination by the district attorney, Dr. Royal admitted that during the past ten years in his forensic work, he had testified exclusively for the defense and that in ninety percent of his cases, he had diagnosed the defendant as having psychological problems. The State asked Dr. Royal his method of being paid, and the psychiatrist disclosed that he billed his services at a rate of $120.00 an hour, with the trial court determining the actual amount paid to him. The court then sustained an objection by defense counsel to the question, "Of course, you recognize, Dr. Royal, that if you don't have a reputation of finding something psychiatrically wrong with people, that criminal defense lawyers will not employ you to examine their clients, isn't that correct, sir?"

During his final argument, the prosecutor used Dr. Royal's testimony regarding his "financial interest" in the case to impeach his

credibility. Because defense counsel did not object during the closing argument, the standard on review is gross impropriety which would require the trial court to intervene *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 761 (1979). After reviewing the record, we conclude that this standard has not been met. "[C]ounsel is allowed wide latitude in the argument to the jury." *Id.* at 368, 259 S.E.2d at 761. Under the evidence, counsel's remarks fall within the boundaries set by this Court. The district attorney properly cross-examined Dr. Royal concerning his forensic practice, his possible bias, and his status as a paid witness. In addition, the prosecutor properly argued to the jury the importance of that testimony from the State's perspective. Nothing in the prosecutor's argument unduly prejudiced defendant or dwelt upon material not in the record.

[7] Defendant also argues that the trial court erred in instructing the jurors that "[y]ou may find that a witness is interested in the outcome of this trial" and that "[i]n deciding whether or not to believe such a witness, you may take the interest of the witness into account." Defendant asserts that this instruction unconstitutionally influenced the jury's decision not to find the (f)(2) and (f)(6) statutory mitigating circumstances. Because the record contains no objection to the trial court's giving of this instruction, we review the challenged instruction only for plain error. *See State v. Collins*, 334 N.C. 54, 61-62, 431 S.E.2d 188, 193 (1993).

We conclude that the giving of the interested-witness instruction, if error, did not constitute plain error so fundamental that justice cannot have been done, and that there were other reasons for the jury to decline to find the two statutory mitigating circumstances noted by defendant. Included among these reasons, the State showed through the cross-examination of Dr. Royal that he lacked a board certification as a forensic psychiatrist, which could have caused the jury to question his credibility. Equally important, there was a lapse of three years between when defendant killed the victim and when Dr. Royal examined him. The jury could likewise conclude that this was too long a period of time for an accurate assessment of defendant's mental condition at the time of the killing.

[8] Defendant next contends he did not receive effective assistance of counsel during the resentencing proceeding. To prevail, defendant must meet the test set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984),

which we expressly adopted in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). The standard to be met under the state Constitution is identical to that under the federal Constitution. *State v. Thomas*, 329 N.C. 423, 439, 407 S.E.2d 141, 151 (1991).

Defendant first argues that defense counsel presented videotaped depositions from defendant's former friends and neighbors that contained explicit or implicit references to his possible parole. In the testimony in question, defense counsel inquired of the witnesses concerning their willingness to welcome defendant into their home or community if, following conviction, defendant served a number of years in prison and then was released and paroled. All of the witnesses indicated they would welcome defendant into their community or home.

We conclude that the thrust of the question posed to these witnesses dwelt upon defendant's purported good character and how out of character the killing was. The references to parole all occurred in the context of defendant's former friends and their unchanged favorable view of him following his conviction. We do not believe defense counsel acted unreasonably in eliciting this favorable testimony.

[9] In further support of his argument, defendant points out the trial court's refusal to allow him on voir dire to examine prospective jurors concerning their views on parole. We hold that the trial court did not err in refusing to allow the questioning of prospective jurors concerning their views on parole, as such questioning is irrelevant under the facts of this capital resentencing proceeding. *State v. McNeil*, 324 N.C. 33, 42-44, 375 S.E.2d 909, 915-16 (1989), *sentence vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991).

[10] Defendant next contends that his counsel provided ineffective representation by presenting evidence that defendant had received a death sentence in the first sentencing proceeding. During defendant's closing argument, counsel mentioned that defendant comes from a loving family and that during his first sentencing, the courtroom contained several family members, but due to financial considerations and other conflicts revolving around work, the same family members were unable to attend this resentencing. Counsel further argued:

> And [defendant's] mother had to sit here in the courtroom and listen to a judge impose a death penalty on her son. And so I suggest that it shouldn't surprise you that she's not here again.

Defendant contends that this mention of his previous sentence was prejudicial and tainted the jury's decision in this case. He argues that the jury was much more likely to impose a sentence of death knowing that a previous jury had recommended death.

We deem this argument a trial tactic to explain the absence of defendant's mother. *See State v. Richards*, 294 N.C. 474, 500, 242 S.E.2d 844, 860 (1978). In addition, mere knowledge by the jurors of the prior death sentence does not necessarily demonstrate prejudice to the defendant. *See State v. Simpson*, 331 N.C. 267, 271, 415 S.E.2d 351, 353-54 (1992). We conclude that defendant has failed to show that his counsel performed below an objective standard of reasonableness or that actual prejudice resulted.

[11] Defendant next assigns as error that his due process rights were violated when the prosecutor repeatedly emphasized future dangerousness and brutality during his closing argument. Defendant argues that the State was attempting to get around the fact that the aggravating circumstance "especially heinous, atrocious, or cruel," N.C.G.S. § 15A-2000(e)(9), could not be considered because, though submitted during the first trial, the first jury did not find that aggravating circumstance to exist.

During the closing remarks by the district attorney, only one objection was entered that centered around the argument concerning future dangerousness and brutality. The district attorney, apparently alluding to the number of stab wounds, stated: "When you get back there in the jury room—I mean, just moving your hand through the air, ladies and gentlemen, and coming down sixteen times, that takes awhile. How brutal—how brutal can he be?" Defense counsel objected, and the court overruled his objection.

Defendant also assigns error to portions of the district attorney's jury argument in which he explicitly or implicitly told the jury that defendant remains dangerous. Defendant contends that by arguing the brutal nature of the killing and that defendant is dangerous, the district attorney in effect was arguing an aggravating circumstance not listed in N.C.G.S. § 15A-2000(e).

In arguing to the jury, counsel are given wide latitude and may argue the facts in evidence, all reasonable inferences from those facts, and the relevant law. *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E.2d 629, 640 (1976). The standard of review for this Court, absent objection, is whether the argument is so grossly improper as to require the trial court to intervene *ex mero motu*. *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

As to the one objection that was made, we conclude that there was no error in overruling it. The district attorney's argument was based on testimony by the defendant's own witness, Dr. Royal, during cross-examination. The district attorney asked Dr. Royal if it was his opinion that if "a uniformed police officer had been standing there outside there at that car when he was doing the stabbing sixteen times that he would have continued to do it," and Dr. Royal testified "yes." When next asked, "Well, doctor, if somebody would stab a person sixteen times with a uniformed police officer standing there, would you say, sir, that that person is dangerous?" Dr. Royal answered, "I would think so, yes." Based on this testimony, the district attorney merely argued to the jury the evidence presented at the trial.

Further, when reviewing the aggravating and mitigating circumstances for the jury, the district attorney plainly stated that there was only one aggravating circumstance for its consideration—pecuniary gain. N.C.G.S. § 15A-2000(e)(6) (1988). The trial court instructed on, and submitted for the jury's consideration, only the pecuniary gain aggravating circumstance. Neither the district attorney nor the trial court ever mentioned the especially heinous, atrocious, or cruel aggravator. Under these circumstances, we conclude that it was clear to the jury that pecuniary gain constituted the sole aggravating circumstance upon which it could return a sentence of death and that defendant suffered no undue prejudice by the prosecutor's mention of brutality or future dangerousness. *See State v. Brown*, 320 N.C. 179, 198-99, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

[12] Defendant also assigns error to what he contends were various misstatements of law and fact by the district attorney during closing arguments. Defendant argues that the district attorney implied that the mere fact that defendant committed a murder justified a death sentence. In support of his position, defendant cites *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976), for the proposition that there can be no mandatory death sentence; the jury must consider all the circumstances of the case and the character of the defendant before deciding on the death penalty. Defendant contends that the jury was not able to follow the law correctly because the district attorney in his argument asked rhetorical questions of the jury, such as, "Can you say he doesn't deserve the same thing that he imposed?" Later in his argument, the district attorney rhetorically asked, "Do you think that he deserves any less for what he did now that he's had a fair trial than the sentence that he imposed and should he get any less than that?" We conclude that this argument was not so grossly improper as to require the trial court to intervene *ex mero motu*.

[13] Defendant also argues that the district attorney improperly suggested to the jury that it weigh the aggravating circumstance against the mitigating circumstances one on one and not consider the mitigating circumstances as a group as required by N.C.G.S. § 15A-2000(c). Defendant submits that the district attorney asked rhetorical questions of the jury about each of the mitigating circumstances. For instance, the district attorney stated that

> if you stab somebody sixteen times they're just as dead whether the person that's doing it is eighteen years old or seventy-five years old. . . .
>
> . . . .
>
> . . . [T]he fact that he's twenty-seven years old when this crime occurred—I guess he's thirty-one now—that has nothing to do with whether or not he ought to get the death penalty.

We conclude that, taking the argument in context, the district attorney did not argue improperly to the jury why it should not find various mitigating circumstances. His approach was to argue each mitigating circumstance separately. He explained that when viewing the mitigating and aggravating circumstances, it is not a "counting process," and he told the jury to weigh the aggravating circumstance against the mitigating circumstances. Further, the trial court correct-

ly charged the jury regarding the weighing process it was required to undertake when considering the aggravating circumstance and the mitigating circumstances.

[14] Defendant further contends that the district attorney improperly argued to the jury how it should view the mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6). The district attorney argued to the jury that it should not find this mitigating circumstance because defendant's own witness, Dr. Royal, testified that defendant knew what he was doing when he committed the murder. After careful review, we conclude that the argument went to the weight to be given this mitigating circumstance. It is for the jury to decide how much weight to give to each mitigating circumstance, and the district attorney may argue the evidence the jury should consider when determining whether to find a certain mitigating circumstance. *See State v. Laws*, 325 N.C. 81, 119, 381 S.E.2d 609, 632 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, — U.S. —, 116 L. Ed. 2d 174, *reh'g denied*, — U.S. —, 116 L. Ed. 2d 648 (1991).

[15] In addition, defendant argues that the district attorney misstated the testimony of Dr. Royal concerning the percentage of his clients that he determines have psychiatric problems. A review of the record shows that Dr. Royal testified that in his forensic work, ninety percent of the patients he examines have psychiatric problems. The district attorney, in his argument to the jury, stated that "Dr. Royal finds 90 percent of the people he examines [have] some kind of a psychiatric problem." We conclude that this misstatement of fact, if it can indeed be considered a misstatement, was harmless in light of the trial court's instruction to the jury that what counsel said was not evidence.

[16] Defendant further submits that the district attorney spoke of facts not in evidence when he stated that many of the organizations Dr. Royal belonged to are ones that require only a membership fee. After Dr. Royal admitted on cross-examination that he failed the examination for board certification as a forensic psychiatrist, defendant introduced testimony to show the various professional organizations of which Dr. Royal was a member.

As this Court held in *Brown*, 320 N.C. at 204-05, 358 S.E.2d at 18-19, the prosecutor may note the failure to produce evidence. Thus, we

conclude that the district attorney properly drew the jurors' attention to the failure to establish any membership qualifications for these various professional organizations. We find no error in the district attorney's argument.

[17] Defendant further complains of the prosecutor's remark during closing arguments regarding the lack of evidence that defendant had admitted his involvement at an early stage in the proceedings or had cooperated with law enforcement officers. Specifically, the district attorney stated, "You haven't heard any evidence to support that." Defendant argues that he made an inculpatory statement to officers on 2 February 1989. Because no objection to the district attorney's statement was entered on the record, the gross impropriety standard is applied. *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761. After review of the record, we conclude that the argument was not grossly improper, and in any event, the trial court charged the jurors that closing statements do not constitute evidence and that they were required to decide the case only on the evidence.

[18] Defendant next contends that the district attorney improperly argued that the jury should decline to find the no history of violent behavior mitigator because of Dr. Royal's testimony concerning defendant's prior violent incident in Massachusetts. Specifically, the prosecutor argued that the jury should refrain from finding defendant had "no history of violent behavior" by referring to Dr. Royal's testimony "that [defendant] had told him something about some conflict that he'd gotten into with somebody in Massachusetts" in which defendant "got out and slapped the boy." The trial court cautioned the jurors to consider the evidence only for the purpose of explaining or supporting Dr. Royal's opinion. The record contains no objection to this portion of the district attorney's argument. Review of the record discloses that the jury found the mitigating circumstance that defendant did not have a history of violent behavior; thus, we conclude that defendant suffered no prejudice.

[19] The last of the errors alleged to have occurred during the district attorney's closing argument is that the district attorney made improper references to Sergeant Clark. During the district attorney's closing remarks, he told the jurors that because the victim had not testified, they had heard only one side of the story. The district attorney then asked the jurors to consider what the victim would have said if he had been able to testify. We conclude that this argument was not so grossly improper as to warrant the trial court's intervention *ex mero motu*.

This assignment of error is overruled.

[20] Defendant next argues that the trial court improperly instructed the jury concerning the effect of the court's decision to take judicial notice of Title 38, Subchapter 3 of the United States Code, which provides servicemen's group life insurance coverage, and 10 U.S.C. § 1475, which provides a death gratuity payment. After reading both provisions to the jury, the trial court instructed the jury that the provisions of the United States Code are to be accepted as true by the jury. Defendant contends that the trial court should have instructed the jury in accordance with N.C.G.S. § 8C-1, Rule 201(g), which requires the trial court in a criminal case to "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Defendant contends that the failure to instruct the jury in accordance with Rule 201(g) impaired his chances of persuading the jury not to find the pecuniary gain aggravating circumstance.

During the trial, the district attorney asked the trial court to take judicial notice of two United States Code sections. After the court read these two federal laws to the jury, he instructed the jury that "I have taken judicial notice of certain laws regarding life insurance[] which I have read to you. These matters of which I have taken judicial notice, you will accept as true for the purpose of this trial." The State contends, and we agree, that the United States Code sections are not adjudicative facts. N.C.G.S. § 8-4 specifically provides that "[w]hen any question shall arise as to the law of the United States, . . . the court shall take notice of such law in the same manner as if the question arose under the law of this State." N.C.G.S. § 8-4 (1986). The trial court instructed the jury as to the federal law as it would have any state law and as required by statute. As the commentary to Rule 201 notes, the rule "deals only with judicial notice of 'adjudicative' facts." In the present case, the trial court properly took notice of and instructed upon federal law. This assignment of error is without merit.

[21] Defendant next contends that the trial court erred by failing to instruct the jurors concerning parole eligibility. Defendant argues that, because of the reference to parole in questions directed to character witnesses, the trial court should have given the requested instruction. We conclude that the trial court properly declined to so instruct the jurors.

As previously noted, during videotaped testimony defense counsel posed questions to several witnesses regarding whether they

would welcome defendant back into their homes or community if he was later "paroled" or "released." Several character witnesses testified that defendant would be welcomed back into the community if he received a life sentence and was later released. However, neither the State nor defendant at any time argued parole eligibility as a consideration in the capital sentencing determination.

We conclude that these references to parole, in the context of evidence of defendant's good character, did not influence the jury during deliberation as to the appropriate sentence. The lengthy instruction that defendant submits the trial court should have given would have brought greater attention to the parole issue. This Court has consistently held that the possibility of parole is not a relevant issue during jury selection, closing argument, or jury deliberation in a capital sentencing proceeding. *McNeil*, 324 N.C. at 44, 375 S.E.2d at 916; *State v. Robbins*, 319 N.C. 465, 518-19, 356 S.E.2d 279, 310-11, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); *State v. Jones*, 296 N.C. 495, 502-03, 251 S.E.2d 425, 429 (1979). We are advertent to the recent United States Supreme Court decision in *Simmons v. South Carolina*, —— U.S. ——, 129 L. Ed. 2d 133 (1994), which held it error to refuse to give a proposed instruction that under state law the defendant was ineligible for parole, especially in view of the State's reference in its jury argument to the defendant's future dangerousness. We do not consider that case controlling here because defendant here, if given a life sentence, would eventually have been eligible for parole under North Carolina law. *See* N.C.G.S. § 15A-1371(a1) (1988). We conclude that this assignment of error is without merit.

[22] Defendant next contends that the trial court erred by submitting the pecuniary gain aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(6). He argues that there was insufficient evidence to show that defendant's motive to kill the victim was to share in the proceeds of the victim's insurance. We reject this contention. Taken in the light most favorable to the State, the evidence is sufficient to show that defendant knew of the insurance covering the victim's life. *See State v. Stanley*, 310 N.C. 332, 339, 312 S.E.2d 393, 397 (1984). At the time of the stabbing, Glennie Clark carried a group insurance policy on his life in the amount of $50,000, with the death benefits payable to the beneficiary, Bonnie Sue Clark. Defendant, in his testimony during the sentencing proceeding of his initial trial, which was read into evidence at resentencing, testified that the insurance "would have been ours," referring to himself and Bonnie Sue Clark. When asked if he believed he would receive some of the insurance

money if Bonnie Sue Clark were to receive it, defendant responded "yes." After the stabbing, an insurance paper with Glennie Clark as the named insured and Bonnie Sue Clark as the beneficiary was found in a room shared by Bonnie Sue Clark and defendant. Defendant testified that prior to the murder, he had to borrow $400.00 to meet his expenses. There was also evidence that defendant told several people he would be receiving a large sum of money soon. Considering the totality of the evidence, there are ample facts to support the conclusion that defendant's motive for the murder was pecuniary gain. We thus conclude that the trial court did not err in submitting pecuniary gain as a possible aggravating circumstance.

[23] Defendant next argues that the trial court improperly instructed the jury on this aggravating circumstance. He submits that the instruction had the effect of permitting the jury to find pecuniary gain even if it determined that defendant did not kill Glennie Clark for the express purpose of obtaining the insurance money. Defendant asserts that the mere expectation of a particular result does not constitute a motive for the act which produces that result.

There was no objection to the instruction. Accordingly, our review is for plain error. *State v. Bronson*, 333 N.C. 67, 78, 423 S.E.2d 772, 778 (1992); *State v. Jeune*, 332 N.C. 424, 436, 420 S.E.2d 406, 413 (1992). "[T]o reach the level of 'plain error' . . ., the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *Collins*, 334 N.C. at 62, 431 S.E.2d at 193 (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

We decline to find plain error on two different grounds. First, the trial court instructed the jury in part as follows:

> This aggravating circumstance examines the motive of the defendant rather than his acts.
>
> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim the defendant expected to share in the life insurance proceeds on the life of the victim, you would find this aggravating circumstance, and would so indicate by having your foreperson to write "yes" in the space after this aggravating circumstance on the Issues and Recommendation Form where you see the place for answer.

Except for the sentence "the defendant expected to share in the life insurance proceeds on the life of the victim," the instruction is in accordance with the North Carolina Pattern Jury Instructions. N.C.P.I.—Crim. 150.10 (1992). The trial court added clarity to the pattern instruction by emphasizing motivation for the murder when it charged the jury: "This aggravating circumstance examines the motive of the defendant rather than his acts." The instruction, taken as a whole, does not suggest to the jury that it could find the aggravating circumstance merely based on an *expectation* of receiving money.

In addition, the wording of the issues and recommendation form further supports our conclusion that the trial court did not commit plain error in its instruction. On the issues and recommendation form, the issue regarding the pecuniary gain factor was stated, "Was this murder committed for pecuniary gain?" The jury indicated on the form that the motivation and purpose of the murder was pecuniary gain; therefore, the jury found that defendant killed Glennie Clark in order to benefit from the insurance proceeds. This assignment of error is overruled.

[24] In his next assignment of error, defendant contends the trial court erred in refusing to submit the statutory mitigating circumstance that he aided in the apprehension of another capital felon. N.C.G.S. § 15A-2000(f)(8). Defendant argues that the record shows that he made statements to law enforcement officers which aided them in the apprehension of Bonnie Sue Clark. In the first sentencing proceeding, the trial court failed to submit this mitigating circumstance, and we remanded for a new sentencing proceeding for this reason. In *Bacon I*, this Court held that any reasonable doubt about the submission of a mitigating circumstance must be resolved in defendant's favor. *Bacon I*, 326 N.C. at 418, 390 S.E.2d at 335-36. We conclude that in the second sentencing, the trial court properly found that no reasonable doubt existed that the aiding in apprehension mitigating circumstance should not be submitted, and thus it did not err in refusing to submit this circumstance.

Much of the evidence presented at defendant's first sentencing proceeding which tended to show that defendant aided investigators in apprehending Clark was not introduced by either the State or defendant in the second sentencing proceeding. There was no evidence presented of statements by Bonnie Sue Clark after she was taken to the hospital. Nor was there evidence of any of defendant's

statements other than his own in-court testimony at the original sentencing proceeding. What the record in the second sentencing proceeding does contain is defendant's testimony during the first sentencing proceeding in which he acknowledged that the insurance money would have been his and Clark's. Also in the record is the State's cross-examination of defendant during the original sentencing proceeding in which he recounted to police officers his conversation with Bonnie Sue Clark about why he did not kill Sergeant Clark on Saturday night. He told her he did not kill Sergeant Clark on Saturday night because there were too many police officers in the area. No evidence before the second jury showed the exact timing of defendant's statements or their relation to the custodial status of Clark. In contrast to the first sentencing proceeding, here the State introduced less testimony, and defendant decided not to include additional evidence that might have required submission of this mitigating circumstance.

We conclude that there was insufficient evidence to support a reasonable finding by the jury that defendant aided in Bonnie Sue Clark's apprehension, and the trial court thus did not err in refusing to submit this mitigating circumstance.

[25] Defendant next contends the trial court erred in its jury instructions on the mental or emotional disturbance mitigating circumstance, N.C.G.S. § 15A-2000(f)(2), and the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6). Defendant, relying on *State v. Johnson*, 298 N.C. 47, 68-70, 257 S.E.2d 597, 613-14 (1979), argues that the trial court must instruct the jury in such a manner as to permit an adequate understanding of the (f)(2) and (f)(6) statutory mitigating circumstances. Thus, defendant asserts that the trial court should have included in its instruction the evidence of the relationship between defendant and Bonnie Sue Clark. In addition, defendant submits that the trial court should have included in its instruction Dr. Royal's testimony regarding defendant's psychological makeup, conjoined with the needs of Bonnie Sue Clark and that of their relationship. Because defendant did not object to this instruction at trial, any defect must rise to the level of plain error for defendant to be entitled to relief.

The trial court charged the jury in accordance with the Pattern Jury Instruction. *See* N.C.P.I.—Crim. 150.10. Our statutory and case law do not require a court to recapitulate the evidence presented at trial. N.C.G.S. § 15A-1232 (1988); *State v. Adcox*, 303 N.C. 133, 140, 277 S.E.2d 398, 402 (1981). It is for the jury to consider the evidence

it has heard during the course of the sentencing proceeding. We conclude that the trial court properly instructed the jury on the impaired capacity and the mental or emotional disturbance circumstances. This assignment of error is without merit.

[26] Defendant next assigns as error the trial court's instruction to the jurors concerning their duty to consider the submitted aggravating circumstance, the mitigating circumstances, and the process of weighing the circumstances in arriving at a sentencing recommendation. He contends that the charge improperly emphasized the pecuniary gain aggravating circumstance. Defendant did not object before or after the instructions, so review is under the plain error standard.

Defendant's arguments were recently addressed and rejected in *State v. Price*, 326 N.C. 56, 88-90, 388 S.E.2d 84, 102, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888 (1994). Because defendant presents no arguments demonstrating that the trial court failed to comply with well-established law, we conclude that this assignment of error is without merit.

[27] By his next assignment, defendant contends the trial court erred in refusing to instruct the jury "that you are entitled to base your verdict upon any sympathy or mercy you may have for the Defendant that arises from the evidence presented in this case." This proposed instruction arises from *California v. Brown*, 479 U.S. 538, 93 L. Ed. 2d 934 (1987), which held that sympathy instructions are not prohibited under the federal Constitution. For the reasons stated in *State v. Hill*, 331 N.C. 387, 420-21, 417 S.E.2d 765, 782-83 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993), we conclude that the trial court did not err in refusing to give the instruction.

PRESERVATION ISSUES

[28-39] Defendant raises eleven additional issues which he concedes have been decided against him by this Court: (1) the trial court erred in refusing to permit defendant to ask prospective jurors whether they possessed any misconceptions concerning the parole eligibility of persons convicted of first-degree murder; (2) the trial court erred in allowing the prosecutor to make a specific deterrence argument; (3) the trial court erred in refusing to allow defendant's trial counsel

to rehabilitate prospective jurors during the "death qualification" process; (4) the trial court erred in allowing the State to peremptorily challenge jurors who, although not subject to a challenge for cause, expressed reservations about the imposition of capital punishment; (5) the trial court erred in sustaining the State's peremptory challenge of prospective juror Ray Toudle; (6) the trial court erred in allowing prospective juror Connie Williams to enter the jury room at a time when it could still have been occupied by other prospective jurors; (7) the trial court erred in sustaining the State's challenge for cause to prospective juror Betty Fuller; (8) the trial court erred in permitting Ms. Rosser to testify that she found an "insurance paper" among Ms. Clark's effects after the murder, listing Ms. Clark as the primary beneficiary; (9) the trial court erred in instructing the jury that, before it could find the existence of a nonstatutory mitigating circumstance, it must first find that circumstance to have mitigating value; (10) the trial court erred in submitting as an aggravating circumstance that "this murder [was] committed for pecuniary gain"; and (11) the trial court erred in imposing the death penalty upon defendant on the grounds that the trial court's judgment sentencing defendant to death contravened the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution.

We have considered defendant's arguments on these issues, and we find no compelling reasons to depart from our prior holdings. These assignments of error are overruled.

[40] One additional issue that defendant does not concede we have previously addressed is that the trial court committed prejudicial error by permitting the State to offer into evidence at defendant's resentencing the testimony of Lieutenant Charles Bilderback and Ms. Rosser from defendant's first trial. Defendant contends that the State did not provide sufficient evidence to show that these two witnesses were unavailable at his second sentencing proceeding. The State contends, and we agree, that the evidence was sufficient. Under *State v. Grier*, 314 N.C. 59, 68, 331 S.E.2d 669, 675-76 (1985), all that is required is a good faith effort to locate the witness, and the State provided ample evidence of its unsuccessful efforts to find the two witnesses. This assignment of error is overruled.

PROPORTIONALITY REVIEW

[41] Having found in *Bacon I* no error in the guilt-innocence phase, and herein no error in the resentencing phase of defendant's capital

trial, we are required by statute to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *Robbins*, 319 N.C. at 526, 356 S.E.2d at 315.[2]

We have held that the record supports the jury's finding of the single aggravating circumstance that the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6). We further conclude that nothing in the record suggests that the jury sentenced defendant to death under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review and "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 354 S.E.2d 373 (1988). 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, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988), and to serve 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 comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

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2. On 22 December 1992, Judge D. B. Herring, Jr., in Superior Court, Durham County, granted defendant Robbins a new sentencing proceeding as a result of ineffective assistance by his trial counsel. We cite *Robbins* only for the manner in which we review the issue of proportionality.

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).[3] The pool "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 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 defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). This Court, however, does not "attempt to employ mathematical or statistical models . . . ." *Williams*, 308 N.C. at 80, 301 S.E.2d at 355. Nor does this Court "feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison." *Id.* at 81, 301 S.E.2d at 356. "In the final analysis . . . , we will rely upon our own case reports in the 'similar cases' forming the pool of cases which we have indicated we use for comparison purposes." *Id.*

> In making the comparison, the Court does not simply engage in rebalancing the aggravating and mitigating factors; rather, it is obligated to scour the entire record for all the circumstances of the case sub judice and the manner in which the defendant committed the crime, as well as defendant's character, background, and physical and mental condition.

State v. McLaughlin, 323 N.C. 68, 109, 372 S.E.2d 49, 75 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *see also State v. Roper*, 328 N.C. 337, 371-73, 402 S.E.2d 600,

3. The Fourth Circuit Court of Appeals subsequently granted defendant Williams a new sentencing proceeding for retroactive *McKoy* review. *Williams v. Dixon*, 961 F.2d 448 (4th Cir.), *cert. denied*, — U.S. —, 121 L. Ed. 2d 445 (1992). At resentencing, defendant received a sentence of life imprisonment. We cite *Williams* only for the manner in which we review the issue of proportionality.

620-21 (discussing process of proportionality review), *cert. denied*, ——U.S. ——, 116 L. Ed. 2d 232 (1991); *State v. Artis*, 325 N.C. 278, 337-38, 384 S.E.2d 470, 505 (1989) (same), *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).

[42] We take this opportunity to clarify that the composition of the "proportionality pool" reflects post-conviction relief awarded to death-sentenced defendants. A death-sentenced defendant may seek post-conviction review in both state and federal court.[4] There is no difference in principle between an appellate reversal and a post-conviction order granting relief to a convicted first-degree murderer. In both instances, a court of competent jurisdiction has held that the underlying trial or sentencing proceeding was infected with prejudicial error. As we have heretofore stated:

> [P]roportionality review is to be undertaken "only in cases where both phases of the trial of a defendant have been found to be without error. Only then can we have before us the true decision of the jury to which we feel great deference should be accorded." It would be incongruous for us to compare the facts of the present case with those of cases in which prejudicial error has been found.

Jackson, 309 N.C. at 45, 305 S.E.2d at 717 (quoting *State v. Goodman*, 298 N.C. 1, 35, 257 S.E.2d 569, 591 (1979)). Any other result would bias the proportionality review process.[5]

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4. State post-conviction review is initiated when the defendant files a motion for appropriate relief pursuant to N.C.G.S. § 15A-1411. "A motion for appropriate relief, whether made before or after the entry of judgment, is a motion in the original cause and not a new proceeding." N.C.G.S. § 15A-1411(b) (1988). Federal post-conviction review is initiated when the defendant petitions for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1992). Although "[t]he writ of habeas corpus is not a proceeding in the original criminal prosecution but an independent civil suit," *Riddle v. Dyche*, 262 U.S. 333, 333-36, 67 L. Ed. 1009, 1011 (1923), federal habeas corpus proceedings provide " 'a bulwark against convictions that violate "fundamental fairness." ' " *Brecht v. Abrahamson*, 507 U.S. ——, ——, 123 L. Ed. 2d 353, 370 (quoting *Engle v. Isaac*, 456 U.S. 107, 126, 71 L. Ed. 2d 783, 799 (1982), *reh'g denied*, —— U.S. —— , 124 L. Ed. 2d 698 (1993)).

5. If this Court, for example, were to remove cases in which convicted first-degree murderers receive relief in subsequent post-conviction proceedings from the pool entirely, the only cases which ever re-entered the pool would be the subset thereof which resulted in new murder convictions (where a new trial had been ordered) or new death sentences (where a new sentencing proceeding only had been ordered). This result would bias the proportionality review process in favor of death sentences.

Because the "proportionality pool" is limited to cases involving first-degree murder convictions, a post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is acquitted or found guilty of a lesser included offense results in the removal of that case from the "pool." When a post-conviction proceeding results in a new capital trial or sentencing proceeding, which, in turn, results in a life sentence for a "death-eligible" defendant, the case is treated as a "life" case for purposes of proportionality review. The case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated. Finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing proceeding ordered in a post-conviction proceeding, which sentence is subsequently affirmed by this Court, is treated as a "death-affirmed" case.[6]

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6. There are certain timing issues that we have resolved following certain basic principles, *viz*, that a conviction and death sentence affirmed on direct appeal is presumed to be without error, and that a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies. Application of those rules requires, for example, that the decision in *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), be considered outside the "proportionality pool" because this Court has not yet affirmed the death sentence which the defendant received at the resentencing proceeding ordered by Judge I. Beverly Lake, Jr., in Superior Court, Duplin County, on 7 December 1990. The decision in *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 206 (1980), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d 220, *reh'g denied*, 451 U.S. 1012, 68 L. Ed. 2d 865 (1981), is excluded from the "pool" entirely because the defendant entered a negotiated plea to second-degree murder following the decision in *McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033, 103 L. Ed. 2d 230 (1989). The decision in *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985), is treated as a "death-affirmed" case because the order entered by Judge James B. McMillan on 3 December 1992, in *Noland v. Dixon*, 831 F. Supp. 490 (W.D.N.C. 1993), has not been reviewed on appeal. The decision 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), is currently outside the "pool" because the State has not sought appellate review of the order entered by Judge D. B. Herring, Jr., in Superior Court, Durham County, on 22 December 1992, requiring that defendant be resentenced. The decision in *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), is considered as a "death-affirmed" case for purposes of proportionality review because the United States Court of Appeals for the Fourth Circuit in *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994) has reversed the order entered by Judge W. Earl Britt in *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991). The decision in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983), is treated as a "life" case because defendant was sentenced to life imprisonment following the decision in *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992). The decision in *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 870, 93

This case involves a cold, calculated, unprovoked killing, committed for the purpose of collecting life insurance proceeds. The combined total of the insurance policies on Sergeant Clark's life, of which Bonnie Sue Clark was the beneficiary, was $130,000. Weeks prior to the 1 February 1987 killing, defendant boasted to several people that he would soon receive a large inheritance. Defendant told law enforcement officers that the insurance money was to be "ours," referring to himself and Bonnie Sue Clark.

Defendant and Bonnie Sue Clark had planned that defendant kill the victim on 31 January 1987, but defendant "chickened out" when it came time to execute the plan. The next night, defendant was in the back seat of Bonnie Sue Clark's Pontiac Sunbird when she went to pick up the victim to go to the movies. While driving through Jacksonville, defendant reached from behind the seat and stabbed Glennie Clark sixteen times with a knife defendant had earlier placed on the rear floor of the car. The three most serious wounds consisted of a wound to the chest and two to the abdominal cavity. The cause of death was the stab wound to the chest, which penetrated the heart. Bonnie Sue Clark then drove to the parking lot of the Cinema Six theater on Western Boulevard and asked defendant what to do. Defendant replied that he would hit her head against the window and when somebody came by she should tell them that someone tried to rob them. Defendant then hit Bonnie Sue Clark's head against the window, got into his car that he had earlier parked at the theater, and went home. Upon arriving at his home, he showered, changed clothes, and had a drink.

A taxicab driver noticed Bonnie Sue Clark slumped over the steering wheel; when he checked on her, he found the victim's body lying between the seats of the Sunbird. Officer J. J. Phillips of the Jacksonville Police Department arrived shortly thereafter and observed the pool of blood beneath the victim's body, and Bonnie Sue Clark, who was still slumped over the steering wheel in what later

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L. Ed. 2d 166 (1986), is treated as a "life" case because defendant was sentenced to life imprisonment at the resentencing proceeding ordered by Judge George M. Fountain in Superior Court, Onslow County, on 7 December 1988. The decision in *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989), is treated as a "life" case because defendant was sentenced to life imprisonment at the resentencing proceeding ordered by this Court upon remand for reconsideration for possible *McKoy* error. *Quesinberry v. North Carolina*, 494 U.S. 1072, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991). The decision in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), is treated as a "life" case because defendant was sentenced to life imprisonment at the resentencing proceeding ordered by this Court in that appeal.

We emphasize that this list is not exhaustive.

proved to be a faked robbery. Although the victim's estranged spouse, Bonnie Sue Clark, was living, as well as sleeping, with defendant, the love triangle was never a part of the reason for the killing. Defendant admitted that he had no romantic interest in Bonnie Sue Clark.

The jury found the only aggravating circumstance submitted—that the murder was committed for pecuniary gain. It found nine mitigating circumstances—that the initial idea for the plan that resulted in the murder was Bonnie Sue Clark's, and that defendant: had no significant history of prior criminal activity; acted under the domination of another person; had no history of violent behavior; had character, habits, mentality, propensities and activities indicating that he is unlikely to commit another violent crime; had committed the murder as the result of circumstances unlikely to recur; had established that his co-defendant, Bonnie Sue Clark, had received a life sentence; had shown remorse since his arrest; and had a family who loved him, continued to visit him while he has been incarcerated, and would continue to do so if he were sentenced to life in prison.

Defendant contends that the reported decisions involving only the "pecuniary gain" aggravating circumstance indicate that his death sentence is disproportionate. In all but two of the fourteen cases, the jury imposed a sentence of life imprisonment. The life cases are: *Stager*, 329 N.C. 278, 406 S.E.2d 876;[7] *State v. Weddington*, 329 N.C. 202, 404 S.E.2d 671 (1991); *State v. Payne*, 327 N.C. 194, 393 S.E.2d 158 (1990); *Quesinberry*, 325 N.C. 125, 381 S.E.2d 681; *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988); *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988); *State v. Hogan*, 321 N.C. 719, 365 S.E.2d 289 (1988); *State v. Baugess*, 310 N.C. 259, 311 S.E.2d 248 (1984); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *State v. Hawkins*, 302 N.C. 364, 275 S.E.2d 172 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E.2d 242 (1980); *State v. Weimer*, 300 N.C. 642, 268 S.E.2d 216 (1980). In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 541 (1988), and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), this Court held the death sentences disproportionate.

"[T]he 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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (1994). This Court independently considers "the individual defendant and the nature of the crime or crimes

7. In *Stager* and *Quesinberry*, 325 N.C. 125, 381 S.E.2d, subsequent resentencing proceedings ordered by this Court resulted in the imposition of life sentences.

which he has committed." *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. 1189, 74 L. Ed. 2d 1031 (1983), *overruled in part on other grounds*, *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). Further, the single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence.[8]

The facts and circumstances of the twelve life cases cited above distinguish them from the present case. Five involved convenience store robbery-murders. *Locklear*, 322 N.C. 349, 368 S.E.2d 377; *Hogan*, 321 N.C. 719, 365 S.E.2d 289; *Baugess*, 310 N.C. 259, 311 S.E.2d 248; *Moore*, 301 N.C. 262, 271 S.E.2d 242; *Weimer*, 300 N.C. 642, 268 S.E.2d 216. In *Murphy*, the defendant robbed and killed his victim, for whom he had done odd jobs. *Murphy*, 321 N.C. at 739, 365 S.E.2d at 616. In *Hawkins*, the defendant killed a person he had met at a fair and pocketed $60 to $80. *Hawkins*, 302 N.C. at 365, 275 S.E.2d at 173. None of these murders were as pre-planned, cold, and calculating as that in the present case.

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8. This Court has affirmed death sentences based on four of the eleven aggravating circumstances when only one aggravating circumstance was submitted to and found by the jury. Those four aggravating circumstances are:

(1) N.C.G.S. § 15A-2000(e)(3): "The defendant had been previously convicted of a felony involving the use or threat of violence to the person." *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1.

(2) N.C.G.S. § 15A-2000(e)(5): "The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb." *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898 (1987) (while engaging in the felony of first-degree rape).

(3) N.C.G.S. § 15A-2000(e)(9): "The capital felony was especially heinous, atrocious, or cruel." *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. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985); *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).

(4) N.C.G.S. § 15A-2000(e)(11): "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983).

In *Payne*, the defendant consistently maintained that he had planned to shoot his wife until shortly before the gun fired, but that the gun truly did fire accidentally. *Payne*, 327 N.C. at 197, 393 S.E.2d at 159. In *Woods*, the defendant conspired with her lover to kill her husband. The lover shot the defendant's husband one morning when the husband walked out the front door to go to work. *Woods*, 307 N.C. at 216, 297 S.E.2d at 576. The jury convicted the defendant as an accessory before the fact, in contrast to the defendant in the present case, who actually perpetrated the crime. *Id.* at 217-18, 297 S.E.2d at 577. In *Stager*, the defendant shot her husband while he slept in their bed, and claimed that the gun discharged accidentally. *Stager*, 329 N.C. at 285-86, 406 S.E.2d at 880. The jury found that she committed the murder for pecuniary gain. The jury also found numerous mitigating circumstances, including that: the defendant had no significant history of prior criminal activity, like the defendant in the present case; she had no criminal record; she had reared two fine children; she was an active and helpful church member; she was gainfully employed throughout most of her adult life; she had attempted to lead a Christian life since childhood and had continued her Christian beliefs and practices since incarceration; she had cooperated with law enforcement officials in their investigation and willingly complied with all their requests; and she was remorseful, like the defendant in the present case. Although factually similar in some respects, none of these cases are characterized by the viciousness and brutality of the murder in the present case.

Defendant further contends that this case more closely resembles those in which this Court has found the death sentence disproportionate than those involving brutal, multiple killings by persons with extensive criminal records in which this Court has allowed death sentences to stand. Three were robbery-murders and involved the pecuniary gain aggravating circumstance. *State v. Benson*, 323 N.C. 318, 373 S.E.2d 517 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). One involved the course of conduct aggravating circumstance. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). 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). One involved the circumstance that the murder was committed against a law enforcement

officer in the performance of his official duty. *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984). None are similar to the present case.

In *Benson*, the defendant confronted the victim and demanded his moneybag. The victim hesitated and the defendant fired his shotgun, striking the victim in the upper portion of both legs; the victim later died in the hospital of cardiac arrest resulting from the loss of blood from the gunshot wounds. *Benson*, 323 N.C. at 321, 372 S.E.2d at 518. This Court found the death penalty disproportionate because the defendant was convicted solely on the theory of felony murder and the evidence that he fired at the victim's legs tended to show that he intended only to rob the victim. The jury found only the pecuniary gain aggravating circumstance, but found as mitigating circumstances that defendant was under the influence of mental or emotional disturbance, as well as, like in the present case, that defendant had no significant history of prior criminal activity. *Id.* at 328, 372 S.E.2d at 522. Further, the defendant confessed and cooperated upon arrest, pleaded guilty during the trial, and acknowledged his wrongdoing before the jury. *Id.* at 328-29, 372 S.E.2d at 522-23. In the present case, by contrast, defendant planned the murder weeks prior to the killing to collect a share of the victim's insurance proceeds.

In *Young*, the defendant, who had been drinking heavily all day, suggested to two accomplices that they rob and kill the victim so they could buy more liquor. *Young*, 312 N.C. at 672-73, 325 S.E.2d at 184. In *Rogers*, the defendant mistakenly shot the victim while attempting to shoot the victim's friend, with whom he had been arguing. *Rogers*, 316 N.C. at 211, 341 S.E.2d at 718. In *Jackson*, the defendant asked the victim for a ride to get some jumper cables. The next time the victim was seen, he was dead, shot twice in the head with a small-caliber weapon at close range. *Jackson*, 309 N.C. at 46, 305 S.E.2d at 717. In *Hill*, defendant shot a police officer at close range with the officer's own weapon. The officer had approached defendant, who was looking for a young woman in the neighborhood; defendant ran, and the officer pursued and tackled him. *Hill*, 311 N.C. at 467-68, 319 S.E.2d at 165. This Court found the death penalty disproportionate, citing "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." *Id.* at 479, 319 S.E.2d at 172. In the present case, by contrast, defendant planned to murder the victim weeks prior to the

actual crime, plotted to entice the victim to the front seat of Ms. Clark's car for the killing, stabbed the victim sixteen times, and then set the stage for a botched robbery attempt, all for half the proceeds of the victim's insurance policies. The murders in *Young*, *Jackson*, *Rogers*, and *Hill* were not coldly calculated over a lengthy period of time and viciously executed, as was the murder of Sergeant Clark.

In *Bondurant*, the defendant pointed the gun at the victim, taunted him for two or three minutes, and shot him. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. This Court "deem[ed] it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. Defendant then entered the hospital to seek medical assistance for the victim. Further, defendant spoke with police at the hospital, confessing that he had fired the shot that killed the victim. *Id.* In the present case, by contrast, defendant stabbed the victim sixteen times, returned the car to the parking lot with the victim draped over defendant's legs, faked a robbery, returned home, showered, and had a drink, rather than securing immediate medical attention for the victim.

In *Stokes*, the defendant and two accomplices planned to rob the victim's warehouse. During the robbery one of the three severely beat the victim about the head, killing him. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. This Court deemed it important that the defendant was only seventeen. The jury found, in contrast to the present case, that defendant suffered from an impaired capacity to appreciate the criminality of his conduct, that he was under the influence of a mental or emotional disturbance at the time of the murder, and that his age at the time of the crime had mitigating value.[9] *Stokes* involved a robbery-murder. The defendant was convicted on the theory of felony murder; there was virtually no evidence of premeditation and deliberation, in contrast to the present case, and no evidence that the defendant was the ringleader or deserved a death sentence any more than an older accomplice who received a life sentence. *Id.* at 21, 24, 352 S.E.2d at 664, 666. Both of these defendants carried sticks to the scene of the crime and struck the blows that resulted in the victim's death. "Both committed the same crime in the same manner." *Id.* at 21, 352 S.E.2d at 663. By contrast, defendant hid a knife on the floor in the rear of Ms. Clark's car. Ms. Clark got into the driver's seat; defendant was in

9. Because the jury found the existence of "one or more" mitigating circumstances, the Court assumed their existence for proportionality review. *Id.* at 21, 352 S.E.2d at 664.

the back seat. While riding around, defendant reached down to the floorboard, picked up the knife, and proceeded to stab the victim sixteen times. Ms. Clark then drove to the theater, where she and defendant staged the fake robbery. Although Ms. Clark received only a life sentence, she and defendant did not commit "the same crime in the same manner."

Defendant contends there are two other cases in the pool in which the jury recommended a life sentence which are most similar to the present case, that of his co-defendant, Bonnie Sue Clark, *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), and *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

In *Gladden*, the defendant was having an affair with the victim's wife at the time of the murder. Six months prior to the actual murder, defendant attempted to hire someone to kill the victim. When this failed, defendant planned and participated in a scheme with the victim's wife whereby they lured the victim to a secluded area by telling the victim that his wife's car had broken down. There the defendant slashed the victim's throat, shot him twice, dragged him into a ditch, and then shot him two more times in the face. After the attack, the defendant went back to his apartment, changed clothes, and returned to the scene. He dragged the victim's body into the woods and took the victim's wallet and watch to make it appear as though a robbery had occurred. *Gladden*, 315 N.C. at 404-06, 340 S.E.2d at 677-79.

While *Gladden* is similar to the present case—for example, both victims were Marine noncommissioned officers, and both defendants planned the murders, in advance, with their lovers—the distinguishing circumstance is that the defendant in *Gladden*, unlike defendant here, did not commit the murder for pecuniary gain.[10] Rather, he was apparently motivated by reports of continuing physical abuse against his lover by her husband and by threats by her husband that he would kill both his wife and the defendant.

Defendant contends that the same essential facts as those in the present case resulted in a sentence of life imprisonment for Ms. Clark. In a similar situation, defendant contends, this Court found a death sentence disproportionate. *Stokes*, 319 N.C. 1, 352 S.E.2d 653. Although defendant actually inflicted the blows which resulted in

10. At the resentencing proceeding granted the defendant in *Gladden* because his trial counsel had rendered him ineffective assistance, the jury failed unanimously to find the existence of *any* aggravating circumstance and recommended a sentence of life imprisonment.

Sergeant Clark's death, Ms. Clark initially suggested the killing and was a full participant in the events leading up to Sergeant Clark's death, having lured him from the safety of his apartment into her vehicle, driven the automobile during and after the stabbing, and attempted to divert law enforcement officers from the truth after the discovery of Sergeant Clark's body. The sentencing jury found that defendant "acted under the domination" of Ms. Clark, and that the "initial idea for the plan that resulted in the death of the deceased was that of the co-defendant, Bonnie Sue Clark." These facts, defendant contends, demonstrate the excessiveness of his death sentence.

Defendant, however, was the only one who wielded the knife, and he, not Ms. Clark, brutally stabbed Sergeant Clark sixteen times. Further, the *Clark* jury found Ms. Clark guilty as an aider and abettor, whereas defendant was found guilty on the basis of malice, premeditation, and deliberation as the actual wielder of the knife. The *Clark* jury found that the murder was "especially heinous, atrocious, or cruel," but refused to find that the murder was committed for pecuniary gain. That jury found, unlike with defendant here, that Ms. Clark was mentally or emotionally disturbed at the time the crime was committed. Further, it found that all of Sergeant Clark's wounds were inflicted by Bacon, the defendant here; that Ms. Clark made an early confession about her involvement in the capital felony; that she was the mother of two small children and had the primary responsibility for rearing them; that she was vulnerable due to her sense of hopelessness and dependency; and that her involvement in the stabbing was the product of long-term abuse and emotional disturbance. Unlike Ms. Clark, defendant Bacon had no mitigating reasons for stabbing Sergeant Clark—a man he had never even met before the night of Sergeant Clark's death. These facts manifestly distinguish the conduct of the co-participants and justify their disparate sentences.

There is one very similar case in the pool in which the jury recommended a sentence of death after finding a single aggravating circumstance—*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 *Syriani*, the defendant accosted his estranged wife and stabbed her to death. Following the assault, the defendant walked calmly back to his van and drove to a nearby fire station, where he told a fireman he needed medical attention because he had been in a fight. *Syriani*, 333 N.C. at 359, 364, 428 S.E.2d at 121-22, 124. The jury found as the single aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." The jury

also found eight mitigating circumstances—that the crime was committed while the defendant was under the influence of mental or emotional disturbance; that he understood the severity of his conduct; that he had, since his incarceration, demonstrated an ability to abide by lawful authority; that he had a history of good work habits; that he had a history of being a good family provider; that he had been a person of good character or reputation in the community in which he lived; that he was reared in a different culture; and that he was aggravated by events following the issuance of an *ex parte* domestic violence order. *Id.* at 401, 428 S.E.2d at 146. This Court concluded that the sentence of death was not disproportionate based on evidence similar to that in the present case, including the nature of the killing, the lack of remorse or pity, and the defendant's cool actions after the murder. *Id.* at 401-06, 428 S.E.2d at 146-49. Further, in the present case defendant pre-planned and coldly calculated the brutal assault, all for half of the victim's rather meager insurance proceeds. Defendant was not found to be under the influence of a mental or emotional disturbance; the anger he felt at the racial slurs directed toward him by the victim does not rise to the level of the distress attendant upon the disintegration of the defendant's marriage in *Syriani*.

We conclude that the circumstances of *Gladden*, *Clark*, and the numerous cases cited by defendant in which the jury returned a life sentence, or in which this Court held the death sentences disproportionate, distinguish those cases from the present case; *Syriani* is the case in the pool most comparable to the present case. In light of *Syriani*, and of the especially calculating, vicious, and brutal nature of the offense here, we cannot say that the death sentence in this case was excessive or disproportionate, considering both the crime and the defendant.

We hold that the defendant received a fair sentencing proceeding, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. *Robbins*, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

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

Justice MEYER concurring in result.

I concur only in the result reached by the majority. I do not concur in the majority's new definition of the pool of cases employed by this Court in its proportionality review in death cases. The majority has added a category of cases not heretofore included, that is, cases in which this Court has not reviewed either or both the guilt-innocence phase or the capital sentencing proceeding—most of which not only have not been reported and thus not tracked in the citators (Shepard's, Insta-Cite, Auto-Cite, etc.), but which also, in some instances, might not have even been transcribed by the trial court reporter.

In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court noted that it would not engage in proportionality review until and unless it first finds both phases of a defendant's trial free from prejudicial error. The Court noted that "[o]nly then can we have before us the true decision of the jury to which we feel great deference should be accorded." *Id.* at 35, 257 S.E.2d at 590.

In *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), this Court defined the manner in which it would conduct proportionality review and defined the pool of cases it would consider in conducting such review. We first established the appropriate pool.

> In comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and *reviewed on direct appeal by this Court* and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E.2d at 355 (second emphasis added). Immediately thereafter, in *State v. Jackson*, we clarified our *Williams* holding and further limited the pool of cases to those cases in which this Court has found no error in both the guilt-innocence and sentencing phases. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983).

Until today, it has been quite clear to everyone that post-trial review by this Court of the trial court's final disposition of the case was the essential factor that qualified a case for inclusion in the pool. Under the majority's decision in this case, cases in which there is a

new sentencing hearing as a result of the direct appeal or post-conviction relief, in which the defendant receives a life sentence will be included in the pool, although there has been no review whatever by this Court of the new sentencing proceeding. The same is true for cases in which new trials are ordered and life sentences are entered automatically because either (1) no aggravating circumstance is found, or (2) the jury fails to find that the aggravating circumstance or circumstances found are sufficient, when compared to the mitigating circumstances found, to call for the imposition of the death penalty. In such cases, there will have been no capital sentencing proceeding, and furthermore, there will have been no review whatsoever of the guilt-innocence phase.

In such cases as these, there is no review of the new and final proceeding by this Court, and no record on appeal has been made up; indeed, the transcript of the proceeding may not have even been typed, and, of course, there is no formal reporting of the results in the citators. Such cases are of little or no value in performing a proper proportionality review.

The majority has, by its opinion in this case, included in the pool this new and totally unreliable category of cases that will make the pool more unwieldy, more unreliable, and even more difficult to use.

The problems with the new category of cases can be illustrated by reference to a particular case, specifically included in the pool by the majority opinion, which has a remarkably similar factual situation to the case at bar. The case is *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 870, 93 L. Ed. 2d 166 (1986), in which the defendant engaged in the brutal killing of a Marine sergeant. The jurors in the sentencing phase of Gladden's original trial found the only submitted aggravating circumstance, that the capital felony was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). The jurors found no mitigating circumstances and returned a recommendation that the defendant be sentenced to death.

This Court affirmed Gladden's death sentence. However, subsequent to the final disposition of Gladden's direct appeal by this Court and the denial of his petition for certiorari by the United States Supreme Court, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166, Gladden filed a motion for appropriate relief in the Superior Court, Onslow County, alleging, *inter alia*, ineffective assistance of his trial counsel during the sentencing phase of his orig-

inal trial. After an evidentiary hearing, the hearing judge found that Gladden's trial counsel, during the sentencing phase of the trial, was deficient to the extent that it prejudiced Gladden so seriously as to deprive him of a fair sentencing hearing and, on 7 December 1988, ordered a new capital sentencing proceeding. At the resentencing, the jury, having failed unanimously to find the existence of any aggravating circumstance, was not permitted to consider the death penalty and, as instructed, recommended a sentence of life imprisonment. On 2 November 1989, Gladden was sentenced to life imprisonment. Because the motion for appropriate relief was filed and disposed of in the Trial Division and was not the subject of any appeal or petition, the case did not again reach the Appellate Division, and the record of the filing and disposition of the motion does not appear in the published subsequent history of the case. This would be true even if the resentencing jury had been allowed to consider the death penalty but failed to recommend it. Having verified that Gladden's death sentence, previously affirmed by this Court, is, by reason of a post-conviction matter, no longer in effect, that he has subsequently been resentenced to life imprisonment, and that the resentencing proceeding has not been reviewed by this Court, *State v. Gladden* should not be included in our pool of cases for purposes of proportionality review.

This Court has not heretofore determined what treatment cases such as *Gladden* should receive in regard to their status in the pool of cases for proportionality review. If this Court affirms a death sentence and the United States Supreme Court denies a petition for certiorari in the case, it is no longer tracked in the citators unless, for some reason, it is again reviewed by a court in our Appellate Division or in the federal courts. If a subsequent motion for appropriate relief is filed and is either denied or allowed in our Trial Division, any number of possible results may follow, some of which would bring the case back to our Appellate Division but some of which, such as was the case with *Gladden*, would not. When the latter occurs and the subsequent history is not tracked in the citators, this Court is not aware of the results unless it makes an investigation of the matter,[1]

1. This Court has initiated procedures to discover such cases at the earliest possible time. We review on a monthly basis the list of inmates on death row to determine if an inmate has been removed. If an inmate has been removed, we investigate to determine whether it is by reason of some post-conviction relief granted in the Trial Division. If so, then the case is tracked for further development, and the case is deleted from the proportionality pool. We have also requested that the Warden of Central Prison (where all the death row inmates are housed) inform us when such an occur-

which, while difficult for the Court, is far more difficult for practicing attorneys unfamiliar with the case. Arguably, for this reason alone, cases like *Gladden* should not be included in our pool of cases for proportionality review purposes.

There are, however, other good and valid reasons not to include such cases in the pool. For a variety of reasons, retrials and new sentencing hearings are not mirror images of the original proceedings and frequently bear little resemblance to them. Witness dispersion and unavailability, a victim's reluctance or unwillingness to relive the experience of the trial, fading memories, lost evidence, and missing transcripts are just a few of the factors that account for the differences, particularly where the new trial or sentencing hearing occurs long and, in some cases, many years after the original trial. The evidence is often not the same and is often weaker.

The record in this very case demonstrates the point. Many of the State's witnesses in the first trial did not testify in the resentencing. Defendant procured substantial expert psychiatric testimony that was not presented at the first trial. Defendant presented a different picture of himself—one scarred by his poor upbringing in a dysfunctional family, a far different picture than he presented at the original trial. Though, here, in spite of these differences, the jury again recommended a sentence of death, the point is that different evidence was presented.

Defendant argues that the administrative problems can be overcome by our requiring the Clerk of the Superior Court to furnish this Court a copy of the sentencing issues and recommendations and the judgment entered in each capital sentencing hearing from which no appeal occurs. While this could provide us with a record of the aggravating and mitigating circumstances submitted and those found, such a record is entirely inadequate for a proper proportionality review. Simply knowing the circumstances submitted and those found does not explain the interplay between the various bits of evidence considered, the relative strengths and weaknesses of the evidence in support of each circumstance, or the weight a juror or jurors might give to each point or other aspects of the defendant's character in reaching a final recommendation.

This Court does not simply compare aggravating and mitigating circumstances presented and found with those presented and found

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rence comes to his knowledge. Further, we have requested that the Clerks of Court in our one hundred counties inform us whenever post-conviction relief is granted in the Trial Division changing the status of a death row inmate.

in other cases in the pool. In *State v. Williams*, 308 N.C. at 81, 301 S.E.2d at 356, we specifically indicated that this Court would "rely upon [its] own case reports" and review all the material, including the complete record and the briefs of the parties, in making comparisons, rather than merely review a specified number of identity points.

I consider it the better course, when engaging in a proportionality review following a determination of no error in both phases of a death case, to exclude from our pool of cases any case in which an earlier death-affirmed case has undergone a new trial or new sentencing hearing that has not been reviewed by this Court. This rule should apply whether the resentencing jury was or was not permitted to consider the sentence of death.

I would state our rule with regard to all similarly situated cases thusly: Capitally tried cases in which a new trial or a new capital sentencing proceeding has been ordered on direct review or on collateral attack, such as *habeas corpus* or motions for appropriate relief in state or federal court following review on direct appeal by this Court, are removed from the pool for purposes of proportionality review. If the new capital sentencing proceeding results in a sentence of death, the case does not return to the pool until it has been reviewed by this Court, and the new proceeding has been found to be without error. If the majority feels that returning only the death cases to the pool skews the pool, then the solution would be not to return such cases to the pool regardless of the outcome of the final proceeding. The pool will always consist of more than enough cases to fulfill its purpose without these cases.

Much of the difficulty in performing our proportionality review in capital cases results from the fact that the pool is constantly growing and constantly changing, with cases leaving and returning to the pool depending on the results of post-conviction attacks in state and federal trial courts and review of those decisions on appeal. Because the pool is constantly changing by reason of cases leaving and reentering, it is not as dependable and reliable a yardstick for determining the proportionality of a death sentence as originally envisioned. Today's majority's decision and its redefinition of the pool exacerbates the problem. The majority may have created an undesirable, if not completely unworkable, administrative and procedural nightmare not only for the Court, but also for the attorneys who handle appeals in capital cases.

Chief Justice EXUM dissenting.

I agree with the majority's statement of the legal principles which this Court follows in conducting its proportionality review, including the majority's definition of the proportionality pool. Believing, however, that the death sentence is excessive and disproportionate when compared with sentences imposed in similar cases, I dissent from the majority's contrary conclusion and, pursuant to N.C.G.S. § 15A-2000(d)(2), vote to impose a sentence of life imprisonment.

At defendant's second sentencing hearing, the State offered evidence, in part consisting of defendant's testimony at his former trial which, in substance tended to show as follows:

Bonnie Clark wanted her estranged husband, Marine Corps Sergeant Glennie Clark, dead, apparently for the purpose of collecting certain insurance proceeds as beneficiary of a Serviceman's Group Life Insurance policy insuring his life. Bonnie Clark and defendant "were boyfriend and girlfriend," sharing a bedroom at the Shadowbrook residence; although Bacon contended that he never became romantically involved with Bonnie Clark after moving into the same apartment and sharing a bedroom with her. Bonnie Clark complained to defendant concerning her estranged husband's drinking and abuse of both her and the children, but defendant told her that he didn't want to hear about these troubles. Bonnie Clark told the defendant, "I wish Glenn was dead." The defendant was not sure whether to take her seriously, but after she continued to insist and to inquire regarding whether defendant had found anyone to murder her husband, defendant concluded that she was serious about having him killed.

Eventually defendant told Bonnie Clark that he would kill her husband. Plans were made between the two for the murder to take place on Saturday, 31 January 1987. Bonnie Clark, as she had agreed to do, lured Glennie Clark to the designated location near a theater; but defendant, becoming afraid, refused to take part.

Bonnie Clark and defendant again made plans to meet with Glennie Clark on Sunday, 1 February 1987, to discuss the conflict in the house created by Glennie Clark's repeated telephone calls in which he gave defendant the first degree and called him names. Defendant placed a knife in his coat pocket. After he and Bonnie Clark got in the car, defendant threw the weapon onto the floor in the back seat of the car. Bonnie Clark drove the car to Glennie Clark's home on the Camp

Lejeune base. As she walked to the door, defendant got into the back seat of the car. Bonnie Clark returned to the driver's seat; Glennie Clark occupied the front passenger seat, and defendant sat in the rear. Neither Bonnie Clark nor defendant intended to kill Glennie Clark on this occasion.

When Glennie Clark entered the vehicle, he pointed to defendant and asked "what's this shit?" At that point Bonnie Clark introduced her husband to defendant, the two having never met before. Bonnie Clark then drove off. Glennie Clark became angry and called defendant "a nigger." Glennie Clark continued to yell and turned toward the defendant. The defendant bent down, picked up the knife and stabbed Glennie Clark, who then put his arm around defendant's neck. Defendant continued to stab Glennie Clark until he was dead.

Bonnie Clark then drove through Jacksonville, wondering what to do. Defendant replied that they should stop the car at a theater where he would strike her on the head to make it appear as though she and Glennie Clark had been attacked. Defendant did this and left the scene.

Defendant's evidence tended to show as follows:

Defendant was a good high school student in Ayer, Massachusetts, where he participated in high school athletics and graduated in 1979. During his childhood and adolescence he lived with his mother, Elizabeth Bacon, and his father, Robert Bacon, Sr. He was described by friends and family members as a pleasant individual who was "intelligent" and who "never gave any trouble." He was popular in school, seemed concerned about other people and was generally admired by his teachers and classmates. He moved to North Carolina in December, 1985 where he obtained work with the Kirby vacuum cleaner company in Jacksonville. He met Bonnie Clark through work.

Defendant was of "average intelligence" with "a personality disorder with impulsivity, immaturity, and a schizoid kind of feature." According to Dr. Billy Royal, a psychiatrist, the murder resulted from defendant's trying to serve Bonnie Clark's psychological needs. Dr. Royal testified that "Mr. Bacon had a history . . . of becoming involved [with] people that were in need of assistance" and tried "to help rescue Mrs. Clark from her reported abuse by her husband." In Dr. Royal's opinion, defendant's personality disorder would probably not have caused him any legal problems had he not become involved with someone like Bonnie Clark. Defendant's psychological makeup

"dovetailed" with Bonnie Clark's needs in a way "that resulted in [Glennie Clark's] death." In Dr. Royal's opinion at the time of the murder "the racial slurs directed at defendant by Glennie Clark resulted in [defendant's losing] control." Dr. Royal testified that defendant's act in killing Glennie Clark was "primarily an impulsive act" and that at the time of the killing defendant's capacity to appreciate the criminality of his act or to conform his conduct to the law was impaired and defendant was under the influence of a mental or emotional disturbance.

The sentencing jury answered the aggravating and mitigating circumstances as set out in the majority opinion. To summarize, the jury found only one aggravating circumstance—the murder was committed for pecuniary gain. It found two statutory mitigating circumstances—defendant had no significant history of prior criminal activity and the murder was committed while defendant was under the domination of another person. It found the following nonstatutory mitigating circumstances: defendant has no history of violent behavior; defendant is unlikely to commit another violent crime; defendant's criminal conduct was the result of circumstances unlikely to recur; the initial plan that resulted in the deceased's death was that of Bonnie Clark; Bonnie Clark was convicted of the same crime as defendant and was given a life sentence; defendant has shown remorse since his arrest; defendant's family loved him, has visited him in prison and will continue to visit him if he is sentenced to life imprisonment.

When the Court conducts its proportionality review, as the majority correctly states, it compares the case at bar with other similar cases in the pool, considering both the crimes committed and the defendants in this and the other cases. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Id. In *State v. Brown*, 320 N.C. 179, 220, 358 S.E.2d 1, 28 (1987), we compared the crime and defendant "with the crime and the defendant in cases with similar facts, including cases in which the same aggravating circumstance was found." We also compared them "to cases in which the Court has affirmed a sentence of death in order to determine whether this case 'rise[s] to the level of those murders in which we have approved the death sentence upon proportionality review.' " In *State v. Price*, 326 N.C. 56, 95-96, 388 S.E.2d 84, 107 (1990), we stated:

> It is useful in proportionality review to compare the case under scrutiny to three clusters of cases in the pool—those cases resulting in sentences of life imprisonment in which the same aggravating circumstances occur, those "death affirmed" cases in which the same aggravating circumstances occurred, and those cases in which this Court has found the death sentence disproportionate.

As the majority notes, there are 14 cases in the proportionality pool in which pecuniary gain was the only aggravating circumstance. *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991)[1]; *State v. Weddington*, 329 N.C. 202, 404 S.E.2d 671 (1991); *State v. Payne*, 327 N.C. 194, 393 S.E.2d 158 (1990); *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1991)[2]; *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988); *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 541 (1988); *State v. Hogan*, 321 N.C. 719, 365 S.E.2d 289 (1988); *State v. Baugess*, 310 N.C. 259, 311 S.E.2d 248 (1984); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *State v. Hawkins*, 302 N.C. 364, 275 S.E.2d 172 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E.2d 242 (1980); *State v. Weimer*, 300 N.C. 642, 268 S.E.2d 216 (1980).

In all of these cases except *Benson* and *Jackson* juries have recommended life imprisonment. In both *Benson* and *Jackson*, this Court determined that death sentences were disproportionate and imposed sentences of life imprisonment.

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1. The life sentence was imposed by the jury at a resentencing proceeding ordered by this Court because of *McKoy* error in the initial capital sentencing proceeding. *State v. Stager*, No. 93CRS03391, Superior Court, Chatham County, 12 October 1993.

2. The life sentence was imposed at a resentencing proceeding ordered by this Court because of *McKoy* error in the initial capital sentencing proceeding. *State v. Quesinberry*, No. 84CRS8304, Superior Court, Randolph County, 3 December 1991.

In two of the cases in the pool, *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574, and *State v. Payne*, 327 N.C. 194, 394 S.E.2d 158, the defendants, like Bacon and Clark, killed their spouses for insurance proceeds. Both sentencing juries recommended life imprisonment after finding the single aggravating circumstance that the defendant had killed for pecuniary gain. In *Payne*, the defendant killed his wife for the insurance benefits. In *Woods*, a lovers' triangle case similar to *Clark* and *Bacon*, the defendant offered to pay her lover a portion of the proceeds of insurance on her husband's life if her lover would kill him. The defendant was not present when her husband was shot, but she had actively aided in setting up the murder, unlocking doors at night in order to facilitate her confederate's entry.

In both *Jackson* and *Benson* the Court determined that the death sentences were disproportionate and imposed sentences of life imprisonment. In *Jackson* only two mitigating circumstances were submitted to the sentencing jury: that the defendant had no significant history of prior criminal activity and "any other circumstance or circumstances arising from the evidence . . . deem[ed] to have mitigating value." A chief reason this Court held the death sentence to be disproportionate in *Benson* was that, in comparison to *Jackson*, the sentencing jury in *Benson* found considerably more mitigating circumstances: that the defendant had no significant history of prior criminal activity; that he was under the influence of mental or emotional disturbance; that he confessed and cooperated upon arrest; that he voluntarily consented to a search of his motel room, car, home, and storage bin; and that he was abandoned at an early age by his natural mother. 323 N.C. at 328, 372 S.E.2d at 522-23.

In the case before us, as in *Benson*, the sentencing jury found significantly more mitigating circumstances than did the jury in *Jackson*. These mitigating circumstances establish that the murder of Glennie Clark was an act not in keeping with defendant's past history, character and reputation and that he would not likely repeat such an act. Unlike Benson, who acted alone, and Jackson, who forced his companions into participating in setting up his victim, defendant acted under the domination of another.

The most similar case for comparison in terms of the crime committed is, of course, the case involving defendant's accomplice, Bonnie Clark—*State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989). Like *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), and *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), in which the defendants

in both cases were confederates in the same crime, defendants Bacon and Clark colluded to kill Clark's husband. The sentencing juries for both Stokes and Bacon recommended sentences of death, whereas those for Murray and Clark recommended life imprisonment. In *Stokes* this Court concluded that both Murray and Stokes had committed the same crime in the same manner and were thus equally culpable. 319 N.C. at 21, 352 S.E.2d at 663. In part for this reason, we concluded Stokes' death penalty was disproportionate.

In *Clark* the jury found only one aggravating circumstance—that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). The jury found the statutory mitigating circumstance that the murder had been committed while the defendant was under the influence of a mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2) (1988). In addition the jury found nine nonstatutory mitigating circumstances which concerned the defendant's vulnerability, hopelessness and dependence; her past abuse by her husband, of which her involvement in this crime was a product; her lack of a significant criminal record; her good behavior and character before the crime and during incarceration; and the unlikelihood that she would pose a danger to society were she spared the death penalty. *State v. Clark*, 324 N.C. at 169, 377 S.E.2d at 68.

In the case *sub judice* the only aggravating circumstance found by the jury was that the murder had been committed for pecuniary gain. Notably, it did not find the killing was heinous, atrocious, or cruel. Among the mitigating circumstances found by the jury were several indicating that, like his accomplice, defendant had no significant history of prior criminal activity; that he had no history of violent behavior; and that his character, habits, mentality, propensities, and activities indicated that he was unlikely to commit another violent crime. The jury also found several other mitigating circumstances reflecting defendant's past good character, diligence, and affability, and his display of remorse. For purposes of proportionality review, however, the two most significant among the mitigating circumstances found by the jury were that defendant had "acted under the domination of another person" and that "the initial idea for the plan . . . was that of the co-defendant, Bonnie Sue Clark."

The contrast between the circumstances of the same crime as perceived by both sentencing juries is striking. The *only* aggravating circumstance found by the sentencing jury in *Clark* was that the murder of defendant Clark's husband was especially heinous, atrocious, or

cruel. *State v. Clark*, 324 N.C. at 168, 377 S.E.2d at 67. The *only* aggravating circumstance found by the sentencing jury in the case *sub judice* was that the capital felony was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (1988). The *Clark* jury perceived the murder as exhibiting a level of brutality exceeding that normally present in first-degree murder or a murder conscienceless, pitiless, or unnecessarily torturous to the victim, or one demonstrating an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murders. *E.g.*, *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The *Bacon* jury perceived none of these egregious circumstances, concluding only that defendant Bacon killed for pecuniary gain.

No less striking is the difference between the culpability of these two defendants as seen by their sentencing juries. According to the mitigating circumstances found by defendant Clark's sentencing jury, she was perceived as vulnerable, despairing, and dependent, the emotionally disturbed victim of domestic abuse. Defendant Bacon's sentencing jury concluded not only that Clark first proposed the murder, but also that defendant Bacon committed it under her domination.

In short, Bonnie Clark and defendant committed the same crime. Although defendant dealt the fatal blows, Clark was the instigator, planner and motivator who was actually present during and actively participated in the murder. Considering the findings of both juries, I conclude Clark and Bacon are at least equally culpable. Considering only the findings in the case before us, I would conclude Clark is more culpable.

Viewed side by side, the disparity between the perceptions of the same crime by these two sentencing juries is patent. When such inconsistent, inherently self-contradictory results lead to the sentence of life imprisonment in one case and the sentence of death in another, it is this Court's duty on proportionality review to remedy the result by setting aside the death sentence and imposing life imprisonment. "The very reason for proportionality review by *this Court* is to reduce the number of inconsistent or inherently self-contradictory results in capital cases . . . ." *State v. Stokes*, 319 N.C. at 30, 352 S.E.2d at 669 (Mitchell, J., dissenting).

That defendant's death sentence is disproportionate is reinforced by comparison with two other cases involving love triangle murders: *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992); and *State v.*

Harris, 333 N.C. 543, 428 S.E.2d 823 (1993). In *Mahaley*, the defendant, who was in an adjoining room while Harris, her boyfriend, and his companion strangled her husband, was sentenced to death. We vacated Mahaley's death sentence and remanded for a new sentencing proceeding. In *Harris*, the boyfriend, Harris, who actually committed the crime, was sentenced to life imprisonment. We found no error in the trial. The sentencing jury for Mahaley found the aggravating circumstances that the killing was especially heinous, atrocious, or cruel and that the offense had been committed for pecuniary gain. The sentencing jury for Harris found that the murder had been committed while the defendant was engaged in the commission of robbery with a dangerous weapon and that the murder had been committed for pecuniary gain, but it did not find that the murder was especially heinous, atrocious, or cruel. That the sentencing jury for Harris, the perpetrator, recommended life imprisonment despite finding *two* aggravating circumstances *including* pecuniary gain underscores the disproportionality of the death sentence here.

Finally, the murder in the case before us is not at the level of culpability of those murders in the cases in which this Court has affirmed sentences of death. Defendant's sentencing jury did not find any of the three aggravating circumstances most prevalent in the majority of the "death-affirmed" cases[3]—that the defendant previously had been convicted of a violent felony; that the murder was especially heinous, atrocious, or cruel; or that the murder was part of a course of conduct in which the defendant committed a violent crime against another person. *See State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988) (prior violent felony; course of conduct); *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) (prior conviction of a violent felony); *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987) (prior conviction of a violent felony); *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988) (heinous, atrocious, or cruel); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987) (prior

3. *See State v. Artis*, 325 N.C. 278, 342, 384 S.E.2d 470, 506 (1989), *judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990) (heinous, atrocious, or cruel and previous conviction of a violent felony are two aggravating circumstances most prevalent in death-affirmed cases); *State v. Greene*, 324 N.C. 1, 28-29 nn.3 & 5, 376 S.E.2d 430, 446-47 nn.3 & 5 (1989), *judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990) (heinous, atrocious, or cruel; previous conviction of a violent felony; or course of conduct aggravating circumstance(s) found in thirty-six of thirty-seven "death-affirmed" cases).

conviction of a violent felony); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986) (heinous, atrocious, or cruel); *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) (prior conviction of a violent felony; heinous, atrocious, or cruel); *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985) (course of conduct); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985) (heinous, atrocious, or cruel); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985) (course of conduct); *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) (course of conduct); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985) (prior conviction of a violent felony; heinous, atrocious, or cruel); *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984) (heinous, atrocious, or cruel); *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) (course of conduct); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983) (heinous, atrocious, or cruel); *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983) (heinous, atrocious, or cruel; course of conduct); *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) (heinous, atrocious, or cruel); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983) (prior conviction of a violent felony; heinous, atrocious, or cruel; course of conduct); *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) (heinous, atrocious, or cruel); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, *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) (heinous, atrocious, or cruel; course of conduct); *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982) (heinous, atrocious, or cruel); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, *Smith v. North Carolina*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, *Williams v. North Carolina*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983) (course of conduct); *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) (prior conviction of a violent felony); *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) (heinous, atrocious, or cruel); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981) (course of conduct); *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) (heinous, atrocious, or cruel); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980) (heinous, atrocious, or cruel). Nor was this an offense involving a sexual assault or other violent felony, *e.g.*, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); nor did it involve the infliction of serious injury or the murder of more than one victim, *e.g.*, *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); nor was it effectuated in order to avoid lawful arrest, *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).

From every perspective the instant case is a misfit among similar cases in the proportionality pool. First, it is the only case in which the death penalty has been ultimately imposed where the sole aggravating circumstance found was the motive of pecuniary gain. Second, it is the only case in the proportionality pool in which a defendant determined by the sentencing jury to have been under the domination of a confederate was condemned to death while the confederate was sentenced to life imprisonment. Third, defendant Bacon, who killed at the behest and under the inspiration, direction, and domination of another and whose sentencing jury found two statutory and seven non-statutory mitigating circumstances, is less culpable than Benson and Jackson, whose death sentences were determined disproportionate by this Court. Finally, the murder here in terms of both the crime and the defendant does not rise to the level of culpability present in the cases in which this Court has determined the death penalty to be not disproportionate. For all these reasons, I conclude defendant's sentence of death is disproportionate and vote to vacate this sentence and impose a sentence of life imprisonment.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ROBERT EARL BROOKS

No. 356PA93

(Filed 29 July 1994)

1. Searches and Seizures § 80 (NCI4th)— crack cocaine—initial approach by SBI agent—no reasonable suspicion required

An SBI agent's initial encounter with a defendant who was eventually indicted on cocaine charges did not violate the defendant's Fourth Amendment right against unreasonable searches and seizures where the evidence before the trial court tended to show that the agent approached the defendant's vehicle and offered a greeting; the initial contact with the defendant occurred as the defendant was sitting in the driver's seat of his car with the driver's side door open; as the agent approached, a man who had been standing near the car and talking with the defendant walked away; there was no evidence tending to show either that the agent made a physical application of force or that the defendant submitted to any show of force; and there was no indication from the evidence that a reasonable person in the position of the defendant would have believed that he or she was not free to leave or otherwise terminate the encounter. This conduct by the agent did not amount to an investigatory "stop" and certainly was not a "seizure"; as a result, no reasonable suspicion was required for the agent's initial approach and questioning of the defendant. No one is protected by the Constitution against the mere approach of police officers in a public place.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

2. Searches and Seizures § 82 (NCI4th)— cocaine—empty holster on car seat—questioning by officer—no *Miranda* warnings

An SBI agent was not required to give a defendant eventually indicted on cocaine charges *Miranda* warnings before asking the

location of a gun where the agent did not "stop" the defendant, but merely walked up to the defendant, who was sitting in his vehicle, shined a light into the interior, and, upon seeing the empty holster on the seat beside the defendant, acted quite reasonably and properly in asking the defendant about the location of defendant's gun. Nothing in the evidence tended to show that the agent asked this question in a threatening manner or made any show of force which would have caused a reasonable person to believe that he or she was not free to go or otherwise terminate the encounter; in any event, questions asked by law enforcement officers to secure their own safety or the safety of the public and limited to information necessary for that purpose are excepted from the *Miranda* rule.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

3. Searches and Seizures § 49 (NCI4th)— cocaine—automobile—concealed weapon discovered—warrantless search

All of the physical evidence discovered during a search of defendant's car was admissible against defendant in a cocaine prosecution where an SBI agent approached the defendant's car and looked into the interior, using his flashlight; upon viewing an empty holster next to the defendant, the agent asked the defendant where his gun was; and defendant told the agent that he was sitting on the gun. The agent then had probable cause to arrest the defendant for carrying a concealed weapon and, having the requisite probable cause to arrest the defendant, was fully justified in searching the entire interior of the defendant's car during a search incident to that arrest. A search may be made before an actual arrest and still be justified as a search incident to arrest, if, as here, the arrest is made contemporaneously with the search.

Am Jur 2d, Searches and Seizures §§ 174-179.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest. 89 ALR2d 715.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court cases. 89 L. Ed. 2d 939.

4. Criminal Law § 584 (NCI4th)— cocaine—evidence suppressed in federal court—not required to be suppressed in state court

The trial court did not err in a cocaine prosecution by denying defendant's motion to suppress physical evidence on the ground that the same evidence had been suppressed in an earlier case against him in federal court where defendant moved to suppress the evidence pursuant to N.C.G.S. § 15A-954(a)(7), the Constitution of the United States and the Constitution of North Carolina. The State of North Carolina was not a party to the federal criminal proceeding, nor was any showing made that the State was in privity with the federal government in prosecuting the defendant on the federal drug charges. Identity of parties is required by the statute and collateral estoppel does not apply under either the federal constitution or the state constitution to criminal cases in which separate sovereigns are involved in separate proceedings and there is no privity between the two sovereigns in the first proceeding.

Am Jur 2d, Criminal Law §§ 321 et seq.

5. Appeal and Error § 451 (NCI4th)— perjury—appeal from Court of Appeals to Supreme Court—issue not raised in Court of Appeals—not properly before Supreme Court

The issue of whether there was sufficient evidence to accept a plea of no contest to a perjury charge was not properly before the Supreme Court where it was not presented as an assignment of error in the Court of Appeals. Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only that decision is before the Supreme Court for review.

Am Jur 2d, Appeal and Error §§ 702 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 111 N.C. App. 558, 432 S.E.2d 900 (1993), vacating a judgment entered by Britt, J., on 7 January 1992 in Superior Court, Duplin County. Heard in the Supreme Court on 14 April 1994.

Michael F. Easley, Attorney General, by James Peeler Smith, Special Deputy Attorney General, and Neil Dalton, Assistant Attorney General, for the State-appellant.

Nora Henry Hargrove for the defendant-appellee.

MITCHELL, Justice.

The defendant, Robert Earl Brooks, was initially indicted by a federal grand jury on 11 December 1990 for possession with intent to distribute crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and possession of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). The defendant filed a motion to suppress evidence. Following a hearing on the motion, the Honorable James C. Fox, United States District Court Judge for the Eastern District of North Carolina, concluded that the defendant had been unlawfully arrested and detained and that both he and his vehicle were searched without probable cause. Judge Fox further concluded that the "fruits" of the search, as well as any incriminating statements that the defendant had made, should be suppressed. Accordingly, Judge Fox granted the defendant's motion to suppress. The charges against the defendant in the United States District Court subsequently were dismissed voluntarily by the United States Attorney's office.

On 1 April 1991, the defendant was indicted by the Grand Jury of Duplin County for possession with intent to manufacture, sell, and deliver cocaine; trafficking cocaine; maintaining a dwelling/motor vehicle to keep drugs; and a misdemeanor charge of carrying a concealed weapon. Prior to trial, the defendant moved to suppress physical evidence and his statements to the police upon which the indictments were founded. At a pretrial motions hearing on 3 September 1991 in the Superior Court, Duplin County, Judge Henry L. Stevens denied in part and granted in part the defendant's motion to suppress. On 28 October 1991, the defendant was indicted for the additional felony of perjury. The defendant's subsequent motion to quash and motion to suppress evidence on grounds of collateral estoppel by reason of the order suppressing evidence in the prior federal case were

denied by Judge Joe Freeman Britt at the 6 January 1992 Criminal Session of Superior Court, Duplin County.

Reserving his right to appeal the denial of his pretrial motions, the defendant tendered pleas of no contest to the charges of possession, trafficking, carrying a concealed weapon, and perjury. The felonies were consolidated for judgment, and the defendant was sentenced to seven years imprisonment. Judgment also was entered sentencing the defendant to a six-month concurrent sentence for the misdemeanor of carrying a concealed weapon. The defendant appealed only from the judgment sentencing him for the felony charges. The Court of Appeals, with one judge dissenting, vacated that judgment of the trial court and granted the defendant a new trial on the felony charges. *State v. Brooks*, 111 N.C. App. 558, 432 S.E.2d 900 (1993). The State did not appeal on the basis of the dissent. Rather, the State filed a petition for discretionary review on 16 September 1993, seeking to present additional issues for this Court's review. In his response to the State's petition, the defendant presented two additional issues which he contends were raised below but not addressed by the Court of Appeals. The State's petition was allowed by this Court on 4 November 1993. *State v. Brooks*, 335 N.C. 178, 438 S.E.2d 203 (1993).

The defendant's initial motion to suppress in this case was heard on 3 September 1991, in Superior Court, Duplin County. At the hearing, the State and the defendant presented evidence. From substantial evidence presented, Judge Stevens made findings of fact which included the following:

> 1. That on July 27, 1991, SBI Agent Bruce Kennedy accompanied members of the Duplin County Sheriff's Department to a place called Hezekiah Carter's Nightclub, located outside of the city limits of Magnolia, Duplin County, to execute a search warrant for the purposes of locating illegal controlled substances.
>
> 2. That Kennedy wore a marked "raid" jacket with a badge on the front, and "POLICE" written in big letters across the back. Moreover, Kennedy was wearing a baseball cap with the letters SBI across the top of the cap. That three law enforcement vehicles arrived at the same time and that one or more of the vehicles were marked police cars.
>
> 3. That upon arriving at the location to be searched, Kennedy observed a green Volkswagen car backed in the parking lot with

a man in it sitting on the driver's seat. Also Kennedy saw another black male standing in front of the car. The time was approximately 9:40 p.m.

4. Kennedy exited the vehicle [in which] he was riding and walked down across the ditch and over to the driver's side of the vehicle in question, where the defendant was sitting in the driver's seat. The other black male that had been standing next to the vehicle walked away before Kennedy was able to arrive at the car.

5. Kennedy shined his flashlight on the defendant in the car. Kennedy observed on the passenger side of the bucket seats of the Volkswagen an empty unsnapped holster within reach of the defendant who was sitting in the driver's seat.

6. Kennedy asked the defendant, "Where is your gun?" The defendant replied, "I'm sitting on it." Kennedy was still unable to see the gun although he shined his light all about the vehicle.

7. Kennedy then requested the defendant to "ease it out real slow." The defendant reached under his right thigh and handed the officer his gun by the grips. Kennedy took the gun from the defendant and put it on top of the defendant's car and then received the holster from the defendant. The defendant told Kennedy, "Be careful, it's got a round in the chamber; it's loaded and there is a round in the chamber." At the very moment Kennedy asked the defendant to hand out his gun, Kennedy put his hand on his gun, but just for a second. After retrieving the gun from the defendant, Kennedy did not stand holding his gun or towering over him.

8. The defendant then volunteered that he had got the permit for the gun from the Sheriff of Lenoir County, Billy Smith.

9. The defendant then asked Kennedy if he needed to see some identification. Kennedy replied, "Yes sir," at which time, the defendant handed his North Carolina Driver's License to Kennedy along with the registration for the said Volkswagen. The defendant was permitted to exit his vehicle on several occasions including getting outside the vehicle and assisting Officer Jones to open the hood of said vehicle.

10. Kennedy did not place the defendant under arrest for carrying a concealed weapon; instead he asked the defendant, "Robert Earl, do you have any dope in this car?" The defendant replied,

"No, do you want to look?" The defendant further stated that the officer could look if he wanted to.

11. The defendant then proceeded to search his own car. The defendant showed Kennedy where there was a compartment in the back seat of the vehicle where the defendant had built some speakers in the car and he showed the officer how the front part would lay down. There was nothing found in the compartment.

12. The defendant then laid a board down at which time Kennedy noticed that there were two nylon bags in the back foot of said vehicle directly behind the driver's seat.

13. The defendant took the board and laid it on top of the two bags in which Kennedy asked the defendant if he could look at the two bags and the defendant reached in and retrieved the two bags and sat them on the ground beside the Volkswagen . . . . The defendant unzipped the bag and inside of it was a digital scale that is commonly used for weighing small weights such as grams and ounces, which is consistent with what people measure narcotics with.

14. At that point, Kennedy took the second bag that was a small nylon pouch that normally attaches around a person's belt. Upon opening the pouch, Kennedy retrieved a white powdery substance and said, "Robert Earl, is this your dope?" The defendant replied, "Yes." Then Kennedy reached in the pouch and retrieved another white powdery substance that was bigger than the first. Kennedy asked the defendant "Is this what you use to cut it with?" The defendant stated, "Yes." Kennedy asked, "how much do you reckon you have got here?" The defendant replied, "About an ounce."

15. At that point, Kennedy informed the defendant that he was going to have to charge him with having drugs and the gun [to] which the defendant replied that he understood. Prior to this statement, [neither] Kennedy nor any other law enforcement officer had made any statement to the defendant restricting his movement.

16. During this whole time, the defendant was cooperating with the officer, he had not formally been placed under arrest and he did not have handcuffs on him.

Based upon the foregoing findings of fact, and others, Judge Stevens rendered the following conclusions and orders:

1. That Kennedy had a reasonable suspicion of criminal activity that justified his action in order to confirm or to dispel his suspicion when he exited his patrol car and walked over to the defendant's vehicle to investigate. That Kennedy was authorized to shine his flashlight into the defendant's vehicle for his own protection and to conduct an initial inquiry.

2. That the defendant was not under arrest or in custody when Kennedy asked the defendant where the gun was.

3. That Kennedy had probable cause to arrest the defendant for carrying a concealed weapon when the defendant retrieved the pistol from under his leg and handed it to the officer. That the two bags containing the scales and alleged controlled substance obtained from the defendant's vehicle on the floor behind the driver's seat was pursuant to a search incident to an arrest and was made contemporaneously after the officer had probable cause to arrest the defendant for carrying a concealed weapon.

4. That the formal arrest of the defendant followed quickly after the search of the defendant's vehicle and the initial seizure of the concealed weapon from the defendant.

5. That Bruce Kennedy was acting in good faith in searching the compartments of the defendant's vehicle incident to the arrest.

6. That after Kennedy retrieved the gun and drugs from the defendant, that an "innocent" reasonable man in the defendant's circumstances would have understood his situation and believed that he was in custody or otherwise deprived of his freedom to leave.

7. That considering the totality of the circumstances, Miranda warnings should have been given prior to any questioning of the defendant concerning the scales or the alleged drugs located in said vehicle.

8. That because the required Miranda warnings were not given to the defendant prior to questioning about the scales or the alleged drugs, the incriminating oral statements made by defendant are inadmissible.

9. That none of the constitutional rights of the defendant, either State or Federal, were violated by reason of any search and seizure by law enforcement in this case.

THEREFORE, IT IS ORDERED that the defendant's Motion to Suppress the search and seizure of drugs and his person be and the same is hereby, DENIED AND DISMISSED. IT IS ORDERED that the defendant's Motion to Suppress statements made by the defendant after the search and seizure of scales and said drugs is hereby allowed.

IT IS HEREBY ORDERED, that the evidence seized from the defendant's person and automobile and all statements prior to the seizure of the scales and drugs shall be admissible. FURTHER, IT IS HEREBY ORDERED, that the incriminating statements made by the defendant subsequent to the discovery and seizure of scales and drugs shall be inadmissible.

The Court of Appeals concluded that the physical evidence also should have been suppressed. The Court of Appeals held that the trial court's failure to exclude this evidence was prejudicial error requiring a new trial. We allowed the State's petition for discretionary review.

[1] The sole question presented by the State, as appellant in this case, is whether reasonable suspicion or probable cause was needed to support SBI Agent Kennedy's initial approach and questioning of the defendant which led to the discovery of the evidence in this case. The trial court concluded that Kennedy had reasonable suspicion to approach the defendant. The Court of Appeals reversed, holding that the findings of fact were insufficient to support this conclusion by the trial court. Concluding that no reasonable suspicion or probable cause was required for Kennedy to lawfully approach the defendant's car, we now reverse the decision of the Court of Appeals.

The State argues: (1) that the officer did not need reasonable suspicion to approach the defendant's car; (2) that upon seeing the empty holster, the officer was not required to give *Miranda* warnings prior to asking the defendant, "Where is your gun?"; (3) that upon being told by the defendant that the weapon was under the defendant's thigh, the officer had probable cause to arrest him; (4) that the search of the defendant's car was a search incident to that lawful arrest; and (5) that in the alternative, the search of the car of the defendant was with his consent. We find the State's arguments persuasive.

The trial court's findings of fact following a suppression hearing concerning the search of the defendant's vehicle are conclusive and binding on the appellate courts when supported by competent evi-

dence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). However, this Court must determine whether those findings of fact in turn support the trial court's conclusions of law. We often have stated that such conclusions of law are binding upon us on appeal if they are supported by the trial court's findings. *E.g.*, *State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991); *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). In this context, the phrase "supported by the findings" means required as a matter of law by the findings or correct as a matter of law in light of the findings. *Mahaley*, 332 N.C. at 592-93, 423 S.E.2d at 64. Only conclusions of law which are "supported" in such a manner by the findings are binding on appeal. *Id.* Therefore, a better and clearer statement of the correct rule is that "[s]uch conclusions are fully reviewable on appeal." *Id.*

Having thoroughly reviewed the evidence introduced at the *voir dire* hearing and the trial court's findings, we conclude that the trial court's findings of fact are supported by substantial competent evidence. Furthermore, even assuming *arguendo* that the findings of fact are insufficient to support the trial court's conclusions of law relating to the issue of reasonable suspicion, the defendant is nonetheless entitled to no relief.

The defendant argues, as the Court of Appeals concluded, that the evidence and the trial court's findings fail to support the trial court's first conclusion of law that the officer had reasonable suspicion, based on objective and articulable facts, to approach the defendant's car. Because the approach to the defendant's car by Agent Kennedy did not require reasonable suspicion, we need not decide this issue.

"No one is protected by the Constitution against the mere approach of police officers in a public place." *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973). Thus, "communication between the police and citizens involving no coercion or detention . . . [falls] outside the compass of the Fourth Amendment." *State v. Sugg*, 61 N.C. App. 106, 108, 300 S.E.2d 248, 250, *disc. rev. denied*, 308 N.C. 390, 302 S.E.2d 257 (1983). Kennedy's approach to the defendant's vehicle was not a "stop" for investigative purposes as defined by the Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), and the Court of Appeals erred in characterizing it as such.

The Supreme Court of the United States recently reaffirmed that police officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate. *Florida v. Bostic*, 501 U.S. 429, —, 115 L. Ed. 2d 389, 396 (1991); *INS v. Delgado*, 466 U.S. 210, 80 L. Ed. 2d 247 (1984). "A seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Bostic*, 501 U.S. at —, 115 L. Ed. 2d at 398. *See also California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d 690, 697 (1991) (chase of defendant by armed officers who ordered him to halt not a seizure where the defendant did not yield). Such encounters are considered consensual and no reasonable suspicion is necessary. *Bostic*, 501 U.S. at—, 115 L. Ed. 2d at 398. The test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter. *Id.* at—, 115 L. Ed. 2d at 398-99; *Michigan v. Chesternut*, 486 U.S. 567, 573, 100 L. Ed. 2d 565, 572 (1988); *United States v. Mendenall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980); *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982).

In this case, the evidence before the trial court tended to show that Kennedy approached the defendant's vehicle and offered a greeting. The initial contact with the defendant occurred as the defendant was sitting in the driver's seat of his car with the driver's side door open. The evidence further tended to show that as the officer approached, a man who had been standing near the car and talking with the defendant walked away. There was no evidence tending to show either that Kennedy made a physical application of force or that the defendant submitted to any show of force. Further, there was no indication from the evidence that a reasonable person in the position of the defendant would have believed that he or she was not free to leave or otherwise terminate the encounter. This conduct by Kennedy did not amount to an investigatory "stop" and certainly was not a "seizure." *See Bostic*, 501 U.S. 429, 115 L. Ed. 2d 389. As a result, no reasonable suspicion was required for Agent Kennedy's initial approach and questioning of the defendant.

For the foregoing reasons, we hold that Kennedy's initial encounter with the defendant did not violate the defendant's Fourth Amendment right against unreasonable searches and seizures. We now address the effect this holding has on the admissibility of the physical evidence obtained.

[2] The defendant contends that once Kennedy saw the empty holster, rather than asking about the location of the weapon, Kennedy should have advised him of his rights by giving him the *Miranda* warnings prior to any further questioning. The defendant argues that, as a result of Agent Kennedy's failure to give him the *Miranda* warnings at that time, he was entitled to have all evidence resulting from his encounter with Kennedy suppressed. We disagree.

The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979); *State v. Sykes*, 285 N.C. 202, 205, 203 S.E.2d 849, 851 (1974). Ordinarily, when a suspect is not in custody at the time he is questioned, any admissions or confessions made by him are admissible so long as they are made knowingly and voluntarily. *See generally Davis*, 305 N.C. 400, 290 S.E.2d 574. A careful examination of the circumstances surrounding Kennedy's approach to the defendant's vehicle reveals that Kennedy was justified in making the approach and in questioning the defendant without advising the defendant of his constitutional rights.

As the facts found by the trial court indicate, at the time of Kennedy's question concerning the location of the defendant's gun, Kennedy had not done anything to restrict the defendant's movement in any manner. Kennedy did not "stop" the defendant; he merely walked up to the defendant who was sitting in his vehicle and shined a light into the interior. At that point, Kennedy had made no show of force or done anything else to indicate to a reasonable person in the defendant's position that he was not free to leave or otherwise terminate the encounter. Therefore, the defendant had not been "seized" or "stopped" for Fourth Amendment purposes at that point. *Bostic*, 501 U.S. at ——, 115 L. Ed. 2d at 398.

Upon seeing the empty holster on the seat beside the defendant, Agent Kennedy acted quite reasonably and properly in asking the defendant about the location of the defendant's gun. Again, nothing in the evidence before the trial court tended to show that Kennedy asked this question in a threatening manner or made any show of force which would have caused a reasonable person to believe that he or she was not free to go or otherwise terminate the encounter. Nor did any evidence before the trial court indicate that the defendant's answer that he was sitting on the gun was other than voluntary.

Therefore, the defendant had not been "seized" or "stopped" at that point, and *Miranda* warnings were not required.

In any event, questions asked by law enforcement officers to secure their own safety or the safety of the public and limited to information necessary for that purpose are excepted from the *Miranda* rule. *See New York v. Quarles*, 467 U.S. 649, 81 L. Ed. 2d 550 (1984) (police officer asked an allegedly armed rape suspect where his gun was, and the suspect's incriminating response was found admissible). The subjective motive of the officer does not affect the exception. *Id.* There was no reason for Kennedy to refrain from asking the defendant about the location of his weapon without giving the defendant the *Miranda* warnings. Police officers do not need to delay an investigation and give such warnings when their own lives or the lives of others may be in danger. *State v. Holsclaw*, 42 N.C. App. 696, 257 S.E.2d 650, *disc. rev. denied*, 298 N.C. 571, 261 S.E.2d 126 (1979). Because Kennedy's question as to the location of the gun was limited to and necessary to Kennedy's and the public's safety, it was excepted from the *Miranda* rule.

[3] The defendant also contends that the evidence before the trial court was insufficient to support the trial court's findings and conclusion that the search of the defendant's person and vehicle was incident to a lawful arrest. The defendant argues that, for this reason, the trial court was required to suppress the physical evidence obtained by that search of his person and vehicle. We disagree.

Officers who lawfully approach a car and look inside with a flashlight do not conduct a "search" within the meaning of the Fourth Amendment. *See Texas v. Brown*, 460 U.S. 730, 75 L. Ed. 2d 502 (1983); *State v. Whitley*, 33 N.C. App. 753, 236 S.E.2d 720 (1977). If, as a result, the officers see some evidence of a crime, this may establish probable cause to arrest the occupants. If officers have probable cause to arrest the occupants, they may search—incident to that arrest—the entire interior of the vehicle, including the glove compartment, the console, or any other compartment, whether locked or unlocked, and all containers found within the interior. *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768, *reh'g denied*, 453 U.S. 454, 69 L. Ed. 2d 1036 (1981); *State v. Andrews*, 306 N.C. 144, 147, 291 S.E.2d 581, 583, *cert. denied*, 459 U.S. 946, 74 L. Ed. 2d 205 (1982). The officers automatically have the right to make a search incident to arrest; they do not need to consider the particular defendant's dangerousness or the likelihood that the defendant may destroy evidence before

they conduct their search. *United States v. Robinson*, 414 U.S. 218, 38 L. Ed. 2d 427 (1973); *Gustafson v. Florida*, 414 U.S. 260, 38 L. Ed. 2d 456 (1973). Further, a search may be made before an actual arrest and still be justified as a search incident to arrest, if, as here, the arrest is made contemporaneously with the search. *Rawlings v. Kentucky*, 448 U.S. 98, 65 L. Ed. 2d 633 (1980); *United States v. Chadwick*, 433 U.S. 1, 53 L. Ed. 2d 538 (1977); *State v. Mills*, 104 N.C. App. 724, 411 S.E.2d 193 (1991).

In this case, the evidence supported the trial court's findings that Kennedy approached the defendant's car and, using his flashlight, looked into the interior. Upon viewing the empty holster next to the defendant, Kennedy asked the defendant where his gun was and was told by the defendant that the defendant was sitting on the gun. Kennedy then had probable cause to arrest the defendant for carrying a concealed weapon. *See* N.C.G.S. § 14-269 (1993) (defining the misdemeanor of carrying a concealed weapon). In contrast to the rule for searches, police generally need not obtain a warrant before arresting a person in a public place. *United States v. Watson*, 423 U.S. 411, 46 L. Ed. 2d 598, *reh'g denied*, 424 U.S. 979, 47 L. Ed. 2d 598 (1976). It is a well-established principle that an officer may make a warrantless arrest for a misdemeanor committed in his or her presence. N.C.G.S. § 15A-401(b)(1) (1988); *State v. McAfee*, 107 N.C. 812, 12 S.E.2d 435 (1890).

Having the requisite probable cause to arrest the defendant, Kennedy was fully justified in searching the entire interior of the defendant's car during a search incident to that arrest. Therefore, all physical evidence discovered during that search was admissible against the defendant.

In the present case, all of the trial court's findings were supported by substantial evidence presented at the suppression hearing. As we have demonstrated, those findings compel the conclusion that Agent Kennedy lawfully approached the defendant initially and, as the result of proper and lawful questions, obtained probable cause to arrest the defendant for carrying a concealed weapon in Kennedy's presence. The search of the defendant's person and vehicle pursuant to that lawful arrest was itself lawful in every respect. Therefore, we conclude that the trial court was correct in denying the defendant's motion to suppress the physical evidence seized during that search on the ground that it had been seized in violation of his Fourth

Amendment rights. The State is correct in its assertion that the Court of Appeals erred in holding to the contrary.

[4] The defendant has also attempted to present and argue assignments of error before this Court, which he contends were properly presented and preserved by him in the Court of Appeals. By one such assignment of error, the defendant contends that Judge Britt erred in denying his subsequent motion to suppress the physical evidence on the ground that the same evidence had been suppressed in an earlier case against him in federal court. He argues—based on the doctrine of collateral estoppel—that the State was barred from using the same physical evidence which had been suppressed in his federal case. The defendant's argument fails because the doctrine of collateral estoppel does not apply where, as here, separate sovereigns are involved in separate proceedings and there was no privity between the two sovereigns in the first proceeding.

The defendant moved to suppress the physical evidence in this case—pursuant to N.C.G.S. § 15A-954(a)(7), the Constitution of the United States and the Constitution of North Carolina—on the ground that the federal court's order collaterally estopped the State from using that evidence against him. None of those authorities entitle the defendant to suppression of the physical evidence.

The defendant's argument under the statute is meritless. With respect to criminal proceedings, identity of parties is required by the statute under which the defendant's motion was made. The statute provides in pertinent part that:

> The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> > An issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of the defendant in a prior action *between the parties.*

N.C.G.S. § 15A-954(a)(7) (1988) (emphasis added). The State of North Carolina was not a party to the federal criminal proceeding, nor was any showing made that the State was in privity with the federal government in prosecuting the defendant on the federal drug charges. Under the plain meaning of the statute, the State simply was not a party to the previous prosecution and the statute is inapplicable.

We turn next to the defendant's arguments under the federal and state constitutions. In *Ashe v. Swenson,* 397 U.S. 436, 25 L. Ed. 2d 469

(1970), the Supreme Court of the United States held that the doctrine of collateral estoppel was embodied in the Fifth Amendment's double jeopardy provision and applicable to the states through the Due Process Clause of the Fourteenth Amendment. The doctrine of collateral estoppel in criminal cases has also been recognized in North Carolina. *State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985); *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977). " 'Collateral estoppel' means that once an issue of ultimate fact has been determined by a valid final judgment, that issue may not be relitigated by the same parties in a subsequent action." *Warren*, 313 N.C. at 264, 328 S.E.2d at 263; *see State v. Lewis*, 311 N.C. 727, 319 S.E.2d 145 (1984). Simply put, *res judicata* precludes litigation of the claim or cause of action, collateral estoppel precludes the litigation of previously litigated issues of fact or law. *Ashe*, 397 U.S. 436, 25 L. Ed. 2d 469. We conclude, however, that collateral estoppel does not apply, under either the federal constitution or the state constitution, to criminal cases in which separate sovereigns are involved in separate proceedings and there is no privity between the two sovereigns in the first proceeding.

Although this Court has recognized and applied the doctrine of collateral estoppel, we have held that there either must be an identity of parties or the party against whom the defense is asserted must have been in privity with a party in the prior proceedings in order for the doctrine to apply.

> Under a companion principle of *res judicata*, collateral estoppel by judgment, *parties and parties in privity with them*—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. "[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."

King v. Grindstaff, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (citations omitted) (emphasis added). The State of North Carolina was not a party to the federal criminal proceeding against this defendant and could not have been. Nothing in the record before us indicates that the State's prosecutors were involved with the federal prosecution. The State was not in a position to appeal the federal court's suppression order and could not have compelled the United States Attorney to do so. The State is not bound by a federal court ruling in a proceeding in which it had no opportunity or standing to be heard. *See United States v. Pforzheimer*, 826 F.2d 200 (2d Cir. 1987).

The defendant contends that the State, by deferring to the federal prosecution, was somehow in privity with the federal government with respect to the federal charges. Deferring to the federal prosecution does not make the State a party to the federal proceeding, nor does it make the State in privity with the federal government. This is unlike the situation in *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210 (1979), where the federal government exercised undisputed control over the state court civil litigation although the federal government was not a named party to the litigation. This case is more like *United States v. Sutherland*, 929 F.2d 765 (1st Cir. 1991), in which the court allowed federal prosecution, although evidence which was introduced by the government had been suppressed in state court on state constitutional grounds. The court observed:

> By contrast [with the events in *Montana v. United States*], in this case there is no evidence that the federal prosecutors played any role or had any direct influence in the state court suppression hearing. The federal government was not a party, nor in privity with a party, and collateral estoppel is therefore inapplicable.

Sutherland, 929 F.2d at 772.

Similarly, with respect to the present state court prosecution, there was no evidence that the state authorities assumed *de facto* control of the federal prosecution. It makes no difference that the state and federal authorities may have acted together in an investigation that led to the charges. Each sovereign may enforce its own laws. *See Heath v. Alabama*, 474 U.S. 82, 88 L. Ed. 2d 387 (1985). A person may be tried for the same conduct by both a state and the federal government. *United States v. Lanza*, 260 U.S. 377, 67 L. Ed. 314 (1922). In *Heath*, the Supreme Court stated that "the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government." *Heath*, 474 U.S. at 89, 88 L. Ed. 2d at 394.

The trial court concluded as a matter of law that the State was not a party to the federal prosecution, nor was the State in privity with a party connected to the federal prosecution. The trial court further concluded as a matter of law that collateral estoppel was therefore inapplicable and that the State was not precluded by that doctrine from using the evidence seized at the time of the defendant's arrest. The evidence fully supports the findings of fact which in turn support these conclusions of law by the trial court. We agree with the trial

court's conclusions and conclude that this assignment of error is without merit.

[5] The defendant also contends that there was insufficient evidence of perjury to support the acceptance of his plea of no contest to that charge. This issue is not properly before this Court. The defendant did not present this issue as an assignment of error before the Court of Appeals as required by Rule 28(a) of the North Carolina Rules of Appellate Procedure. After there has been a determination by the Court of Appeals, review by this Court, whether by appeal of right or discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before us for review. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969); *State v. Williams*, 274 N.C. 328, 163 S.E.2d 353 (1968); N.C. R. App. P. 16(a). A party who was an appellant before the Court of Appeals is only entitled to present for review by this Court assignments of error which he properly presented for review to the Court of Appeals. *Sales Co. v. Board of Transportation*, 292 N.C. 437, 443, 233 S.E.2d 569, 573 (1977). In this case, the defendant failed to assert this issue as an assignment of error in the Court of Appeals. Therefore, it is not properly before this Court and we do not address it here.

We conclude that the defendant received a fair trial free of prejudicial error. The decision of the Court of Appeals vacating the trial court's judgment and awarding the defendant a new trial is reversed, and this case is remanded to that court for further remand to the Superior Court, Duplin County, for reinstatement of the judgment entered there upon the defendant's pleas to the felony charges against him.

REVERSED AND REMANDED.

CAPITAL OUTDOOR ADVERTISING, INC., CAROLINA POSTERS CORPORATION, HARRIS SIGNS, INC., HOGAN OUTDOOR OF RALEIGH, INC., AND WHITECO INDUSTRIES, INC., T/A WHITECO METROCOM, INC. v. THE CITY OF RALEIGH, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 136PA93

(Filed 29 July 1994)

1. Judgments § 43 (NCI4th)— dismissal of complaint—jurisdiction to sign order out of session

The trial court had jurisdiction under N.C.G.S. § 7A-47.1 to enter an order dismissing plaintiffs' complaint out of session without the consent of the parties since the order did not require a jury and was signed and entered in the proper county and proper judicial district. Furthermore, the out-of-session order was also authorized by N.C.G.S. § 1A-1, Rule 6(c), which provides that the expiration of a court session has no effect on the court's power "to do any act or take any proceeding," since this rule clearly allows a superior court judge to sign a written order out of session without the consent of the parties so long as the hearing to which the order relates was held in the trial judge's assigned term and assigned district.

Am Jur 2d, Judgments §§ 58 et seq.

2. Limitations, Repose, and Laches § 86 (NCI4th); Zoning § 24 (NCI4th)— outdoor advertising sign ordinance—attack on constitutionality—statute of limitations

Plaintiff billboard companies' 42 U.S.C. § 1983 claim contesting the constitutionality of a city's October 1983 outdoor advertising sign ordinance accrued on the effective date of the ordinance pursuant to N.C.G.S. § 160A-364.1. Therefore, plaintiffs' action filed five and one-half years after the effective date of the ordinance was barred by both the nine-month statute of limitations for an action contesting the validity of any zoning ordinance or amendment thereto contained in N.C.G.S. §§ 1-54.1 and 160A-314.1, which has been applied by the N.C. Court of Appeals to § 1983 sign cases, and by the three-year personal injury statute of limitations set forth in N.C.G.S. § 1-52(5), which has been applied by the federal courts of the Fourth Circuit to such cases.

Am Jur 2d, Zoning and Planning §§ 322 et seq., 1048-1050.

On discretionary review of a unanimous decision of the Court of Appeals, 109 N.C. App. 399, 427 S.E.2d 154 (1993), vacating an order of Hight, J., dismissing plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, entered 4 November 1991 in Superior Court, Wake County, as a result of a motion hearing conducted at the 28 October 1991 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 13 October 1993.

Wilson & Waller, P.A., by Betty S. Waller and Brian E. Upchurch, for plaintiff-appellees.

Thomas A. McCormick, City Attorney, by Ira J. Botvinick, Deputy City Attorney, for defendant-appellant.

MEYER, Justice.

The dispositive issues before this Court are (1) whether the trial judge had jurisdiction to enter the order dismissing plaintiffs' complaint, and (2) whether the trial judge erred in dismissing plaintiffs' complaint for the reason that it was time-barred. The Court of Appeals panel below (1) held that the trial judge erred in signing the dismissal order in question because he lacked jurisdiction to sign the order out of term, and (2) did not reach the issue of the timeliness of the filing of the complaint.

Having determined that the trial judge did not err in entering the order of dismissal out of term and that the plaintiffs' complaint was not timely filed, we now reverse the decision of the Court of Appeals and remand the case for reinstatement of Judge Hight's order dismissing the plaintiffs' complaint.

Plaintiffs are five outdoor advertising companies that own fifty-six billboards in Raleigh. On 18 October 1983, the City of Raleigh adopted an ordinance, Ordinance No. (1983) 210 TC 198, codified as section 10-2066 (presently section 10-284) of the Raleigh City Code (hereinafter "the October 1983 ordinance"), which became effective 23 October 1983. The ordinance amended an earlier 1979 ordinance that established zoning regulations for signs in Raleigh by reducing the size of permissible off-premises signs and restricting their location to "industrial zones" as defined in the ordinance, declared existing over-sized signs to be nonconforming uses, established an amortization period for nonconforming signs in lieu of any form of compensation, and prohibited the construction of any new nonconforming signs.

The October 1983 ordinance was entitled "An Ordinance Regulating the Placement, Area, and Height of Outdoor Advertising Signs." Since its effective date, all decisions relating to the permitting, locating, sizing, spacing, zoning conformance status, and amortization of billboards have been made according to this ordinance. The October 1983 ordinance, in pertinent part, requires that all nonconforming outdoor advertising signs be made to conform to the ordinance or be discontinued by 24 April 1989 unless application of the ordinance is specifically prohibited by state statute.

The nature of the issues raised on this appeal makes it unnecessary to set forth the contents of the ordinance in this opinion. We briefly characterize its contents only for the purpose of clarifying the issues. The October 1983 ordinance limits the area of off-premise outdoor advertising signs (billboards) facing four-lane streets to 150 square feet and limits the area of off-premise billboards facing streets with less than four lanes to 75 square feet. Outdoor advertising signs are restricted to a maximum height of 30 feet. Each billboard must generally be spaced at least 1,000 feet from another billboard and must be located at least 400 feet from a zoning district that permits dwellings. The ordinance is not a total prohibition of outdoor advertising signs. Subject to the spacing and locational standards, outdoor advertising signs may be located in Industrial-I and Industrial-II districts. The ordinance established a five and one-half year amortization period for removal of nonconforming signs. The ordinance specifically states that the amortization does not apply to billboards adjacent to highways on the National System of Interstate and Defense Highways or to the Federal-Aid Primary Highway System because regulation of such signs is prohibited by North Carolina statute. N.C.G.S. § 136-131.1 (1993). The five and one-half year amortization period ended on 24 April 1989.

Except for ordinary maintenance and poster panel replacements, nonconforming billboards, by virtue of other zoning regulations that are not the subject of this case, could not be altered, reerected, or removed during or after the amortization period unless the entire billboard was brought into conformity with the October 1983 ordinance.

Some preexisting billboards continued to meet the size and height requirements of the October 1983 ordinance, but others did not. None of the fifty-six billboards owned by the plaintiff billboard companies conformed to the requirements of the ordinance. The

entire sign inventory of four of the five plaintiff companies was well in excess of the ordinance's allowable size limits. Of the plaintiffs' fifty-six billboards, twenty-seven had to be amortized on or before the expiration of the five and one-half year amortization period. Their remaining signs were exempted from the amortization requirements pursuant to N.C.G.S. § 136-131.1 because of their proximity to federal highway system roads.

Plaintiffs received a notification letter dated 6 January 1989 from the City demanding the removal of their nonconforming billboards by the April 1989 deadline. They filed a complaint on 12 April 1989 challenging the constitutionality of the ordinance. Specifically, plaintiffs contend that the ordinance constitutes a regulatory taking of plaintiffs' property for which no remedy is provided and is therefore illegal, void, and unconstitutional. Plaintiffs also contend that the spacing, height, and size restrictions in the ordinance and the "amortization clause" contained therein were enacted solely for aesthetic purposes and take the most substantial part of the value of plaintiffs' property. Consequently, the same is outside the police power delegated to the City and violates the laws and constitutions of North Carolina and the United States.

Plaintiffs brought this claim under 42 U.S.C. § 1983 and sought a declaratory judgment that the ordinance enacted by the City and, in particular, the amortization provisions thereof are void and requested an injunction permanently enjoining the City from enforcing any existing or subsequently enacted criminal and civil penalties. As previously indicated herein, the trial judge dismissed the action as being time-barred, and plaintiffs appealed. The Court of Appeals reversed the trial court, holding that the trial judge erred in signing the dismissal order out of term. The Court of Appeals did not address the issue of the timeliness of the filing of the complaint. We allowed discretionary review of the Court of Appeals' decision and therefore have before us the issue of whether the trial court had jurisdiction to enter the order dismissing the complaint. Because we reverse the Court of Appeals on that issue, we necessarily reach the issue of the timeliness of the filing of the complaint. We do not address the other issues raised by the complaint.

We first address the issue of whether the trial judge had jurisdiction to enter the order dismissing the plaintiffs' complaint. As did the Court of Appeals, we take judicial notice of the assignment of Judge Hight to hold court, *Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757,

761-62 (1954), and that during the fall term[1] of 1991 (1 July 1991 to 1 January 1992), Judge Hight was assigned to the Tenth Judicial District (a single-county district consisting of Wake County); he was assigned to hold the 28 October 1991 session[2] of Wake County Superior Court, a one-week session; this session of superior court was adjourned by Judge Hight on 1 November 1991; and Judge Hight was assigned to hold the 4 November 1991 session of Wake County Superior Court, a one-week session. Nothing in the record of this proceeding in the trial court indicates that Judge Hight extended the 28 October 1991 session pursuant to N.C.G.S. § 15-167 or that the parties or their attorneys consented to entry of the order of dismissal in a session of court other than the session in which the motion was heard. Judge Hight heard the City's Rule 12(b)(6) motion on 29 October but made no ruling on the motion until 4 November, the Monday following the expiration on the previous Friday of the 28 October session. Thus, his order was entered within the proper county, within the proper judicial district, but out of session.

While lamenting the necessity of its decision and suggesting that the problem deserved legislative inquiry, the Court of Appeals nevertheless held that because the parties did not consent on the record and in a timely fashion, Judge Hight's dismissal order was null and void. We disagree.

In its opinion, the Court of Appeals noted the following oft-repeated rules: Except by agreement of the parties, an order of the superior court must be entered "during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). An order entered inconsistent with this rule is "null and void and of no legal effect." *Id.* We have held that, to be valid, consent to entry of an order outside the county in which the action is pending must appear

1, 2. As noted by the panel below, the words "session" of court and "term" of court are often used interchangeably. *Black's Law Dictionary* 1470 (6th ed. 1990). "When used with reference to a court, [*term*] signifies the space of time during which the court holds a session." *Id.* "A *session* signifies the time during the term when the court sits for the transaction of business . . . ." *Id.* Although 1962 amendments to the North Carolina Constitution changed the word "term" to "session" when referring to the period of time during which superior court judges are assigned to court, *see* N.C. Const. art. IV, § 9(2); 1 Dickson Phillips, *McIntosh North Carolina Practice and Procedure* § 107 (2d ed. Supp. 1970), the continued use of both "term" and "session" is proper, *see, e.g.*, *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). The use of "term" has come to refer to the typical six-month assignment of superior court judges, and "session" to the typical one-week assignments within the term.

"in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from what appears in the record." *Godwin v. Monds*, 101 N.C. 354, 355, 7 S.E. 793, 794 (1888). The same is true for consent to an entry of an order out of term, session, or district. Failure to object to the entry of an order out of the session does not, however, constitute consent. *See Boone*, 310 N.C. at 288, 311 S.E.2d at 555-56. Likewise, preparation of a proposed order for the trial judge to sign out of the session cannot infer consent. *Turner v. Hatchett*, 104 N.C. App. 487, 490, 409 S.E.2d 747, 749 (1991).

From their earliest days, our courts have recognized the power and authority of our legislature to provide for the transaction of business in the superior court out of term except for the trial of issues of fact requiring a jury.

In the early seminal case in this area, *Bynum v. Powe*, 97 N.C. 374, 2 S.E. 170 (1887), this Court, though finding no statute then authorizing a judgment of voluntary nonsuit to be entered out of term, acknowledged the authority of the legislature to provide otherwise.

> *It thus appears plainly that the Legislature has ample power to establish, define and limit the jurisdiction of the Superior Courts, and prescribe the methods of procedure in them. This power must embrace the power to prescribe the extent, manner, time and place[] of exercising jurisdictional authority. . . .*
>
> The Legislature may make such regulations as it shall deem fit and expedient, in the respects mentioned, and they will be operative if they do not conflict with provisions of the Constitution . . . . As to the trial of issues of fact by a jury, [the superior courts] shall not be continuously open—they shall be open only at stated period—in term time—but as to all other matters, they shall be *continuously open*—open for the transaction of any—all—business that may properly come before them, at the time, in the order, at the place, and in the way prescribed, but not necessarily that such business shall be continuously transacted. They are continuously open, so that *the Legislature may prescribe that certain classes of business shall be transacted only in term time, certain other classes may be transacted out of, or in term time, or that all business may be transacted at any time without regard to terms of the court, except as to the trial of issues of fact by a jury. . . .*
>
> . . . .

> . . . *[T]he Legislature can provide for the continuous transaction of business of the Superior Courts of which they have jurisdiction without regard to stated terms thereof*, except as "to the trial of issues of fact requiring a jury," because they are always open . . . .

Id. at 379-81, 2 S.E. at 172 (emphasis added).

Through the years, this Court has continuously recognized the authority of the legislature to provide by statute for the transaction of business in the superior court out of term and out of county. *Patterson v. Patterson*, 230 N.C. 481, 484, 53 S.E.2d 658, 661 (1949) (judge cannot hear a case and make an order out of the county "unless authorized so to do by statute"); *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923) (states the rule and recognizes exception "by reason of some express provision of law"); *Cox v. Boyden*, 167 N.C. 320, 321, 83 S.E. 246, 246 (1914) (judgment cannot be signed out of county unless authorized by statute); *Bank v. Peregoy*, 147 N.C. 293, 296, 61 S.E. 68, 70 (1908) (recognizing that an order may not be signed out of county except "in those cases for which special provision is made by the statute"); *Parker v. McPhail*, 112 N.C. 502, 504, 16 S.E. 848, 848 (1893) (order cannot be signed out of county except "in those cases specially permitted by statute"); *McNeill v. Hodges*, 99 N.C. 248, 249, 6 S.E. 127, 127 (1888) (orders may not be signed out of county "except in particular cases and respects specially provided for").

[1] The question presented here is whether there exists any statutory authority for the entry of the dismissal order out of session. We find that there is.

N.C.G.S. § 7A-47.1 provides:

> In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. Any regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) and any special superior court judge residing in the district or set of districts and the judge regularly presiding over the courts of the district or set of districts have concurrent jurisdiction throughout the district or set of districts in all matters and proceedings in which the superior court has jurisdiction out of session; *provided, that in all matters and proceedings not*

> *requiring a jury* or in which a jury is waived, any regular resident superior court judge of the district or set of districts and any special superior court judge residing in the district or set of districts shall have concurrent jurisdiction throughout the district or set of districts with *the judge* holding the courts of the district or set of districts and any such regular or special superior court judge, in the exercise of such concurrent jurisdiction, *may hear and pass upon such matters and proceedings in vacation, out of session* or during a session of court.

N.C.G.S. § 7A-47.1 (1989) (emphasis added).

Defendant's Rule 12(b)(6) motion does not require a jury. Therefore, under the plain words of the statute, Judge Hight was authorized to sign the contested order out of session.

This is essentially the same statute analyzed by this Court in *Patterson v. Patterson*, 230 N.C. at 484, 53 S.E.2d at 661. In *Patterson*, we recognized that the authority permitting the signing of an order out of session was statutorily grounded, and the then-existing statutory framework was analyzed. The Court could find no statutory authority for the out-of-county, out-of-district contempt order, although there was statutory authority to enter the out-of-term order. The order was therefore vacated. However, unlike in *Patterson*, the order in this case was signed and entered in the proper county and proper judicial district. *See also Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757.

N.C.G.S. § 7A-47.1 was applied to uphold orders of the trial judge signed and entered out of session in *Towne v. Cope*, 32 N.C. App. 660, 665-66, 233 S.E.2d 624, 628 (1977), and in *E-B Grain Co. v. Denton*, 73 N.C. App. 14, 23-24, 325 S.E.2d 522, 528-29, *disc. rev. denied*, 313 N.C. 598, 330 S.E.2d 608 (1985).

Yet a second statute authorizes the out-of-session order, N.C.G.S. § 1A-1, Rule 6(c) (1990). Rule 6(c) of the Rules of Civil Procedure provides:

> The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

Applying the statute in *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 305-06, 271 S.E.2d 385, 392 (1980), and in *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 678-80, 360 S.E.2d 772, 778-79 (1987), this Court rejected arguments that a nonconsensual order was void because it was signed and entered out of session.

In *Feibus & Co. v. Construction Co.*, the case was heard by the trial judge on a motion for summary judgment. The judge denied defendant's motion at the close of the hearing but did not sign the written order at that time. After the term of court expired, he signed the written order at his home, which was outside of the district. Defendant in that case argued that the trial judge's order granting summary judgment was invalid because it was signed out of term and district without defendant's consent. This Court held that defendant's contention was without merit. The Court explained that:

> Rule 6(c) of the Rules of Civil Procedure provides that the expiration of a session of court has no effect on the court's power "to do any act or take any proceeding." G.S. § 1A-1, Rule 56(c) (1969). This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term.

Feibus & Co., 301 N.C. at 305, 271 S.E.2d at 392.

In *Daniels v. Montgomery Mut. Ins. Co.*, on facts very similar to those in *Feibus & Co.*, this Court again interpreted Rule 6(c). There, the superior court judge heard a motion to tax costs and announced his decision to tax plaintiff with defendant's expenses in the district during the session in which the motion was made. At the hearing, the judge determined and announced the nature of the penalty to be assessed against the plaintiff. We held that the fact that the order was subsequently signed and supplemented with the actual amounts did not alter the fact that the decision to tax plaintiff with defendant's costs was made and announced at the hearing. We said that it was clear that the delayed signing and filing of the order taxing plaintiff with costs had no effect on the authority of the trial judge to enter this order. Thus, the order taxing costs was held to be valid.

Rule 6(c) provides that the expiration of a court session has no effect on the court's power "to do any act or take any proceeding." The rule clearly allows a superior court judge to sign a written order out of session *without* the consent of the parties so long as the hear-

ing to which the order relates was held in term. *Barbee v. Jewelers, Inc.*, 40 N.C. App. 760, 761, 253 S.E.2d 596, 597-98 (1979).

Because there are two separate statutes that authorize the execution and entry of the dismissal order of the trial judge out of session, the decision of the Court of Appeals must be reversed.

We believe the correct rule to be, as stated by a contemporary writer of the subject, "Rule 6(c) permits a judge to sign an order out of term [which we interpret to mean both out of the session and out of the trial judge's assigned term] and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district." W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 6-7, at 68 (4th ed. 1992).

We note that our General Assembly has recently enacted an amendment to N.C.G.S. § 1A-1, Rule 58, effective 1 October 1994 and applicable to all judgments subject to entry on and after that date, which provides, *inter alia*:

> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk . . . . Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

1994 N.C. Sess. Laws ch. 594.

[2] Having determined that the trial judge had jurisdiction to enter the order dismissing plaintiffs' complaint, we now turn to the issue not addressed by the panel below—whether the trial judge erred in dismissing plaintiffs' complaint for the reason that it was time-barred. We conclude that the trial judge did not err.

The principal issues to be determined in this regard are (1) what is the applicable statute of limitations,[3] and (2) when does it begin to run. Five pages of Judge Hight's seven-page order are dedicated to an examination and determination of these issues. He concluded that of

3. Because there is no federal statute of limitations applicable to suits under § 1983, "it is the rule that the applicable 'provision limiting the time in which an action [under § 1983] must be brought, must be borrowed from the analogous state statute of limitations.' " *Bireline v. Seagondollar*, 567 F.2d 260, 262-63 (4th Cir. 1977) (quoting *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975)).

the statutes of limitations that might possibly be applicable, all of them had expired by the time the plaintiffs filed their complaint on 12 April 1989, some five and one-half years after the effective date of the October 1983 ordinance, which was the date on which plaintiffs' cause of action accrued. We agree.

This precise issue, regarding this same ordinance, was addressed and decided by the Fourth Circuit Court of Appeals in favor of the City of Raleigh in *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), *cert. denied*, — U.S. —, 118 L. Ed. 2d 593 (1992). In that case, the sign company filed its § 1983 complaint more than three years after the adoption of the October 1983 ordinance and approximately one month after the expiration of the five and one-half year amortization period. In its answer in that case, the City contended that the action was barred either by N.C.G.S. § 1-54.1, which establishes a nine-month limitation period for "an action contesting the validity of any zoning ordinance or amendment thereto," or by N.C.G.S. § 1-52(2), which establishes a three-year limitation period for lawsuits based on "liability created by statute, either state or federal." The District Court determined that N.C.G.S. § 1-52(2), the three-year statute, applied; that the cause of action accrued upon enactment of the ordinance; and that this action was barred. On appeal, the Fourth Circuit affirmed the trial court's granting of summary judgment for the City but found the applicable statute of limitation to be N.C.G.S. § 1-52(5)[4] relating to personal injury actions, rather than N.C.G.S. § 1-52(2).

In selecting N.C.G.S. § 1-52(5), relating to personal injury actions, as the applicable statute, the Fourth Circuit said this:

> [T]he Supreme Court held that the analogous state statute of limitations most appropriate for § 1983 actions is the limitation period for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In 1989, the Supreme Court further refined *Wilson* by holding that
>
> > where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

4. N.C.G.S. § 1-52(5) provides:

> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

N.C.G.S. § 1-52(5) (Supp. 1993).

> *Owens v. Okure*, 488 U.S. 235[, 249-50], 109 S.Ct. 573, 582, 102 L.Ed.2d 594[, 606] (1989) . . . . Thus, as courts since *Wilson* have recognized, the three-year period for personal injury actions set forth in § 1-52(5) is the North Carolina limitations period applicable to § 1983 actions. *Mallas v. Kolak*, 721 F.Supp. 748 (M.D.N.C. 1989); *Reagan v. Hampton*, 700 F.Supp. 850 (M.D.N.C. 1988); *Reed v. United Transp. Union*, 633 F.Supp. 1516, 1525 (W.D.N.C. 1986); *see also Keller v. Prince George's County*, 827 F.2d 952, 955 n. 2, 965 (4th Cir. 1987) (recognizing that *Wilson v. Garcia* requires all § 1983 actions to be characterized as personal injury tort actions for statute of limitations purposes).

National Advertising Co. v. City of Raleigh, 947 F.2d at 1162 n.2.

Two North Carolina statutes appear to address the issue quite specifically. The first of these is N.C.G.S. § 1-54.1, entitled "Nine months," which sets forth the time period within which such an action as this must be brought:

> Within nine months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Chapter 160A of the General Statutes or other applicable law.

N.C.G.S. § 1-54.1 (Supp. 1993). The second, N.C.G.S. § 160A-364.1, entitled "Statute of limitations," provides:

> A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within nine months as provided in G.S. 1-54.1.

N.C.G.S. § 160A-364.1 (1987).

A recent North Carolina appellate case applying statutes of limitations to state and federal constitutional challenges to municipal zoning regulations is *Pinehurst Area Realty, Inc. v. Village of Pinehurst*, 100 N.C. App. 77, 394 S.E.2d 251 (1990), *cert. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991). In that case, the municipality also made a Rule 12(b)(6) motion to dismiss based on the statute of limitations. The Court of Appeals upheld the trial court's dismissal of the action based on the nine-month statute of limitations in N.C.G.S. § 1-54.1. In so doing, the court rejected the landowner's arguments that some

other and longer time period applied within which to bring challenges to zoning ordinances grounded on deprivation of constitutional rights:

> Zoning claims raise important public policy considerations. There is a strong need for finality with respect to zoning matters so that landowners may use their property without fear of a challenge years after zoning has apparently been determined. North Carolina courts have not held that violations of federal constitutional claims in zoning actions extend the usual nine-month statute of limitations. In *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E.2d 357, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986), this Court held that plaintiff's claims for federal due process violations were barred by the nine-month statute of limitations. It is noteworthy that Sherrill was decided after *Wilson, supra.*
>
> We hold plaintiff's challenge to the 1985 zoning law based on alleged state and federal constitutional violations is barred by the nine-month statute of limitations. The trial court properly dismissed plaintiff's complaint for failure to state a claim for which relief could be granted.

Id. at 80-81, 394 S.E.2d at 253-54.

The *Pinehurst Area Realty, Inc.* case is in accord with the ruling rendered in an earlier 42 U.S.C. § 1983 challenge to a local zoning ordinance. *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344 S.E.2d 357, *cert. denied & appeal dismissed*, 318 N.C. 417, 349 S.E.2d 600 (1986).

We find therefore that the federal courts of the Fourth Circuit are applying N.C.G.S. § 1-52(5), the three-year personal injury statute, to § 1983 sign cases, while our Court of Appeals is applying N.C.G.S. § 1-54.1, the nine-month statute for zoning claims, to the same factual situations.

While our nine-month statute of limitations contained in N.C.G.S. § 1-54.1 and N.C.G.S. § 160A-314.1 appears to treat the issue far more specifically than N.C.G.S. § 1-52(5) and while our North Carolina Court of Appeals decisions appear the better reasoned decisions on the issue, we need not resolve the matter in this case if the cause of action accrued as of the date of the adoption of the October 1983 ordinance as contended by the City, rather than as of the expiration of the amortization period as contended by the plaintiffs. If we con-

clude, as did the trial judge, that this cause of action accrued on the date of the adoption of the ordinance, then the action would be barred in any event by the three-year statute, N.C.G.S. § 1-52(5), and would necessarily be barred by the shorter nine-month statutes contained in N.C.G.S. § 1-54.1 and N.C.G.S. § 160A-364.1.

We now, therefore, address the issue of the date this cause of action accrued.

To begin our discussion, we note the pertinent provision of N.C.G.S. § 160A-364.1 that addresses specifically the time of accrual:

> *A cause of action as to the validity of any zoning ordinance, or amendment thereto*, adopted under this Article [Article 19 of Chapter 160A] or other applicable law *shall accrue upon adoption of the ordinance, or amendment* thereto . . . .

The challenged billboard regulations are a part of defendant City's zoning regulations. Under the clear wording of this statute, plaintiffs' cause of action arose upon the adoption of the October 1983 ordinance or, in this particular case, the effective date of that ordinance. While most ordinances are effective upon their passage, many of them provide that they shall become effective on a specified date certain in the future to allow time for affected parties to become aware of their adoption. *See generally* Eugene McQuillin, 5 *The Law of Municipal Corporations* § 15.39 (3d ed. 1992).

Plaintiffs' cause of action, for statute of limitations purposes, arose at the time the City's billboard ordinance first became effective because it was then that the regulation injured plaintiffs' property in clear and concrete fashion. This was the precise holding of *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158.

It was the enactment of the October 1983 ordinance, with its size and placement provisions, that made each and every one of plaintiffs' billboards nonconforming, thereby subjecting them to removal. Removal of the signs by 24 April 1989 would not be required *but for* the spatial and size nonconformities created upon the adoption of the October 1983 ordinance. On 23 October 1983, plaintiffs' signs became nonconforming.

Plaintiffs' complaint alleges that the *ordinance* is what constitutes the alleged regulatory taking of plaintiffs' property. Plaintiffs, in their complaint, sought a permanent injunction to prohibit the enforcement of "the ordinance." The alleged wrongful state action

that forms the basis for plaintiffs' § 1983 action is the City's adoption of the October 1983 ordinance. It was on the effective date of the ordinance that the regulation of the size, height, location, placement, and separation requirements and the zoning conformance status of every existing billboard was fixed and finalized. It was on the effective date of the ordinance that the consequences of the existence of a nonconforming ordinance were conclusively set. It was on that precise date that the expected useful life of the plaintiffs' billboards was foreshortened.

It was on the effective date of the ordinance that, because of other then-existing zoning regulations, plaintiffs' signs could not be replaced or relocated. It was on this date that the reconstruction, repair, and rebuilding of plaintiffs' nonconforming billboards were restricted to an amount equal to 50% of their individual tax value. It was on the effective date of the ordinance that the ability of the plaintiffs to locate new billboards was restricted and the "neighborhood business" zoning district was placed off limits to billboards.

The cumulative effect of the requirements of the October 1983 ordinance significantly reduced the fair market value of each of plaintiffs' business operations in the City of Raleigh. This reality was acknowledged by United States District Court Judge Bullock in *Naegele Outdoor Advertising v. City of Durham*, 803 F. Supp. 1068, 1079 (1992), in which he noted that an expectation that there would be no diminished value caused by *enactment* of governmental sign regulations would not be logical in light of recent takings jurisprudence and the prior experience of outdoor advertisers in Fifth Amendment litigation.

In the case at bar, the trial judge concluded as follows: "Based on this record, the court concludes that plaintiffs suffered actual concrete injury on October 23, 1983 [the effective date of the ordinance], so that the cause of action arose on that date." This conclusion is fully supported by the record evidence. We hold that the plaintiffs' cause of action accrued on the effective date of the October 1983 ordinance and was thus time-barred.

There is a matter of fairness that should not escape our attention. Officials of several of the plaintiff billboard companies were well aware of the proposed ordinance long before it was adopted and, in fact, appeared and expressed their views in opposition to the proposed regulations at hearings before the Raleigh Appearance Commission when they were originally being formulated. Yet, plaintiffs

filed this action five and one-half years after the effective date of the ordinance and just twelve days before the expiration date of the five and one-half year amortization period. During the pendency of this suit, plaintiffs have continued to earn income on their nonconforming signs—years after the expiration date of the amortization period—and, in so doing, have gained advantages over their competition by continuing to maintain billboards that are four to eight times larger than newly erected signs. Plaintiffs have continued to offer advertisers bigger and taller signs than companies that have erected the smaller billboards now allowed under the ordinance. Plaintiffs have maintained their nonconforming billboards, while the two largest billboard companies in Raleigh have been compelled to remove nearly two hundred nonconforming signs. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158; *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102, 94 L. Ed. 2d 185 (1987).

In circumstances such as this, delay often becomes the motivating factor for a lawsuit, and parties in the position of these plaintiffs sometimes prefer that their litigation continue to languish in the courts. Litigation has already added more than five years to the amortization grace period, and twenty-seven billboards required to be removed on or before 24 April 1989 are still standing. Much of the inequity resulting from such cases may be prevented by an early determination of the legal issues presented.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Wake County, for reinstatement of the judgment of Hight, J., entered 4 November 1991.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. SAMUEL TYRONE MASON

No. 401A93

(Filed 29 July 1994)

1. Evidence and Witnesses § 162 (NCI4th)— threats to State's witness—relevancy

Testimony that defendant and his friends threatened the State's principal witness and warned him not to testify and that

defendant on one occasion shot the witness in the thigh was relevant to show defendant's awareness of his guilt, and the trial court did not err by finding that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence §§ 324 et seq., 443, 543.

2. Evidence and Witnesses § 221 (NCI4th)— defendant armed when arrested—relevancy

Evidence that defendant was armed with a shotgun at the time of his arrest and that he was hesitant to submit to arrest for a murder committed less than a week before was relevant to show defendant's knowledge of his own guilt.

Am Jur 2d, Evidence § 540.

3. Constitutional Law § 313 (NCI4th); Evidence and Witnesses § 1629 (NCI4th)— tape recording—interview with State's witness—insensitive comment by defense counsel—no reflection on representation—no plain error

The State's introduction of a portion of defense counsel's tape-recorded interview with the State's principal witness in which defense counsel stated, following a discussion of threats to the witness and a statement by the witness that his going home made his mother and grandmother nervous, that "I'm going to be nervous being in court with you" did not reflect upon the substantive aspects of defendant's case and would not necessarily portray defendant's attorney's representation of him as unworthy of serious consideration by the jury. Moreover, any error in the admission of this statement did not constitute plain error, defendant having failed to object thereto, since defendant has not shown that a different result would have been reached at trial had this portion of the recording not been played before the jury in light of the strong evidence of defendant's guilt, including eyewitness testimony that defendant shot and killed the victim, evidence of motive, and evidence that defendant and his friends threatened the State's principal witness in an effort to prevent him from testifying.

Am Jur 2d, Criminal Law §§ 752, 985-987; Evidence § 583.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

4. Evidence and Witnesses § 179 (NCI4th)— murder case—killing of another gang member—evidence of motive

The trial court in a first-degree murder prosecution did not err by the admission of evidence of the killing of a member of defendant's "family" called the Pimps where it is clear that such killing, if not the principal reason for the killing of the victim in the present case, was a central and critical fact in the explanation of the sequence of events and motive for the murder in the present case.

Am Jur 2d, Evidence § 435.

5. Constitutional Law § 313 (NCI4th)— opening statement—supporting evidence—no ineffective assistance of counsel

Defense counsel did not forecast a defense not supported by the evidence and thus deny defendant the effective assistance of counsel by her opening statement that defendant was a "scapegoat" since (1) there was evidence that there were others who had a motive and opportunity to kill the victim and that defendant was, as his counsel claimed, a "scapegoat," and (2) the opening statement did not constitute a "promised defense" within the purview of the decision in *State v. Moorman*, 320 N.C. 387 (1987).

Am Jur 2d, Criminal Law §§ 752, 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

6. Criminal Law § 427 (NCI4th)— jury selection—remark by prosecutor—no improper comment on defendant's failure to testify

The prosecutor's remark during voir dire of potential jurors that the jury would be hearing from witnesses who were at a party, "both from the State and I would suspect also from the defendant," did not constitute an improper comment directed toward defendant's assertion of his right not to testify but was nothing more than anticipation by the prosecutor that defendant would call witnesses at his trial.

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.

7. Criminal Law § 100.1 (NCI4th)— officer's advice that witness not discuss case with others—no prosecutorial misconduct

A witness's testimony that a police detective advised him not to discuss the case with anyone else was insufficient to establish prosecutorial misconduct resulting in the denial of defendant's right to a fair trial where there was no indication that the witness gave misleading information to defendant's investigators as a result of the detective's alleged instructions or that the detective instructed the witness to take such action in the event of further inquiry about the case.

Am Jur 2d, Depositions and Discovery §§ 400 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Read, J., at the 29 March 1993 Criminal Session of Superior Court, Durham County, upon a jury verdict of guilty of first-degree murder. Calendared for argument in the Supreme Court 12 April 1994; determined on the briefs without oral argument.

Michael F. Easley, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for the State.

Irving Joyner for defendant-appellant.

MEYER, Justice.

On 7 October 1991, defendant Samuel Tyrone Mason was indicted for the first-degree murder of Fredrick Harris. Defendant was tried noncapitally, and on 2 April 1993, the jury returned a verdict of guilty of first-degree murder. Defendant was sentenced to a term of life imprisonment.

The evidence presented at trial tended to show the following. On 13 September 1991, a party was being given for Tasha Haskins and several of her friends at 1114 Scout Drive in Durham. About seventy-five people, mostly teenagers, were at or around this location; also present was defendant, Samuel Mason.

Around 11:20 p.m. that evening, Officer Mah of the Durham Police Department was dispatched to the area to respond to a noise complaint. After arriving in the area and determining that the noise and the party were under control, Officer Mah departed sometime around midnight. About an hour later, he received another call directing him

to return to the location to respond to a report of a shooting. When he returned to the area, he found the victim, Fred Harris, in a grassy area on Scott Drive. It was later determined that Harris had sustained four gunshot wounds; he had been shot once in the right chest, twice in his back, and once in his lower back just above his left buttock. Fred Harris died as a result of these gunshot wounds.

The State's principal witness, Terrell Frederick Royster, had been in the area and at the party that night. He had known defendant for over two years and was also familiar with the victim.

Royster and defendant had been members of a "family" called the Pimps. Some time prior to the night of Fred Harris' murder, Jamal Hanberry, one of the principal members of the Pimps, had been shot and killed. After Jamal Hanberry's killing, members of the Pimps started getting into trouble, and defendant had been seen carrying a gun. Prior to Jamal Hanberry's murder, the Pimps were mainly interested in girls, money, and clothes, but after Hanberry's murder, defendant wanted the Pimps to become more like a street gang.

Royster saw defendant at the party that evening and testified that while he was dancing, defendant was standing around. Royster presumed that defendant was carrying a gun because he was by himself and had a ski mask hanging out of his pocket. At some point during the evening, a fight broke out between the victim and a friend of Royster's named Pete Shealey. Testimony at trial indicated that the cause of the fight was a remark by the victim that Jamal Hanberry, the leader of the Pimps, had "deserved what he got." Pete Shealey was on the ground, and the victim was on top of him when defendant shot the victim in the back. The victim attempted to run away, but defendant ran after him and continued to shoot him.

About four days after the murder, Royster was approached by Detective Dowdy of the Durham Police Department and was questioned with regard to the murder. At that time, Royster denied knowing anything about the shooting. He agreed to accompany Detective Dowdy to the Police Department for further questioning but again denied having any information regarding the shooting.

Later, Detective Dowdy received information that defendant was the one who shot Fred Harris. He obtained a warrant for defendant's arrest and travelled to the housing project where defendant lived in order to take him into custody. After parking his car and talking with some bystanders, Detective Dowdy saw defendant appear from

behind a building, carrying a shotgun. Detective Dowdy pulled his weapon, ordered defendant to drop the shotgun, and arrested defendant.

At this point in the investigation, Detective Dowdy believed that it was Royster who had been in the fight with the victim immediately prior to the shooting and that he knew who had committed the murder. As a result, Detective Dowdy arrested Royster and charged him with accessory after the fact of the murder that was committed by defendant.

While in jail, Royster indicated that he wished to speak with Detective Dowdy and gave a statement explaining that he had not been the person in the fight with the victim but had in fact seen defendant pull a gun out of his pants and shoot the victim. As a result of this information, Royster's bond was reduced, and he was allowed to leave the jail. Royster testified at trial that it was defendant who had shot the victim.

Other facts will be presented as necessary for the proper resolution of the issues presented by defendant.

In his first assignment of error, defendant contends that a number of errors committed by his counsel during the trial amounted to a denial of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

In order to resolve the issues in an orderly manner, we will first address and determine the impact of the errors defendant offers as the basis of his claim of ineffective assistance of counsel and then determine the merits of the ineffective assistance claim.

[1] In the first of his assignments of error, defendant contends that the trial judge erred by allowing, and defense counsel erred by not objecting to, evidence that defendant and his friends threatened and even shot witness Royster prior to trial.

Defendant was released from jail pending trial shortly after Royster had given his statement and was released. Royster testified that after defendant had been released and prior to trial, defendant, on a number of occasions, had threatened him and warned him not to testify. On one occasion, defendant shot Royster in the thigh with a pistol. On another occasion, one of defendant's friends pointed a gun at Royster's head, said that he had read Royster's statement, and warned him not to testify in court. Later, when Royster was standing beside a

building, someone shot at him from a moving car. The Durham Police Department helped Royster travel to Atlanta by providing money for bus tickets for him, his daughter, and his daughter's mother.

Defendant contends that this testimony was not relevant for the purpose of proving who shot Fred Harris, that it had no probative value, and that the only purpose for presenting the testimony was to show that the defendant was a bad and violent person with a character consistent with that of a killer. Accordingly, defendant contends, the testimony should have been ruled inadmissible by the trial court.

We have held that "[a]n attempt by a defendant to intimidate a witness in an effort to prevent the witness from testifying or to induce the witness to testify falsely in his favor is relevant to show the defendant's awareness of his guilt." *State v. Hicks*, 333 N.C. 467, 485, 428 S.E.2d 167, 177 (1983). Being relevant, it remained for the trial court to make a determination, pursuant to Rule 403, whether its probative value was substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992).

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."

State v. Mercer, 317 N.C. 87, 93, 343 S.E.2d 885, 889 (1986). 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).

In the present case, testimony concerning defendant's threats to the State's principal witness was a strong indication of defendant's awareness of his own guilt. The testimony was not presented in a manner designed to inflame the passions of the jury or otherwise to have "an *undue* tendency to suggest decision on an improper basis." *Mercer*, 317 N.C. at 94, 343 S.E.2d at 889. Defendant has shown no

abuse of discretion on the part of the trial court in the admission of this testimony; accordingly, his assignment of error on these grounds is overruled.

[2] In his second assignment of error, defendant contends that the trial court erred when it allowed, and defense counsel erred by failing to object to, Officer Dowdy's testimony that at the time of defendant's arrest, defendant was armed with a shotgun and Officer Dowdy was forced to draw his weapon and order defendant to drop the shotgun prior to taking him into custody. Again, defendant contends that this testimony was not probative of any fact in evidence and was unduly prejudicial and inflammatory. Defendant contends that the only purpose in admitting this testimony was to portray him as a bad person with the propensity to commit the crime in question.

Details concerning a defendant's arrest may be relevant to prove a number of facts, including defendant's knowledge of his own guilt. In the present case, the record indicates that when defendant was sighted by Detective Dowdy, he did not immediately drop the weapon and surrender, but "stopped behind a bush," and did not drop the weapon until Detective Dowdy instructed him at least twice, at gunpoint, to do so. We are not prepared to say that the fact that defendant was armed with a shotgun and was hesitant to submit to arrest for a crime committed less than a week before has no relevance. " '[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury.' " *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (quoting *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966)) (alteration in original). "The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." N.C.G.S. § 8C-1, Rule 401 commentary (1992). As we noted in *State v. McElrath*, "the relevance standard to be applied in this and other cases is relatively lax." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988). The evidentiary fact that defendant was armed and hesitant to submit to arrest is not inconsequential and was relevant to the determination of his guilt in the recent murder of Fred Harris. Defendant has not met his burden of showing that the trial judge abused his discretion in his determination that the probative value of this evidence was not outweighed by the danger of unfair prejudice. We hold that the evidence was properly admitted, and defendant's assignment of error on these grounds is overruled.

[3] In his third assignment of error supporting defendant's claim of ineffective assistance of counsel, defendant contends that the trial court erred when it allowed, and defense counsel erred by failing to object to, the State's introduction of certain portions of a tape recording of a statement made by Terrell Royster, in the presence of his attorney, to defense counsel. The pertinent portion of the statement follows a general discussion between the three men about the threats made to Royster, his decision to travel to Atlanta, and the circumstances of his return to Durham:

> MR. ROYSTER: I don't like going home, man. It makes my mom nervous and my grandma nervous.
>
> MR. BROWN [Defendant's Attorney]: I understand, man. I can easily understand that. Oh, yes.
>
> MR. ROYSTER: What's so funny, man?
>
> MR. BROWN: I'd be nervous, too.
>
> MR. CAMPBELL [Royster's Attorney]: That was pretty funny to say. That they get nervous. I think I'd be a little nervous, too, with all that shooting going on.
>
> MR. BROWN: To be honest with you, I'm going to be nervous being in court with you.
>
> MR. ROYSTER: Huh?
>
> MR. BROWN: I'm going to be nervous to be in court with you.

Defendant contends that the picture painted of his attorney by this exchange was unflattering and prejudicial and distracted from the credibility of his defense.

At the outset, we note that it is difficult to determine from the record what the impact of this portion of the tape-recorded statement would have been at trial. The comments were but a small portion of an interview that is reproduced in over thirty pages of transcript. A reading of the transcribed recording indicates that defense counsel had, for the most part, established a comfortable and productive rapport with the State's witness. That his attempt at levity may later be viewed as inappropriate or insensitive does not reflect upon the substantive aspects of defendant's case, nor would it necessarily portray defendant's attorney's representation of him as unworthy of serious consideration by the jury.

In addition, defendant failed to object at trial to the admission of this portion of the recording; accordingly, we must analyze the impact of the comments pursuant to a "plain error" analysis. *See State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). We have described the plain error analysis as follows:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

Id. at 39, 340 S.E.2d at 83 (quoting *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (quoting with approval *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982))). After doing so, if we conclude that there is not a reasonable probability that the error committed caused the jury "to reach a different verdict than it would have reached otherwise," *id.* at 40, 340 S.E.2d at 84, defendant is not entitled to relief.

Although we do not find it necessary to determine the admissibility of defense counsel's remarks made during the interview of the State's principal witness, we conclude that defendant is not entitled to relief on this basis. The evidence of defendant's guilt in this case was strong: The record as a whole indicates that the witnesses who were in a position to observe the shooting, though not in agreement on some details of the murder, were in agreement that it was defendant who shot and killed the victim. There was evidence of a motive for the killing and that defendant and his friends threatened the State's principal witness in an effort to prevent him from testifying. We conclude that defendant has not shown that there is a reasonable likelihood that had this portion of the recording not been played before the jury, a different result would have been reached at trial. Defendant's assignment of error on these grounds is overruled.

[4] In his fourth assignment of error in support of his claim of ineffective assistance of counsel, defendant contends that the trial court erred in admitting, and that defense counsel erred in not objecting to, evidence concerning the death of Jamal Hanberry. Defendant contends that inasmuch as motive is not an element of the offense of first-degree murder, evidence of Jamal Hanberry's killing was unrelated to the present case and was only used to tie defendant to other violent acts. This assignment of error is without merit.

It is well settled that evidence of motive, although not an element of the crime sought to be proved, " 'is not only competent, but often very important, in strengthening the evidence for the prosecution.' " *State v. Richards*, 294 N.C. 474, 483, 242 S.E.2d 844, 850 (1978) (quoting *State v. Casey*, 201 N.C. 185, 203, 159 S.E. 337, 346 (1931)); *see also State v. King*, 226 N.C. 241, 37 S.E.2d 684 (1946).

In the present case, there was extensive testimony concerning the fact that Jamal Hanberry, a member of defendant's "family" called the Pimps, had been killed prior to the murder at issue. Terrell Royster testified that he, Jamal, and defendant had been original members of the Pimps when it was formed but that defendant had left the group due to a misunderstanding between himself and some of the other members. After Jamal had been killed, defendant rejoined the Pimps, and the group "just started getting bigger and bigger. A lot of people started joining." Royster explained that after Jamal's murder, "[w]e became angry. A lot of us were discouraged and everybody just didn't have nowhere to go. We didn't know where we were going to go and what we were going to do. So we just started getting in trouble a lot." Royster testified that after Jamal's murder, Jamal's brother, Ron Hanberry, became associated with the Pimps. Later in the trial, witness Tasha Haskins testified that on the night of the murder, while at the party, Ron Hanberry told her she "should leave because something about some guy that had something to do with his brother's murder was there and that they were going to do something to him or something like that." Finally, although there was no testimony linking the victim with Jamal Hanberry's murder, in the tape-recorded interview with defense counsel, Royster stated that after the shooting, he had asked Ron Hanberry why the victim had been shot; as an explanation, "[Ron Hanberry] said [the victim] said Jamal Hanberry, you know, deserved what he got." The evidence also indicated that Ron Hanberry, upon witnessing the victim engaged in a fight with Pete Shealey, had told defendant to "go ahead and burn him." Ron

Hanberry was also identified as one of the individuals who had threatened Royster and warned him not to testify in this case.

It is clear that the murder of Jamal Hanberry, if not the principal reason for the killing of Fred Davis, is nonetheless a central and critical fact in the explanation of the sequence of events and motive for the present crime. We are not persuaded by defendant's contention that this explanation for the motive of the killing was based solely upon speculation and resulted in unfair prejudice. The trial court properly allowed the admission of testimony concerning Jamal Hanberry's death; accordingly, defendant's assignment of error on these grounds is without merit.

[5] In his final assignment of error presented in support of his claim for ineffective assistance of counsel, defendant contends that defense counsel failed to present evidence to support a defense that she had forecast in her opening statement. We disagree.

The portion of the opening statement upon which defendant predicates this argument is as follows:

> Fred Harris' killer is not Samuel Tyrone Mason. Samuel Tyrone Mason is being used by Fred Harris' killer as a scapegoat. Samuel Tyrone Mason is being used by the State of North Carolina as a scapegoat also.
>
> . . . .
>
> You will find out that Frederick [sic] Harris had a run in with members of the Pimps, had run ins with the Hanberry boys. And you will find that the Hanberrys made threats against Fred Harris.

Defendant contends that the failure to present evidence of these matters constitutes ineffective assistance of counsel in the manner this Court determined it to be ineffective in *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987). We disagree.

In *Moorman*, a rape trial, the defendant's attorney "promised in his opening statement to prove that defendant was physically and psychologically incapable of rape." *Id.* at 393, 358 S.E.2d at 506. The defendant in that case testified at a postconviction hearing that he "never told [the attorney] that it was physically or psychologically impossible for him to commit rape. Defendant said he had no idea what [the attorney] meant when he promised to prove defendant was incapable of rape." *Id.* No evidence of such incapability was presented in the trial. We noted that "[t]his promised defense severely

undercut the credibility of the actual evidence offered at trial." *Id.* at 401, 358 S.E.2d at 511.[1]

In the present case, there was evidence that there were others who may have had a motive and the opportunity to kill Fred Harris and that defendant was, as his counsel claimed, a "scapegoat." That defense counsel was not able to convince the jury of this does not demonstrate a lack of effective representation. In addition, the opening remarks made by counsel in the present case do not constitute a "promised defense" in the context determined to be at issue in *Moorman*. *Id.* Defendant's assignment of error on these grounds is overruled.

We now determine whether defendant's assigned errors, taken singly or in combination, merit relief on the basis that he was denied effective assistance of counsel. We conclude that they do not.

The test to be applied in the determination of whether a criminal defendant has been denied effective assistance of counsel requires the defendant to make two showings. " 'First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment.' " *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Second, defendant must show that 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *Moorman*, 320 N.C. at 399, 358 S.E.2d at 510 (quoting *Strickland v. Washington*, 466 U.S. at 693, 80 L. Ed. 2d at 687). "The question becomes whether a reasonable probability exists that, absent counsel's deficient performance, the result of the proceeding would have been different." *Id.* When a court undertakes to engage in such an analysis,

> [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

1. In holding that the defendant in that case was denied effective assistance of counsel, we based our decision on the defense counsel's "wide-ranging opening assertions, which had no foundation in his pretrial investigation and were never remotely supported by any evidence proffered at trial, . . . [his] closing argument that an important part of his client's testimony was not credible[,] . . . his regular use of a variety of pain killing drugs, his frequent migraine headaches, and his drowsiness, lethargy, and inattentiveness during portions of the trial," and concluded that "a reasonable probability is created that had all these things not occurred the trial outcome might have been different." *Id.* at 402, 358 S.E.2d at 511.

> reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington, 466 U.S. at 689, 80 L. Ed. 2d at 694.

Applying these principles to the present case, we conclude that defendant has not demonstrated that he should prevail in his claim. We have already discussed the effect of each of defendant's assignments of error in support of his claim of ineffective assistance of counsel. In addition, we have noted the strength of the evidence presented against defendant. We conclude that defendant was not denied his right to effective assistance of counsel; accordingly, his assignment of error on these grounds is overruled.

[6] In his next assignment of error, defendant contends that he is entitled to a new trial as a result of an impermissible comment by the prosecutor suggesting that he would testify at trial.

The comment about which defendant complains came during the State's *voir dire* of potential jurors:

> You're going to be hearing from different kinds of witnesses. Obviously, police officers, medical examiner, other people who were at the scene, a forensic expert from the State Bureau of Investigation[] who will talk about the bullets that killed Freddie Harris.
>
> You, also, obviously are going to be hearing from civilian witnesses, that is, some of the people who were at the party, *both from the State and I would suspect also from the defendant.* There are a few of those names that are particularly significant, at least from the State's point of view and I want to see whether or not you've heard or recognize any of these names.

(Emphasis added.) Defendant did not object to this comment at trial but on appeal contends that it amounted to a "preemptive attack" on his right not to testify.

We do not interpret the comment to be directed toward defendant's assertion of his Fifth Amendment privilege against self-incrimination. Taken in context, the remark appears to be nothing more than anticipation by the prosecutor that the defendant would

call witnesses to testify at his trial. Defendant's assignment of error on these grounds is overruled.

[7] In his final assignment of error, defendant contends that he is entitled to a new trial because during his investigation of the murder, Detective Dowdy took a statement from a witness and told the witness that she was not to talk to anyone else about what she had told him.

The basis for this assignment of error is the portion of witness Tasha Haskins' direct examination in which the prosecutor inquired about statements she gave to investigators for defendant:

> Q Did you tell [the investigators] anything when they were asking them [sic] questions? Did you tell them things that were different from what you've told this jury?
>
> A Yes.
>
> Q And do you remember what you told them that was different than what you told the jury?
>
> A No, I don't.
>
> Q Let me ask you this, why would you tell them something different from what you told Investigator Dowdy back in September and from what you told the jury today?
>
> A Because in September of '91, I was not suppose [sic] to mention what I mentioned to Det. Dowdy to anyone because they could use it against me in court or something like that.
>
> Q What do you mean exactly?
>
> A Well, Det. Dowdy told me the things that I was telling him, that I shouldn't repeat them to anyone else.
>
> Q And when did he tell you that?
>
> A On September 18th of '91.
>
> Q At the time he talked to you back in September of 1991?
>
> A Yes.
>
> Q And when you talked to Investigator Dowdy back in September, did you get the impression from him that you were not suppose [sic] to talk to anybody else about this?
>
> A Yes, I knew I wasn't suppose [sic] to talk to anyone else about this.

Q So—

A (Interposing) Why did I talk to somebody else?

Q Why did you talk to somebody else?

A I don't know. I truly don't know.

Defendant contends that this testimony shows that the State committed an affirmative act that obstructed his efforts to prepare for trial and that, for that reason, his conviction should be reversed.

In a criminal case, "a defendant has the right to attempt to interview any witness he desires, including prospective State witnesses, free from obstruction by the prosecution." *State v. Mason*, 295 N.C. 584, 587, 248 S.E.2d 241, 244 (1978), *cert. denied*, 440 U.S. 984, 60 L. Ed. 2d 246 (1979). " '[A] prosecutor has an implicit duty not to *obstruct* defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense.' " *State v. Wilson*, 311 N.C. 117, 125, 316 S.E.2d 46, 52 (1984) (quoting *State v. Pinch*, 306 N.C. 1, 12, 292 S.E.2d 203, 214-15 (1982), *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)); *see also State v. Mason*, 295 N.C. at 588, 248 S.E.2d at 244 ("reversal on this ground requires a clear showing that the prosecutor instructed a witness not to cooperate with defendant").

In *Wilson*, a detective at the county jail told the defendant's attorneys that they could not talk to a particular witness, who was incarcerated at the time, without first obtaining permission from the district attorney. The detective testified that he told the defendant's attorneys this "on his own volition and not because the district attorney had given him any instructions concerning [the witness'] visitors." *Wilson*, 311 N.C. at 126, 316 S.E.2d at 52. The defendant's attorneys were not able to talk with the witness that day, and the record indicated that no other attempts were made to interview the witness. *Id.* at 126 n.1, 316 S.E.2d at 52 n.1.

In denying defendant's assignment of error, we concluded:

> The defendant's evidence does not show that the district attorney, or anyone acting pursuant to his instructions, affirma-

> tively instructed any witnesses not to cooperate with the defendant's attorneys. The evidence was clearly insufficient, standing alone, to establish an obstructing of access to either witness sufficient to impose sanctions in the form of excluding their testimony at the trial of the instant case.

Id. at 126, 316 S.E.2d at 52.

We addressed this issue in a similar context in *State v. Pinch*, where the defendant's attorney alleged error in the trial court's denial of his pretrial motion to direct the district attorney to make certain witnesses "available" for interviews. *Pinch*, 306 N.C. at 11, 292 S.E.2d at 214. In his motion, the defendant's attorney alleged "that the district attorney had told [defense counsel] of his specific refusal to allow the interviews in question." *Id.* at 12, 292 S.E.2d at 214. In concluding that the denial of the motion did not deny defendant his right to a fair trial, we noted that

> [t]he only indication of *possible* prosecutorial misbehavior is the bare allegation of defense counsel in the motion that the district attorney had told him of his specific refusal to allow the interviews in question. We find nothing in the record to substantiate this claim nor any evidence tending to show that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them against their cooperation.

Id. at 12, 292 S.E.2d at 215. When we examine the circumstances of the present case, we likewise conclude that defendant has not presented sufficient grounds for reversal of his conviction. At most, the testimony of Tasha Haskins demonstrates that Detective Dowdy advised her not to discuss the case with anyone else. Such a showing is not sufficient to establish prosecutorial misconduct resulting in the denial of defendant's right to a fair trial. Further, we are not persuaded by defendant's argument that as a result of Detective Dowdy's alleged instructions to this witness, she gave misleading information to his investigators. There is nothing to indicate that Detective Dowdy instructed the witness to take such action in the event of further inquiry about the case. We hold that defendant has not demonstrated that he was denied his right to a fair trial on these grounds; accordingly, this assignment of error is overruled.

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

NO ERROR.

STATE OF NORTH CAROLINA v. ODELL LAMONT ALEXANDER, & GEORGE JUNIOR CUNNINGHAM

No. 258A93

(Filed 29 July 1994)

1. Assault and Battery § 21 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—intent to kill—sufficiency of evidence

The evidence of defendant Cunningham's intent to kill Corey Hill was sufficient to withstand his motion to dismiss considering the nature of the assault, the weapon used, and the circumstances. When a person fires a twelve-gauge shotgun into a moving vehicle four times while at the same time his accomplice is firing a pistol at the vehicle, it may fairly be inferred that the person intended to kill whoever was inside the vehicle.

Am Jur 2d, Assault and Battery §§ 48 et seq.

2. Assault and Battery § 22 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—serious injury—sufficiency of evidence

There was sufficient evidence of injury presented at trial to withstand defendants' motion to dismiss charges of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that the force of the shotgun blasts into the truck drove shards of glass into the arm and shoulder of Corey Hill; blood was observed on his arm, and treatment for the injuries was given; Hill identified a photograph that he testified showed "cuts and wounds that I sustained from glass coming through the window from the shotgun blast"; the photograph was admitted into evidence and distributed to the jury for its examination; and officer Frank testified that when he arrived at the hospital Corey Hill "appeared to be very shaken. He had some blood, I believe it was on his left arm, I could see he was pretty shaken up."

Am Jur 2d, Assault and Battery §§ 48 et seq.

Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.

3. Evidence and Witnesses § 2071 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—officer's description of wounds as appearing to be buckshot—admissible

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and murder by allowing an officer to testify that a photograph showed small openings that appeared to be buckshot in the assault victim's arm or by allowing the assault victim to testify that photographs of the vehicle he was driving on the night of the murder showed gunshot holes in the vehicle. The officer's testimony with regard to what he saw in the photograph is best described as "shorthand statement of fact" and there is no requirement that the officer's impression be correct for the statement to be admissible. Defendants had an opportunity to and in fact did call the accuracy of the officer's testimony into question during cross-examination, and defendant Alexander, who raised the issue, concedes that he cannot show how he was prejudiced by testimony that photographs of the vehicle showed gunshot holes in the vehicle.

Am Jur 2d, Expert and Opinion Evidence §§ 199 et seq.

4. Criminal Law § 819 (NCI4th)— murder and assault—interested witness instruction—denied—no error

The trial court's failure to give an interested witness pattern instruction after having agreed to give the instruction at the charge conference was harmless error where evidence of defendants' guilt was comprehensive and substantial, coming from one of the victims as well as other eyewitnesses, and the court included a reference to interest or bias in the instructions on determining whether to believe a witness. Although no conclusion was reached as to whether those instructions would serve as adequate compliance with defendants' request for the pattern instruction, they were of significance in determining prejudice, and defendants failed to show a reasonable possibility that a different result would have been reached had the pattern instruction been given.

Am Jur 2d, Trial §§ 855 et seq.

5. Evidence and Witnesses § 1082 (NCI4th)— murder and assault—exercise of right to remain silent—no prejudicial error

There was no prejudicial error in an assault and murder prosecution where the trial court admitted testimony concerning one defendant's exercise of his right to remain silent. Defendant did not object to the line of questioning at issue, the comments were relatively benign, a review of the record indicates that the prosecutor made no attempt to emphasize the fact that defendants did not speak with them after having been arrested, and the evidence of defendants' guilt was substantial and corroborated by a number of eyewitnesses.

Am Jur 2d, Homicide § 339.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error—modern cases. 32 ALR4th 774.

6. Criminal Law § 1038 (NCI4th)— felony murder—discharging firearm into vehicle—judgment sheet—both convictions listed—remanded

A case was remanded for amendment of the judgment sheet where the judgment sheet for first-degree murder also listed a conviction for discharging a firearm into occupied property and imposed a sentence of life imprisonment with no further reference to the firearm charge. Although the conviction for discharging a firearm was merged into the first-degree felony murder conviction and became superfluous, and the judgment sheet clearly reflects that the listed convictions were consolidated for judgment, the case was remanded from an abundance of caution.

Am Jur 2d, Criminal Law §§ 533 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing as to each defendant a sentence of life imprisonment entered by Burroughs, J., at the 18 August 1992 Criminal Session of Superior Court, Catawba County, upon jury verdicts of guilty of first-degree felony murder and discharging a firearm into occupied property, and different sentences as to each defendant for assault with a deadly weapon with intent to kill inflicting serious injury. Defendants' motions to bypass the Court of Appeals as to the discharging a

firearm and assault judgments were allowed 7 July 1993. Heard in the Supreme Court 14 March 1994.

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

Ann R. Goodman for defendant-appellant Alexander.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant Cunningham.

MEYER, Justice.

On 26 August 1991, defendants Alexander and Cunningham were indicted for the first-degree murder of Darrin Karon Burch, for the assault with a deadly weapon with intent to kill inflicting serious injury of Corey Eugene Hill, and for discharging a firearm into occupied property, specifically, a vehicle occupied by the victims, Burch and Hill. The charges were consolidated for trial in a capital trial conducted at the 18 August 1992 Criminal Session of Superior Court, Catawba County, before Judge Robert M. Burroughs. Both defendants were found guilty by a jury of first-degree murder under the felony-murder theory, of discharging a firearm into occupied property, and of the assault with a deadly weapon with intent to kill inflicting serious injury charges. Following a capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended sentences of life imprisonment for both defendants. Judge Burroughs sentenced defendant Alexander to a prison term of life for the conviction of first-degree murder and to a consecutive term of six years for the felony assault conviction. Defendant Cunningham was sentenced to a term of life for the conviction of first-degree murder and to a consecutive term of twenty years for the felony assault conviction.

The evidence presented at trial tended to show the following. On 27 June 1991, sometime between 11:00 p.m. and 1:00 a.m., Corey Hill drove to an area of Hickory known as "The Hill." After Hill parked the truck he was driving, he was approached by Darrin Burch, who told him that something was going on and that he was going to be in a fight. Hill walked around the corner and placed an order in a local restaurant. While waiting for his food to be prepared, Hill walked back to the truck. Hill noticed a commotion in the area of a nearby church and walked up the street toward it. As he approached the

intersection near the church, he saw Burch on top of and fighting with defendant Alexander. There was a crowd of fifteen to twenty people gathered around, but Hill did not see defendant Cunningham. After the fight broke up, Hill returned to the restaurant to pick up his food.

As Hill walked back toward the restaurant, Burch came past and spoke to him. As Burch was passing, Hill told him he would pick him up down the street. Hill picked up his food from the restaurant, got in his truck, and went in search of Burch.

Hill circled the area until he heard Burch call out to him from behind some bushes. Hill stopped the truck and backed up, and Burch got in. Hill asked him which way to go, and Burch told him to keep going the same way.

Hill drove back past the restaurant and started to turn left at the next intersection. As he did so, he caught a "glimpse" of defendant Cunningham in the rear view mirror. Cunningham had a shotgun. Shots were fired, and Hill recognized the sounds of a shotgun and a pistol. One shot struck Burch in the head. Burch said, "Oh sh—," and fell over into Hill's lap. Burch did not speak anymore.

Hill drove away from the scene and took Burch directly to the emergency room at Frye Regional Hospital. Some time later, he drove through the area of the shooting in the patrol car of Officer Joe Frank of the Hickory Police Department and observed both defendants as they were being questioned by Hickory Police Officer Phillip Thorpe. Hill identified both defendants as the men who had fired the shots, and they were arrested.

Witness Michael Prysock testified that he had been in the area at the time of the shooting. He saw defendant Alexander and Rodney Cunningham, defendant Cunningham's brother who was handicapped and walked with the aid of crutches, walk past Burch while Burch was playing craps with a person named Stickman. Rodney Cunningham was drunk and waving a gun around, and Burch told him to put the gun away. Rodney started cursing at Burch, who then punched defendant Alexander. A fight between defendant Alexander and Burch ensued, and as a result, defendant Alexander was knocked unconscious. After the fight, Burch ran away from the scene, and Prysock did not see him again.

Some time later, Prysock saw defendant Cunningham standing on South Center Street with a shotgun. Defendant Alexander walked

over to him carrying a pistol. Prysock heard one of them say, "Where did they go?" At that point, Hill drove by in the truck, and someone yelled, "There they go." As the truck was turning, both defendants opened fire, standing side by side in the middle of South Center Street. Defendant Cunningham fired the shotgun at least four times; Prysock was unable to count the number of shots fired by defendant Alexander. After the shooting, the truck sped away.

An autopsy conducted on Burch's body showed that he died from a single bullet wound to the head. The bullet entered behind his left ear, passed through his brain, bounced off of the front of his skull, and remained lodged in the brain until recovered by the pathologist. The bullet was a Winchester 9-millimeter.

Other facts will be presented as necessary for the proper resolution of defendants' assignments of error.

[1] In the first assignment of error, defendant Cunningham contends that, as to him, the evidence was insufficient to show that he had the intent to kill Corey Hill. Both defendants contend that the trial court erred when it refused to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury. As the basis for their contention, defendants claim that there was insufficient evidence from which the jury could conclude beyond a reasonable doubt that Corey Hill suffered a serious injury.

In order to withstand a motion to dismiss the charge at issue, the State must present substantial evidence of the following elements: (1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death. *State v. James*, 321 N.C. 676, 687, 365 S.E.2d 579, 586 (1988). Substantial evidence is that amount of evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981); *State v. Fletcher*, 301 N.C. 709, 712, 272 S.E.2d 859, 860-61 (1981). When considering a motion to dismiss, "[i]f the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979). In addition, it is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 774-75, 309 S.E.2d 188, 190 (1983).

With regard to defendant Cunningham's assertion that the evidence was insufficient to show that he had an intent to kill Corey Hill, he argues that the State presented no evidence of his motive to kill Corey Hill, that he knew who was in the car, or that he knew he had injured anyone during the shooting.

" 'An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982).

Applying these principles to the present case, we note that the evidence showed that it was defendant Cunningham who was armed with the shotgun during the time of the shooting and that he fired the gun four times at Corey Hill's truck. Although it appears that defendant Cunningham was not present during the initial confrontation between Burch and defendant Alexander, his brother Rodney Cunningham, who walked with the aid of crutches, was present, and during the confrontation, Rodney Cunningham's gun was taken away from him. We further note that when a person fires a twelve-gauge shotgun into a moving vehicle four times while at the same time his accomplice is firing a pistol at the vehicle, it may fairly be inferred that the person intended to kill whoever was inside the vehicle.

Considering the nature of the assault, the weapon used, and the circumstances, we hold that the evidence of defendant Cunningham's intent to kill Corey Hill was sufficient to withstand his motion to dismiss. Accordingly, the trial judge properly denied the motion, and defendant Cunningham's assignment of error on these grounds is overruled.

[2] Both defendants contend that the evidence of injuries sustained by Corey Hill was insufficient to allow the jury to determine whether he had sustained serious injury as a result of the assault. We disagree.

"The term 'inflicts serious injury,' under G.S. 14-32(b)[1], means physical or bodily injury resulting from an assault with a deadly

1. N.C.G.S. § 14-32(b) has been amended effective 1 January 1995.

weapon." *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373 (1978) (quoting *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962)). The Court in *State v. Ferguson* had earlier defined the term in this manner and noted that " '[f]urther definition seems neither wise nor desirable.' " *Ferguson*, 261 N.C. at 560, 135 S.E.2d at 628 (quoting *State v. Jones*, 258 N.C. at 91, 128 S.E.2d at 3).

As this Court explained in *State v. Hedgepeth*,

> Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988). A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983). Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury. *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978).

State v. Hedgepeth, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991).

Cases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious. *See Joyner*, 295 N.C. at 65, 243 S.E.2d at 374 ("there being evidence of physical or bodily injury to the victim, the question of the nature of these injuries was . . . properly submitted to the jury").

In the present case, the evidence tended to show that the force of the shotgun blasts into the truck drove shards of glass into the arm and shoulder of Corey Hill. Blood was observed on his arm, and treatment for the injuries was given. Hill identified a photograph that he testified showed "cuts and wounds that I sustained from glass coming through the window from the shotgun blast." The photograph was admitted into evidence and distributed to the jury for its examination. Officer Frank testified that when he arrived at the hospital, Corey Hill "appeared to be very shaken. He had some blood, I believe it was on his left arm, I could see he was pretty shaken up."

We hold that there was sufficient evidence of injury presented at trial to withstand defendants' motion to dismiss. The trial judge properly denied the motion, and defendants' assignment of error on these grounds is overruled.

[3] In their next assignment of error, defendants contend that the trial court erred when it allowed Officer Frank to testify that a photograph shown to him at trial showed "small openings that appeared to be buckshot" on Corey Hill's arm. Both defendants contend that the comment amounted to an impermissible lay witness opinion and resulted in unfair prejudice in their trial.

The portion of Officer Frank's testimony upon which this assignment of error is based included the following exchanges:

> Q: Describe for the ladies and gentlemen of the jury what you saw on his arm, sir?
>
> A: I saw some blood, several small openings that appeared to be buckshot.
>
> MR. CUMMINGS: Objection to what appeared to be.
>
> MR. PORTWOOD: Objection.
>
> THE COURT: Overruled, overruled, go ahead.
>
> Q: They appeared to be buckshot, is that correct?
>
> A: Yes.

Later, on cross-examination, Officer Frank testified that he did not distinguish between buckshot and birdshot, but that he thought that Corey Hill had pieces of buckshot in his arm. He further admitted that he did not actually see anything in Hill's arm and that, from his own knowledge, he did not know if there were pieces of buckshot or anything else in Corey Hill's arm. When asked why he characterized what he saw as "buckshot," he replied, "It's just a term." In addition, Corey Hill had already testified that his wounds were caused by "glass coming through the window from the shotgun blast."

The admissibility of lay witness opinion testimony is governed by N.C.G.S. § 8C-1, Rule 701, which provides that:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1988).

Defendant Cunningham contends that the comment did not meet the first requirement for a lay witness opinion because cross-

examination revealed that Officer Frank's comment was only an indication of what the photograph appeared to show and that he did not in fact have any firsthand knowledge of whether the wounds were actually caused by buckshot. Both defendants contend that because a photograph of Corey Hill's arm was available for the jury to view, the testimony was inadmissible because it was not "helpful to a clear understanding of his testimony or the determination of a fact in issue." We disagree.

Officer Frank's testimony with regard to what he saw in the photograph is best described as what the Court has characterized as a "shorthand statement of fact." N.C.G.S. § 8C-1, Rule 701, official commentary. We addressed the admissibility of such statements in *State v. Spaulding*:

> This Court has long held that 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." Such statements are usually referred to as shorthand statements of facts.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975) (quoting *State v. Skeen*, 182 N.C. 844, 845, 109 S.E. 71, 72 (1921)), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976).

We had occasion to apply these principles in *State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987). In that case, the witness testified that he saw "gunshot wounds" on the victim's body and that the victim's "left arm had been shot." *Id.* at 77-78, 352 S.E.2d at 431-32. The trial court sustained the defendant's objections to the testimony, but defendant nonetheless appealed, arguing that the trial court erred by failing to instruct the jury to disregard the testimony. We held that it would not have been error to admit the testimony, finding the testimony admissible as a shorthand statement of fact. *Id.* at 78, 352 S.E.2d at 432. The same is true in the present case. Despite the fact that cross-examination and other testimony indicated that Officer Frank's impression may not have been correct, there is no such requirement for the admissibility of such a statement. Defendants had an opportunity to and in fact did call the accuracy of Officer Frank's testimony into question during cross-examination. We hold that it was not error to admit Officer Frank's testimony; accordingly, defendants' assignment of error on these grounds is overruled.

In a related assignment of error, defendant Alexander contends that it was error to allow Corey Hill to testify that photographs of the vehicle that he was driving on the night of the murder showed "gunshot holes" in the vehicle. Defendant concedes that he cannot show how he was prejudiced by this testimony. For the reasons given above, we hold that it was not error to allow Corey Hill to give this testimony; accordingly, defendant Alexander's assignment of error is overruled.

[4] In their next assignment of error, defendants contend that the trial court committed prejudicial error when it failed to give an instruction on the treatment of the testimony of an interested witness.

During the charge conference conducted at the conclusion of the evidence, counsel for defendant Cunningham submitted a written request that the jury be instructed in accordance with N.C.P.I.—Crim. 104.20, which concerns testimony of interested witnesses. The trial court agreed to give the instruction; during the subsequent charge to the jury, however, the instruction was, for an unspecified reason, omitted.

This Court has had occasion to determine the impact of the trial court's failure to give an agreed-upon instruction. In *State v. Ross*, the trial court inadvertently neglected to give an instruction on defendant's decision not to testify. We first noted that

> a request for an instruction at the charge conference is sufficient compliance with the rule [for assignments of error on appeal] to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988); *see also State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987). We next undertook to determine the standard that was to be applied in the determination of prejudice. We concluded that, because the trial judge's error implicated the defendant's rights under the Fifth Amendment to the United States Constitution, the relevant standard was provided in N.C.G.S. § 15A-1443(b), which required the State to demonstrate beyond a reasonable doubt that the error was harmless. *Ross*, 322 N.C. at 266, 367 S.E.2d at 892.

In *State v. Pakulski*, however, we determined that the proper standard by which to determine prejudice for failure to give an

instruction on impeaching a witness with a prior inconsistent statement would be that contained in N.C.G.S. § 15A-1443(a), which required the defendant to show that "there [was] a reasonable possibility that had the error not been committed, a different result would have been reached" at trial. *State v. Pakulski*, 319 N.C. at 575, 356 S.E.2d at 327. As part of the basis for this determination, we noted that "[t]his Court has held that instructions on a witness' credibility relate to a subordinate feature on which the court need not charge absent a request from counsel." *Id.*; *see also State v. Eakins*, 292 N.C. 445, 447, 233 S.E.2d 387, 388 (1977). In *State v. Vick*, we specifically held that "an instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate feature of the case which does not require the trial judge to give the cautionary instruction *unless there is a request for such instruction.*" *State v. Vick*, 287 N.C. 37, 43, 213 S.E.2d 335, 339 (1975). We conclude that the same standard of review is to be applied in the present case, where the requested instruction concerned the credibility of witnesses who may have had an interest in the case.

A review of the record indicates that defendants have failed to carry the burden of showing that there is a reasonable possibility that had the instruction been given, a different result would have been reached at trial. Evidence of defendants' guilt was comprehensive and substantial, coming from one of the victims as well as other eyewitnesses. In addition, we note that the trial court did include the following principles in its instructions to the jury:

> In determining whether to believe any witness, you should aply [sic] the same tests of truthfulness which you apply in your every day [sic] affairs. As applied to this trail [sic], these tests may include the opportunity of the witness to see, to hear, to know or to remember the facts or occurrences about which the witness has testified; *any interest or bias or prejudice that the witness may have*; the apparent understanding and fairness of the witness . . . .

(Emphasis added.) Although we reach no conclusion with regard to whether these instructions would serve as adequate compliance with defendants' request for the pattern instruction on interested witnesses, we find it to be of significance with regard to the determination of prejudice in the trial. We hold that the trial court's failure to give the requested instruction was harmless error; accordingly, defendants are not entitled to a new trial on these grounds.

[5] In an assignment of error pertaining only to defendant Cunningham, he contends that the trial court erred when it admitted testimony concerning defendant's exercise of his right to remain silent.

The following exchange occurred at trial:

Q: [Prosecutor, questioning Officer Steve Hunt]: Did you make any attempt to speak to these individuals, Rodney Cunningham or George Cunningham or Odell Alexander?

A: I did, sir.

Q: Who did you attempt to speak to?

A: I attempted to speak to Mr. Cunningham first[.]

Q: George Cunningham?

A: Yes, sir, Mr. George Junior Cunningham.

Q: To your knowledge, had he been advised of his rights prior to that time?

A: He had been, sir.

Q: Who had advised him of his rights?

A: Officer Bain Weinrich.

Q: And did Mr. Cunningham speak to you or talk to you at all?

A: No, sir. If it was, it was to indicate that he wished not to talk to me.

Q: What about the other two gentlemen, did you try to speak to them or did they talk?

A: I did, sir. Mr. Rodney Cunningham was quite intoxicated, and the other gentleman, if he said anything to me at all was that he wished not to talk to me, Mr. Odell Lamont Alexander.

Defendant Cunningham contends that this exchange violated the prohibition against the admission of testimony relating to defendant's exercise of his privilege against self-incrimination. *See State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986); *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975); *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974).

The prohibition against such references was explained by the Supreme Court in *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976). In that case, the defendants took the stand and offered an explanation

of the events leading to their arrest for the sale of marijuana, claiming that they had been framed. The Court noted:

> Petitioners' explanation of the events presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it. As part of a wide-ranging cross-examination for impeachment purposes, and in an effort to undercut the explanation, the prosecutor asked each petitioner . . . why he had not told the frameup story to Agent Beamer when he arrested petitioners.

Id. at 613, 49 L. Ed. 2d at 95. The defendants in the case objected to this form of cross-examination. The Court in *Doyle* reversed the convictions, reasoning that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial," *id.* at 618, 49 L. Ed. 2d at 98, and held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving Miranda warnings, violate[s] the Due Process Clause of the Fourteenth Amendment," *id.* at 619, 49 L. Ed. 2d at 98.

We have applied the principles enunciated in *Doyle* on a number of occasions. In *State v. Freeland*, the defendant assigned as error the trial court's refusal to declare a mistrial following testimony that the defendant had asserted his right to silence and requested a lawyer after being arrested and advised of his rights. *Freeland*, 316 N.C. at 18, 340 S.E.2d at 38. In holding that the error was harmless beyond a reasonable doubt, we focused on the fact that following defense counsel's timely objection and motion to strike, the trial court gave curative instructions, but we also noted that "the prosecutor in this case was not attempting to capitalize on defendant's silence or his request for counsel." *Id.* at 19, 340 S.E.2d at 38.

In *State v. Walker*, the State's references to defendant's silence were markedly more pointed and were more specifically directed at discrediting the defendant's alibi defense presented at trial. *Walker*, 316 N.C. at 36-37, 340 S.E.2d at 82. Despite this, however, we noted that "the prosecutor was developing the defendant's testimony and did not dwell on the fact that the defendant had not mentioned his alibi defense to the authorities following his arrest." *Id.* at 39, 340 S.E.2d at 84. In addition, the defendant in that case failed to object to the line of questioning; we accordingly analyzed the impact of the references pursuant to a "plain error" analysis, *id.* at 38, 340 S.E.2d at 83, which we described as follows:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

Id. at 39, 340 S.E.2d at 83 (quoting *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (quoting with approval *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982))). After doing so, we concluded that the error committed did not cause the jury "to reach a different verdict than it would have reached otherwise." *Id.* at 40, 340 S.E.2d at 84.

We reach the same conclusion in the present case. Defendant did not object to the line of questioning at issue, the comments were relatively benign, and a review of the record indicates that the prosecutor made no attempt to emphasize the fact that defendants did not speak with them after having been arrested. In addition, as we have already noted, the evidence of defendants' guilt was substantial and corroborated by a number of eyewitnesses. The impropriety of the comments was not sufficient to warrant a new trial; accordingly, defendant Cunningham's assignment of error on these grounds is overruled. In addition, to the extent that defendant Alexander may have been affected by the witness' comment, he also is entitled to no relief.

[6] In a final assignment of error asserted on appeal by defendant Cunningham, he contends, and the State agrees, that he is entitled to have judgment arrested for the conviction of discharging a firearm into an occupied motor vehicle, the underlying felony in the conviction for felony murder.

When a defendant is convicted of a felony that serves as the basis for a conviction of felony murder, he is entitled to have the judgment arrested for the underlying felony. *See State v. Weeks*, 322 N.C. 152, 176, 367 S.E.2d 895, 909 (1985); *State v. Martin*, 309 N.C. 465, 482, 308 S.E.2d 277, 287 (1983); *State v. Jackson*, 309 N.C. 26, 43, 305 S.E.2d

703, 715-16 (1983); *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981).

This assignment of error is based upon the fact that the judgment sheet for the conviction of first-degree murder also lists the conviction for discharging a firearm into occupied property. The judgment sheet imposes a sentence of life imprisonment with no further reference to the firearm charge.

The State takes the position that since, as a matter of law, the conviction for discharging a firearm into occupied property merges into the first-degree felony-murder conviction, the notation on the judgment sheet referring to the firearm charge is superfluous and has no legal significance. We agree. In addition, the judgment sheet clearly reflects that the listed convictions "are consolidated for the purpose of judgment" and states "that the defendant be imprisoned for a term of Life." Out of an abundance of caution, however, we direct that this case be remanded to the trial court for amendment of the judgment sheet in order that it may more clearly reflect that the judgment for the firearm offense has been arrested. In addition, although this assignment of error was not asserted on appeal by defendant Alexander, his judgment sheet was prepared in the same manner; accordingly, we direct that the same action be taken with regard to his judgment for conviction of first-degree felony murder.

After a careful review of the transcript, the record, and the briefs and oral argument of counsel for all parties, we conclude that both defendants received a fair trial, free of prejudicial error.

AS TO DEFENDANT ALEXANDER:

91CRS8739, COUNT 1, FIRST-DEGREE MURDER: NO ERROR;

91CRS8739, COUNT 2, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: NO ERROR;

91CRS8739, COUNT 2, DISCHARGING A FIREARM INTO OCCUPIED PROPERTY: NO ERROR, REMANDED TO THE TRIAL COURT FOR AMENDMENT OF JUDGMENT SHEET.

AS TO DEFENDANT CUNNINGHAM:

91CRS8735, COUNT 1, FIRST-DEGREE MURDER: NO ERROR;

91CRS8735, COUNT 2, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: NO ERROR;

91CRS8735, COUNT 2, DISCHARGING A FIREARM INTO OCCUPIED PROPERTY: NO ERROR, REMANDED TO THE TRIAL COURT FOR AMENDMENT OF JUDGMENT SHEET.

STATE OF NORTH CAROLINA v. JAMES JONES

No. 445A93

(Filed 29 July 1994)

1. Homicide § 230 (NCI4th)— noncapital first-degree murder—sufficiency of evidence

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss where the evidence taken in the light most favorable to the State shows that defendant and the victim met in a remote area on the evening of 5 January 1992; defendant had in his possession a .38 caliber pistol and a box of .38 caliber ammunition; defendant carried the pistol with him into the victim's automobile; sometime during the meeting the victim was shot at close range, once in the head and once in the abdomen; the bullet taken from the automobile which had passed through the victim's abdomen was either a .38 or .357 caliber and the gunpowder residue found on the victim and her sweater indicated the pistol was fired at close range; defendant's clothes contained no gunpowder residue, but evidence showed that the clothes had been cleaned prior to being given to law enforcement officers to be examined; differences in the defendant's statements and the omission of key information would permit but not require a jury to conclude that defendant tried to hide the existence of his pistol from police and that he had fabricated his description of an alleged murderer; testimony of a State's witness would permit but not require a jury to conclude that defendant and the victim were having serious problems in their relationship; and there was evidence which would permit a jury to conclude that defendant had disposed of the murder weapon and was trying to determine his son's height and weight in order to provide the police with a description of someone else as the murderer.

Am Jur 2d, Homicide §§ 425 et seq.

2. Evidence and Witnesses § 1079 (NCI4th)— noncapital first-degree murder—requested instructions—defendant's refusal to give a statement, take a polygraph, or be hypnotized—denied—no prejudice

There was no prejudicial error in a first-degree murder prosecution from the trial court's denial of defendant's request for an instruction where defendant specifically argued that the tendered instruction was necessary because of the State's repeated references to his exercise of his right to counsel and his refusal to submit to a polygraph test or to undergo hypnosis, but most of the alleged improper references do not constitute evidence supporting the tendered instruction; the manner in which defendant prepared statements submitted to investigators by his attorney and the content of the statements had independent significance apart from the fact that they necessarily revealed defendant's use of an attorney in dealing with the investigators; and there was no prejudicial error because a number of the allegedly improper references occurred during defendant's own cross-examination testimony where, responding to questions that did not involve his right to counsel, defendant voluntarily made reference to his use of an attorney; and the court conveyed to the jury that defendant's assertion of his right to counsel and his refusal to submit to a polygraph or to undergo hypnosis was not to affect its decision by repeatedly sustaining defendant's objections and on one occasion by instructing the jury to disregard the State's line of questioning.

Am Jur 2d, Trial § 1184.

3. Evidence and Witnesses § 2477 (NCI4th)— noncapital murder—sequestration of witnesses—exception for lead officer—no abuse of discretion

There was no abuse of discretion in a noncapital first-degree murder prosecution where the State requested that defendant's witnesses be sequestered, defendant contended that sequestration should be universal if ordered, and the State was granted an exception for its lead officer under N.C.G.S. § 8C-1, Rule 615(3). Although defendant contends that this constituted an endorsement of the officer's veracity and points to a change in the officer's testimony, the Supreme Court could not see a significant distinction in the change in testimony and it was not sufficient evidence of an abuse of discretion.

Am Jur 2d, Trial § 61.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR4th 705.

4. Evidence and Witnesses § 876 (NCI4th)— noncapital first-degree murder—statements by victim—hearsay—state of mind exception

The trial court did not err in a noncapital first-degree murder prosecution by admitting testimony that the victim had said before her death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that she was "tired of his junk." The statements were evidence of the victim's state of mind and her state of mind regarding her relationship with defendant was relevant to show that the victim and defendant were having problems in their relationship.

Am Jur 2d, Evidence § 667.

5. Evidence and Witnesses § 2227 (NCI4th)— noncapital first-degree murder—bullet lead composition—qualification of expert

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by admitting a witness to testify as an expert in the field of bullet lead composition where the witness had received a Bachelor of Science Degree in Physics from The University of North Carolina; had worked in the Elemental and Metals Analysis Unit of the FBI Laboratory for over thirteen years; had received a Master's Degree in Public Administration from Virginia Commonwealth University; and during the last twelve years most of his time at the FBI Laboratory had been spent examining bullets and determining the composition of bullets or pieces of lead.

Am Jur 2d, Expert and Opinion Evidence §§ 303 et seq.

6. Evidence and Witnesses § 116 (NCI4th)— noncapital first-degree murder—evidence pointing to guilt of another—mere conjecture

The trial court did not err in a noncapital first-degree murder prosecution by sustaining the State's objection to the admission of evidence of the circumstances surrounding the sale of a farm owned by the victim's family after her death where the evidence

did not point directly or indirectly to the guilt of any other specific person or persons but created, at most, conjecture that defendant was not the perpetrator.

Am Jur 2d, Evidence § 587.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Barnette, J.*, at the 17 May 1993 Criminal Session of Superior Court, Robeson County. Heard in the Supreme Court 12 May 1994.

Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

Cabell J. Regan for defendant-appellant.

FRYE, Justice.

Defendant was indicted for the first-degree murder of Carolyn Britt. He was tried noncapitally by a jury, found guilty as charged, and sentenced to a mandatory term of life imprisonment. Defendant appealed to this Court asserting six assignments of error. We find no reversible error.

The evidence presented at trial tended to show the following facts and circumstances. Defendant lived in Red Springs with his girlfriend of fifteen years, Patricia Strickland, and their son, Adolph Strickland. In addition, defendant was involved in an ongoing intimate relationship with Carolyn Britt.

On 5 January 1992, defendant and Britt arranged to meet on a dirt road in the Wilcox Road area north of Lumberton. At approximately 5:00 p.m., defendant arrived and backed his Subaru into a wooded area off the road. About ten minutes later, Britt arrived and parked her Pontiac Grand Prix in front of defendant's vehicle. The two got into the front seat of Britt's vehicle and began talking. Defendant had a .38 caliber pistol in his possession. After talking and drinking some beer, defendant and Britt "decided to make love" and at that point moved to the back seat of the vehicle. Defendant laid his pistol on the front seat of the Pontiac.

Defendant testified that approximately two hours had elapsed from the time he and Britt met and when he noticed the overhead light come on in the Pontiac. Defendant saw a man standing at the opened door of the automobile. Defendant described the man as an

Indian approximately thirty years old. Defendant further testified that the man had a pistol in his hand and told defendant "to get out, get out." Defendant exited the Pontiac and began to walk toward his Subaru when he heard two gunshots.

Defendant testified that he returned to Britt's automobile and found her slumped over in the back seat with her face covered in blood but at this point did not know she was dead. There was no sign of the Indian male or the pistol defendant had earlier placed in the front seat. Defendant got into the driver's side of Britt's Pontiac and began driving toward Southeastern General Hospital. The window on the driver's side had been shattered and glass covered the front seat. Defendant testified that while on his way to the hospital he thought he heard Britt from the back seat, so he looked around, and "the next thing [he] knew" the Pontiac "hit something," at which point he became unconscious.

Trooper H.L. Covington testified that when he arrived at the scene he found rescue personnel attending to defendant who was "somewhat trapped" in the front seat of the automobile. Defendant was taken to Southeastern General Hospital. Covington further testified that he found the victim's body in the back seat of the automobile with a bullet hole in her right torso and another behind her right eye. There appeared to be traces of gunpowder around her eye.

Officer Franklin Lovette investigated the case for the Robeson County Sheriff's Department. Lovette testified that as part of the murder investigation he spoke briefly with defendant at the hospital, at which time defendant requested an attorney before making a statement. Lovette also testified that a search of defendant's Subaru revealed a box of .38 caliber ammunition on the front seat. Six bullets were missing from the box.

An autopsy revealed two bullet wounds, one to the head, which penetrated the lower part of the brain and would have caused death almost immediately, and another to the abdomen. In addition, there were two lacerations on the victim's head and abrasions and lacerations on her legs. There were gunpowder marks on the head wound which indicated the pistol was fired from close range.

Eugene Bishop, Special Agent with the State Bureau of Investigation (SBI), testified that he examined the box of ammunition taken from defendant's Subaru, the fired bullet taken from the victim's Pontiac which was determined to have passed through the victim's

abdomen, and the victim's sweater. Bishop concluded that the bullet taken from the victim's vehicle was either fired from a .38 caliber or .357 caliber pistol. He found gunshot residue on the victim's sweater that would indicate the pistol was fired from less than two feet away.

Ernest Roger Peele of the Federal Bureau of Investigation (FBI) testified as an expert witness in the field of bullet lead composition. Peele stated that the bullet taken from the victim's Pontiac was consistent in composition with the bullets from the box of ammunition found in the search of defendant's vehicle.

At trial, the State presented three statements given by defendant on separate occasions through his attorney. In the first statement, made nineteen days after the incident, defendant described the alleged murderer as being about thirty or thirty-two years old, five feet, ten inches tall, and weighing 150 pounds. In his second statement, given about a month later, defendant admitted he "own[ed] guns and had a gun in the car on January 5, 1992." In the third statement, defendant said that his ".38 caliber revolver was on the front passenger seat" in Britt's automobile.

Ruby Dale Chavis, a co-worker of the victim, testified that the victim, in a conversation discussing her relationship with defendant, stated that defendant "was very, very jealous," that she was "tired of his junk," and that "she was thinking about breaking up with him."

Defendant's son, Michael Chavis, testified for the State that he had spoken with his father in the hospital a couple of days after the shooting. When he asked defendant what had happened to the .38 caliber pistol, his father replied that "he had gotten rid of it." Further, when Michael asked his father if he knew who had shot Britt, his father nodded his head yes. Also, when the State asked Michael on direct examination, "While you were at the hospital talking to your father, did he ask you about how tall you were and how much you weighed?", Michael responded "Yes."

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss made at the close of all the evidence.

Upon a motion to dismiss in a criminal case,

> [a]ll of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977); *State v. Poole*,

285 N.C. 108, 203 S.E.2d 786 (1974). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Witherspoon, supra; State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972). In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. *State v. Allred*, 279 N.C. 398, 183 S.E.2d 553 (1971). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Com'r. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 231 S.E.2d 882 (1977).

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980); *see also State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493-94 (1992).

Defendant argues in support of his motion to dismiss that the State has not presented evidence sufficient to show that he was the person who committed the homicide. Defendant was charged with murder in the first degree which is defined as the unlawful killing of another human being with malice and with premeditation and deliberation. *McAvoy*, 331 N.C. at 589, 417 S.E.2d at 494. "The test that the trial court must apply is whether there is substantial evidence—either direct, circumstantial, or both—to support a finding that the crime charged has been committed and that defendant was the perpetrator." *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989).

The evidence taken in the light most favorable to the State shows that defendant and the victim met in a remote area on the evening of 5 January 1992; that defendant had in his possession a .38 caliber pistol and a box of .38 caliber ammunition; that defendant carried the pistol with him into the victim's automobile; and that sometime during the meeting the victim was shot at close range, once in the head and once in the abdomen. An SBI Agent testified that the bullet taken from the automobile which had passed through the victim's abdomen was either a .38 or .357 caliber bullet and that the gunpowder residue found on the victim and her sweater indicated the pistol was fired at close range. Defendant's clothes contained no gunpowder residue, but evidence showed that the clothes had been cleaned prior to being given to law enforcement officers to be examined.

In addition, the State's evidence included three statements given over the course of several months. All of the statements were prepared by defendant's attorney, signed by defendant, and submitted to

investigators. In the first statement, defendant did not mention having a pistol in his possession on the night in question; in the second statement defendant admitted owning guns and having one with him that night but did not specify the caliber. It was not until the final statement that defendant admitted possessing a .38 caliber revolver. Also, in his first statement defendant provided a description of the alleged murderer as being an Indian male approximately thirty years of age, about five feet, ten inches in height, weighing 150 pounds, and wearing what appeared to be a "closed jacket dark in color and darker pants." Defendant did not specify the color of the pants or jacket. At trial, however, defendant's description of the alleged murderer provided that the pants were dark blue and the jacket was light blue. The differences in the statements and the omission of key information—the color of the clothing—when taken in the light most favorable to the State, would permit, but not require, a jury to conclude that defendant tried to hide the existence of his pistol from police and that he had fabricated his description of an alleged murderer.

Further, the testimony of State's witness Ruby Chavis would permit, but not require, a jury to conclude that defendant and the victim were having serious problems in their relationship. Also, defendant's son, Michael Chavis, testified that when he asked his father what had happened to his .38 caliber pistol, defendant responded that "he had gotten rid of it." When Michael asked defendant if he knew who shot the victim, he nodded his head yes. Additionally, Michael responded affirmatively to the prosecutor's question: "While you were at the hospital talking to your father, did he ask you about how tall you were and how much you weighed?" This evidence would permit a jury to conclude that defendant had disposed of the murder weapon and was trying to determine his son's height and weight in order to provide the police with a description of someone else as the murderer.

Viewing all of the evidence in the light most favorable to the State, we conclude that there is substantial evidence which would permit a reasonable jury to find that defendant was the perpetrator of the homicide. Therefore, the trial court did not err in denying defendant's motion to dismiss.

[2] In his second assignment of error, defendant contends that the trial court erred in denying his request to give the following instruction:

> The defendant in this case did not give a statement directly to a law enforcement officer, did not submit to a polygraph exami-

> nation, and did not submit to an examination under hypnosis. The law in North Carolina gives him this privilege. The same law also assures him that his decision not to do so creates no presumption against him. Therefore, such evidence, if any, is not to influence your decision in any way.

Defendant contends that the refusal to give the requested jury instruction constitutes prejudicial error.

The law clearly provides that where "a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance." *State v. Ford*, 314 N.C. 498, 506, 334 S.E.2d 765, 770 (1985). "The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence." *State v. Cousins*, 292 N.C. 461, 464, 233 S.E.2d 554, 556 (1977).

Defendant admits finding no authority dealing directly with his tendered instruction but contends that "the factual and evidentiary matters in the present case presented an unusual situation" requiring special instructions. Defendant specifically argues that the tendered instruction was necessary because of the State's repeated references to defendant's exercise of his right to counsel and his refusal to submit to a polygraph test or to undergo hypnosis. After a thorough review of the trial transcript, including those excerpts cited by defendant, we conclude that most of the alleged improper references do not constitute evidence supporting the tendered instruction. We first note that many of the excerpts cited by defendant do not contain any mention of defendant's assertion of his right to counsel or his refusal to submit to a polygraph test or to undergo hypnosis. Secondly, a number of the references were objected to by defendant and his objections were sustained. Further, at one point, the jury was instructed, at defendant's request, to disregard the State's line of questioning. "When such proper instructions are given when the evidence is admitted, the judge is not required to repeat these instructions in the charge." *State v. Crews*, 284 N.C. 427, 440, 201 S.E.2d 840, 849 (1973).

Additional references which were not objected to by defendant occurred during questioning regarding three statements from defendant submitted to investigators by his attorney. The questioning by the State concerned the manner in which the statements were given to investigators and the inconsistencies and omissions among the statements. The manner in which defendant prepared these statements

and their content had independent significance apart from the fact that they necessarily revealed defendant's use of an attorney in dealing with the investigators. Nonetheless, a cautionary instruction would not have been improper in light of the fact that the State's questioning did include references to defendant's assertion of his right to counsel.

Assuming *arguendo*, that the trial court erred by not submitting the tendered instruction, we conclude that defendant was not prejudiced by the error. First, a number of the allegedly improper references occurred during defendant's own cross-examination testimony where, responding to questions from the State that did not involve defendant's right to counsel, defendant voluntarily made reference to his use of an attorney. Secondly, by repeatedly sustaining defendant's objections to the State's references and, on one occasion instructing the jury to disregard the State's line of questioning, the trial judge conveyed to the jury that evidence of defendant's assertion of his right to counsel and his refusal to submit to a polygraph test or to undergo hypnosis was not to affect its decision. We are convinced that failure to give the proffered instruction was not prejudicial error. N.C.G.S. § 15A-1443(a) (1988).

[3] In his third assignment of error, defendant argues that the trial judge erred when he granted the State's motion to sequester defense witnesses and then ultimately sequestered all of the witnesses with the exception of the State's lead officer, Detective Lovette. Under N.C.G.S. § 15A-1225 and N.C.G.S. § 8C-1, Rule 615, a trial judge may, upon a motion of a party or upon his own motion, order witnesses sequestered. This rule does not authorize exclusion of "a person whose presence is shown by a party to be essential to the presentation of his cause," or "a person whose presence is determined by the court to be in the interest of justice." N.C.G.S. § 8C-1, Rule 615(3), (4) (1992). Further,

> [a] trial court has discretion in a criminal case to sequester witnesses. N.C.G.S. § 15A-1226 (1988). *See also State v. Stanley*, 310 N.C. 353, 357, 312 S.E.2d 482, 485 (1984). A ruling within the trial court's discretion should be reversed only upon a showing that the ruling could not have been the result of a reasoned decision. *Stanley*, 310 N.C. at 357, 312 S.E.2d at 485.

State v. Gay, 334 N.C. 467, 487-88, 434 S.E.2d 840, 851 (1993).

Here the State requested that defendant's witnesses be sequestered. Defendant's position was that no sequestration was needed but, if ordered, should be universal to include both witnesses for the defense and the State. The State did not object to universal sequestration but requested an exception for its lead officer under Rule 615(3), asserting that Officer Lovette's presence was essential to the presentation of the State's case. Defendant argued that no exception was needed and allowing Officer Lovette to remain while all other witnesses were sequestered "implies the Court's approval of the witness' veracity." The trial court, believing that Officer Lovette's presence was essential to the presentation of the State's case, ordered the sequestering of all witnesses with the exception of Officer Lovette.

Defendant now argues that allowing Officer Lovette to remain in the courtroom when all other witnesses were sequestered "constituted an endorsement of this officer's veracity" at a critical point in the trial and thus amounted to an abuse of discretion. In support of his contention that the trial court abused its discretion, defendant argues that, on direct examination by the State, Officer Lovette testified that defendant's clothes had been given to him "washed and cleaned." However, when defendant recalled Officer Lovette as an adverse defense witness, Lovette testified that he did not say the clothes had been "washed" but that they had been "cleaned." Defendant alleges Officer Lovette contradicted himself in his testimony, therefore his veracity would have been suspect before the jury.

We fail to grasp a significant distinction between the terms "washed and cleaned" and "cleaned" in the context of this case and defendant does not suggest one. In any event, this change in the officer's testimony is not sufficient evidence of prejudice to justify reversing a trial court's discretionary ruling allowing an officer to remain in the courtroom as a person essential to the presentation of the State's case. *See* N.C.G.S. § 8C-1, Rule 615(3).

[4] In his fourth assignment of error, defendant argues that the trial court erred by allowing Ruby Chavis to testify to statements made by the victim because such statements were not relevant to any issue before the court. Chavis testified that shortly before the victim's death the victim told her that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk." Defendant concedes that this testimony, if relevant, would ordinarily be admissible, either as nonhearsay, because it is

not offered into evidence to prove the truth of the matter asserted, or under the state of mind exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rules 801(c), 803(3) (1992). Defendant argues here the testimony is irrelevant and should have been excluded because he was not aware that the statements had been made.

Under Rule 401 of the North Carolina Rules of Evidence, " '[r]elevant evidence' means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Further, under Rule 402, all relevant evidence is admissible. N.C.G.S. § 8C-1, Rule 402 (1992).

We have held that "evidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case." *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (victim's statements made three weeks before her disappearance about her husband's threats were admitted because the victim's state of mind was relevant to the issue of her relationship with her husband); *see also State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993) (victim's conversations with three witnesses related directly to the victim's fear of defendant and were admissible to show the victim's state of mind at the time the conversations took place), *cert. denied*, —— U.S. ——, 128 L. E. 2d 220 (1994); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (victim's recorded statements were relevant because they tended to disprove the normal loving relationship that defendant contended existed between the two). Also, "any evidence offered to shed light upon the crime should be admitted by the trial court." *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 349 (1990).

In this case, the victim's statements that defendant "was very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk," were evidence of her state of mind regarding her relationship with defendant. These statements rebutted defendant's testimony on cross-examination that the victim "seemed to be perfectly happy with the relationship." We hold that the victim's state of mind regarding the nature of her relationship with defendant was relevant in this case to show that, contrary to testimony by defendant, the victim and defendant were having problems in their relationship. This is true, notwithstanding that defendant may not have known the statements were made. Therefore, the trial court did not err in admitting the testimony.

[5] In his fifth assignment of error, defendant argues that the trial court improperly allowed testimony of Ernest Roger Peele as an expert in the field of bullet lead composition. Rule 702 of the North Carolina Rules of Evidence provides for expert testimony and states that:

> 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).

Defendant argues that Peele was not qualified to testify as an expert witness in this case. However,

> [i]t is not necessary that an expert be experienced with the identical subject in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession. Furthermore, the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.

State v. Bullard, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) (citations omitted). The trial court's finding that a witness is qualified as an expert will not be reversed unless there is no evidence to support it. *Id.*

The State presented evidence that Peele received a Bachelor of Science Degree in Physics from The University of North Carolina and had worked in the Elemental and Metals Analysis Unit of the FBI Laboratory for over thirteen years. Peele testified that he received a Master's Degree in Public Administration from Virginia Commonwealth University and that during the last twelve years most of his time at the FBI Laboratory had been spent examining bullets and determining the composition of bullets or pieces of lead. We conclude that there was evidence to support the trial court's finding that Peele was qualified to testify as an expert in the field of bullet lead composition. Therefore, the trial court did not abuse its discretion and this assignment of error is rejected.

[6] Finally, defendant argues that the trial court committed reversible error in sustaining the State's objections to defendant's proffered evidence of the circumstances surrounding the sale of a farm owned by the victim's family after her death. Defendant presented testimony

that the victim had purchased life insurance to take care of her parents and was considering making her brother a beneficiary. There was also evidence that her family's farm was to be sold around the time of her death. Defendant made an offer of proof that: (1) his witness Lloyd Meekins would have testified that he was contracted to sell the farm and the sale was held on 4 January 1992, but the day after the murder the sale was cancelled; and (2) his witness Hobert Britt would have testified that he was the last and highest bidder at the sale and that his deposit was refunded to him. Defendant argues that this scenario shows motive of a possible third party in the homicide of Britt.

When evidence is tendered for the purpose of showing that someone other than defendant was the perpetrator of the offense in question, the evidence is relevant and admissible if it does more than create an inference or conjecture that defendant was not the perpetrator. *See, e.g., State v. McElrath*, 322 N.C. 1, 14, 360 S.E.2d 442, 449 (1988) (map relevant and admissible because it "casts doubt upon the State's evidence that defendant was the killer and suggests instead an alternative scenario for the victim's ultimate demise"); *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279-80 (1987) (evidence that a person with similar features committed charged offense and two other offenses in similar manner is relevant as tending to implicate the other party and be inconsistent with defendant's silence). Nevertheless, it is well established that in order to be both relevant and admissible such evidence must point directly to the guilt of some specific other person or persons. *State v. Brewer*, 325 N.C. 550, 561, 386 S.E.2d 569, 575, *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990). In the instant case, the tendered evidence does not point directly or indirectly to the guilt of any other specific person or persons for the homicide. The proffered evidence creates, at most, conjecture that defendant was not the perpetrator. Therefore, the trial court did not err in sustaining the State's objection to the admission of this evidence.

In defendant's trial we find no error.

NO ERROR.

STATE OF NORTH CAROLINA v. BOBBY SCOTT JOHNSON

No. 266A93

(Filed 29 July 1994)

1. Robbery § 118 (NCI4th)— armed robbery—dangerous weapon—lug wrench

The trial court did not err in an armed robbery prosecution by denying defendant's request for an instruction on common-law robbery where the victim testified that he was awakened by a man holding what appeared to be a crowbar and threatening to kill him and other evidence showed that the man was defendant and that he possessed a lug wrench. Given the nature of the instrument and defendant's threat to kill the victim, the lug wrench was a deadly weapon. N.C.G.S. § 14-87(a).

Am Jur 2d, Robbery §§ 71 et seq.

2. Robbery § 18 (NCI4th)— armed robbery—no instruction on common law robbery—victim's life threatened

The trial court did not err in failing to instruct on common-law robbery in an armed robbery prosecution where defendant argued that there was no evidence that anyone threatened the life of Mrs. Ross, but the State's evidence showed clearly that three robbers planned to subdue Mr. and Mrs. Ross; defendant forced Mr. Ross into a room with Mrs. Ross; Mr. Ross was struck on the head with the lug wrench when he attempted to get up and help his wife; this blow with the lug wrench to her husband in Mrs. Ross' presence constituted a threat to her; the uncontradicted evidence also showed that when defendant and Debbie entered the trailer, Debbie, who subdued Mrs. Ross, carried a pry bar, and Mrs. Ross started screaming almost immediately; a pry bar could be used to inflict a deadly blow; and, in the hands of a middle-of-the-night intruder, a pry bar would be perceived by a four-foot, eleven-inch-tall woman as a dangerous, life-threatening weapon.

Am Jur 2d, Robbery § 9.

3. Kidnapping § 18 (NCI4th)— accompanying armed robbery—restraint not inherent in robbery

The trial court did not err by refusing to dismiss two kidnapping charges where there was ample evidence of restraint not inherent in the armed robbery in that the State's evidence showed

that defendant threatened to kill Mr. Ross with a lug wrench while an accomplice, a heavy woman, jumped on Mrs. Ross' chest, thereby restraining her, and covered Mrs. Ross' mouth and nose; defendant next forcibly removed Mr. Ross from his bedroom to the living room sofa, then called another accomplice in, handed her the lug wrench, and instructed her to guard Mr. Ross; that accomplice observed that Mr. Ross' hands had been taped together; defendant next bound Mrs. Ross' hands and feet; Mr. Ross attempted to get up and help Mrs. Ross after she fell silent, but someone struck him on the head with the lug wrench; and his hands and feet were thereafter tied. All the restraint necessary and inherent to the armed robbery was exercised by defendant's threatening Mr. Ross with the lug wrench; when defendant removed Mr. Ross to the living room, where he was struck and then tied up, Mr. Ross was exposed to a greater danger than that inherent in the armed robbery itself. Further, in light of Mrs. Ross' physical condition, the multiple restraints actually used on her exposed her to greater danger, even death, than that inherent in the armed robbery.

Am Jur 2d, Abduction and Kidnapping § 32.

Seizure of detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

4. Evidence and Witnesses § 755 (NCI4th)— burglary, kidnapping, robbery—defendant's prior bad acts—same evidence admitted in other testimony

Any error in admitting evidence in a prosecution for burglary, kidnapping and robbery about defendant having previously stolen checks could not have been prejudicial where defendant had just elicited the same evidence.

Am Jur 2d, Appeal and Error § 806.

5. Conspiracy § 43 (NCI4th)— instructions—not limited to those people named in indictment—no error

The trial court did not commit plain error by instructing the jury that it could find defendant guilty of conspiracy without limiting the conspiracy to those people named in the indictment where both of the people named in the indictment testified for the State; each corroborated the other in the details of their

testimony; and no evidence showed that defendant conspired with other persons.

Am Jur 2d, Conspiracy §§ 16, 28, 29.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing a sentence of life imprisonment entered by Strickland, J., at the 8 March 1993 Criminal Session of Superior Court, Onslow 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 burglary, first-degree kidnapping, second-degree kidnapping, robbery with a dangerous weapon, and conspiracy was granted 15 November 1993. Heard in the Supreme Court 12 May 1994.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

PARKER, Justice.

Defendant was indicted on charges of murder, first-degree burglary, first-degree kidnapping, second-degree kidnapping, two counts of robbery with a dangerous weapon, and conspiracy to commit first-degree burglary. He pleaded not guilty, was tried noncapitally, and was found guilty of all charges. The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, which was based on felony murder. As to the other crimes, pursuant to N.C.G.S. § 15A-1340.4(a)(1)o the court found defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' imprisonment. Finding no mitigating factors existed, the court imposed maximum consecutive sentences totalling 170 years. On 26 April 1993, the trial court granted defendant's motion for appropriate relief; arrested judgment on his conviction for first-degree burglary, the predicate for defendant's felony-murder conviction; and made the sentence for first-degree kidnapping consecutive to the life sentence for murder. For reasons which follow, we conclude defendant received a fair trial free of prejudicial error.

State's evidence tended to show that in the summer of 1992 Ida Ross and her husband, Wilbur, had been married for thirty years. They lived in a house trailer at 105 Ladd Street, Jacksonville, North Carolina. Mrs. Ross was four feet, eleven inches tall and overweight.

She suffered from diabetes, hypertension, hiatal hernia, and bronchitis. She slept on a hospital bed in the living room, and her husband slept in a bedroom at the back of the trailer.

In the same town, several young adults and infants were residing in, staying temporarily in, or visiting a house at 1401 Davis Street. The house was rented in the name of Robert Eric Hill, who resided there. His sister, Rachel Hill, also had a room there with her boyfriend, Philip Trackey, and their two-month-old child. Another Hill sibling, Rebecca ("Becky"), also resided there with her baby. In addition, Deborah Hemmert ("Debbie") had a room there, and her three-year-old son visited or stayed there occasionally. Defendant also had a room at 1401 Davis Street. His pregnant girlfriend, Melanie Walters, moved in with him in August 1992. Melanie worked at Sears, Trackey was a cab driver, and Robert Eric Hill worked at a fish market. The other adults were unemployed. Melanie was the only one of the group who owned an automobile.

Prior to moving in with defendant, Melanie lived with a girlfriend at 402 Dogwood Lane, Jacksonville. Around 1 August, there was a party at the Dogwood Lane residence. Becky Hill testified that she, defendant, and Debbie were in the living room drinking. Defendant said he needed to "do a lick" to make some money, and Becky understood this meant to commit a robbery. Defendant asked Becky if she knew any good licks where there would be a lot of cash. Becky replied that she knew a lady, Ida Ross, who usually kept at least $1000 in cash. Becky's grandmother rented a trailer from Mrs. Ross, and Becky knew Mrs. Ross had money and jewelry. Becky told defendant, "[I]t wouldn't be a real good lick to make when they're home." However, defendant said, "[W]e could go with him and tie them up and everything and take the money, and he asked me if I would do it with him, and at first I said no and then later on I agreed." As the evening progressed, defendant repeatedly asked Becky to help with the robbery and she finally agreed. Although Debbie was present during the conversation, she did not participate in it.

A few days later, Becky went with her baby to Ida Ross' trailer to meet Becky's grandmother. Becky arrived late; her grandmother was not there. Mrs. Ross invited Becky to stay for supper; and when Becky returned to Davis Street, she told defendant where she had been. Defendant said that they "needed to make that lick soon." On Friday, 7 August, Becky returned to the Rosses' trailer because she thought her baby had dropped a pacifier there. Debbie was with

Becky, and the two women went inside. They did not find the pacifier and left in order to pick Melanie up from work.

The three women then drove to the Davis Street house. Melanie went to sleep, but Becky drew a diagram of the Rosses' trailer. Debbie helped her label the rooms. As they were working, defendant walked through the room and saw them. Becky told defendant what she and Debbie were doing. Defendant said that they "needed to go ahead and make that lick soon."

Later that evening the residents of 1401 Davis Street had a cookout. While defendant was outside grilling food, Becky and Debbie talked to him. They were drinking whiskey and smoking crack cocaine. Defendant said he wanted to make the lick that night. He wanted Debbie to go along because Becky was not strong enough to hold anyone. The three discussed how to carry out the robbery. They agreed that they would need disguises. Becky said that near the Rosses' trailer was a clearing where they could park. Debbie said that she had some Halloween makeup and they could use it to blacken their faces. Defendant said they should portray themselves as blacks and put panty hose over their heads and bandannas over their faces. Becky and Debbie were not to speak aloud, defendant would do all the talking, and he would use dialect in order to sound like a black person. Defendant also said he knew Melanie had some rubber medical gloves, and they should wear them to avoid leaving fingerprints. Further, they should wear dark clothes. They agreed to don their disguises at the clearing so that no one at the Davis Street house would see them. They also agreed that defendant and Debbie would go in the back door of the trailer. Defendant would subdue Wilbur, Debbie would subdue Ida, and the victims would be tied up. Becky was to wait until defendant called her into the trailer.

Sometime around midnight either defendant or Rachel Hill woke Melanie up, and everyone ate supper. Defendant asked Melanie to go to the store for beer. Becky went with her, but first they went to Melanie's house so that Melanie could get some clothes. Becky found some of Melanie's knee-high stockings, went into the bathroom, tried to put them over her own face, and decided they were too tight. Becky also took a box of surgical gloves Melanie used in coloring hair and giving permanent waves. The two women then went to a convenience store, where they purchased beer and cigarettes. Becky also bought some panty hose.

Upon their return to Davis Street, Melanie began to help Rachel feed her baby. Defendant told Melanie he was going to use her car to take care of some business. Defendant told Rachel he was going to get some liquor and left. Becky and Debbie had already gone out the door, but no one saw them leave. About fifteen minutes later, Becky's baby started to cry. Rachel went through the house looking for Becky and became aware that neither she nor Debbie was there. Rachel and Melanie looked after the babies, and around 3:00 a.m., Philip Trackey came home from work. Soon after, Melanie, Rachel, and Philip went to bed.

In the meantime, defendant drove to the clearing near the Rosses' trailer. Becky and Debbie were with him, and as planned, all wore dark clothing. The two women blackened their faces, secured their hair, put panty hose over their heads, and tied bandannas around their lower faces. Defendant also put panty hose over his head and donned a bandanna. Becky put on two pairs of rubber gloves, and defendant and Debbie each put on three pairs. Defendant produced a lug wrench, a pry bar, a screwdriver, and some tape. He gave the pry bar to Debbie and the screwdriver to Becky but kept the lug wrench for himself.

The three went to the Rosses' trailer, where defendant and Debbie waited near the back door and Becky waited at the side of the trailer. Debbie walked over and told Becky they wanted to wait until the air conditioner, which was noisy, started up. Soon Becky heard the back door pop open, defendant and Debbie running in the house, and Mrs. Ross yelling. Although they had planned to use the tools to break into the house, the back door was not locked.

Mr. Ross was awakened by defendant's standing over him with what appeared to be a crowbar, yelling at him to get up. Defendant's face was blackened, and he wore a bandanna over his lower face. He called Mr. Ross "white trash," grabbed his arm, and began to push him down the hallway towards the living room of the trailer. In the meantime Debbie jumped on the bed, straddled Mrs. Ross, and sat on her chest. Debbie used her hand to cover Mrs. Ross' mouth. Mrs. Ross bit Debbie, and Debbie punched her in the face twice. Debbie saw defendant bring Mr. Ross into the living room and force him to sit on the sofa and heard defendant tell Mr. Ross to lie down. Defendant opened the front door and called for Becky to come into the trailer. However, following the plan, he addressed her as "Tyronne." Defendant handed Becky the lug wrench and told her to stand watch over Mr. Ross. Becky saw that Mr.

Ross' hands had been taped together. During this time, Mrs. Ross was still struggling and trying to scream. Defendant went towards the back of the trailer to get something with which to tie up the victims. Becky saw that defendant was using a small, shiny black flashlight. He returned, tied Mr. Ross up, and told Becky to keep watch out the window. With Debbie's help, defendant then tied up Mrs. Ross. He told Becky to remove Mrs. Ross' rings, and Becky did so. Defendant also told Becky to find Mrs. Ross' purse, and then he and Becky went through the purse and removed some money, credit cards, and jewelry.

Thereafter, Becky went into Mr. Ross' bedroom to find something to steal. Defendant came into the bedroom, and the two found and removed fifty dollars from Mr. Ross' wallet. Becky returned to the living room and noticed that Mrs. Ross had stopped making any noise. Mr. Ross testified that when his wife stopped yelling, he attempted to get up and help her; but someone hit him on the head with the crowbar. Other evidence introduced at trial showed he sustained a cut on his head. After being hit, Mr. Ross was forced facedown onto the sofa and his hands and feet were tied.

Still following the plan, Debbie whispered to Becky that Mrs. Ross had stopped moving, they needed to hurry up and get out, and Debbie did not know what was wrong. Becky went to defendant and told him they needed to hurry and leave. Defendant returned to the living room, observed that Mrs. Ross was motionless, put his hand on her neck to check her pulse, said he could feel her heart beating, and laid his head on her chest to see if she was still breathing.

The three robbers then gathered up items including a portable video camera, a small radio, and the aforementioned cash, credit cards, and jewelry and carried them to the car. On the way out of the trailer, Becky grabbed a towel and wet it in the sink. Back in the clearing, the three removed the panty hose and bandannas from their faces and used the towel to wash off the blacking. They put the panty hose, bandannas, and gloves in a pile in the backseat of the car, and defendant said he would throw them away. Defendant drove to Davis Street, where all the clothing worn in the robbery was given to Melanie to wash. Defendant sorted the stolen goods and buried or hid in the backyard those things he intended to keep, except for the cash, which he pocketed. He put the stolen goods which he did not intend to keep in a bag with the disguise materials, tied a weight to the bag, and threw it in the water at the Henderson Drive bridge.

Defendant and Becky then went to Court Street, where they used money from the robbery to buy crack cocaine. Next they stopped at a

convenience store to buy lighters and returned to Davis Street. For the rest of the night they remained awake, smoking the crack. Around first light, defendant left the house without Becky's knowledge.

In the meantime Mr. Ross was able to free himself and call for help. Jacksonville Police Officer Favius J. Howard arrived at the Rosses' trailer shortly after 4:00 a.m., observed Mr. Ross' injury, determined that Mrs. Ross was dead, and summoned other officers to the scene.

Sometime after daylight Becky's grandmother came to Davis Street with the news that Mrs. Ross had been murdered. Becky and Debbie were very frightened. Around noon, defendant, high on crack, returned to the house and learned that Mrs. Ross was dead. That night, he took the stolen video camera and radio, pry bar, and screwdriver to the Henderson Drive bridge. He smashed the camera and radio and scattered the pieces in the water. Then he drove to a grocery store in New River, where he threw the box of medical gloves into the trash. Later he instructed Becky to pack his clothes, and he left Jacksonville on 12 August. On 5 September 1992 he was apprehended in Searcy, Arkansas.

Expert medical testimony showed that the backs of Mrs. Ross' hands bore defensive wounds. Wounds to her face included a blackened right eye; lacerations across her nose; and lacerations of her lips, both on the outer and inner surfaces. Although a sock had been wrapped around her neck, lack of any external marks or internal injury indicated the ligature was not tightened. The cause of her death was suffocation owing to obstruction of her airways. Her nose and mouth had been closed off and her chest compressed by Debbie's sitting on her.

At the close of State's evidence defendant moved to dismiss all charges for insufficiency of evidence, and his motion was denied. Defendant offered no evidence.

[1] Defendant's first contention is that the trial court erred in denying his request for an instruction on common-law robbery. Defendant argues that State's evidence conflicted as to use of the pry bar, screwdriver, and lug wrench carried into the trailer by the assailants. Therefore, the jury could have determined that no deadly weapon was used to threaten or endanger the Rosses. We do not find defendant's arguments persuasive.

The applicable statute provides as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (1993). Construing the predecessor of this statute, this Court said, "The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). Further, "[w]hether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it *or threatened to use it*, and in some cases the victim's perception of the instrument and its use." *Id.* at 563, 330 S.E.2d at 196 (emphasis added).

In the instant case, Mr. Ross testified that he was awakened by a man holding what appeared to be a crowbar and threatening to kill Mr. Ross. Other evidence showed the man was defendant; in reality he possessed a lug wrench. Under N.C.G.S. § 14-87(a) and *Peacock*, given the nature of the instrument and defendant's threat to kill Mr. Ross, the lug wrench was a deadly weapon. Therefore, defendant's argument that the jury could have determined no weapon was used to threaten Mr. Ross must fail.

[2] Defendant also argues that the trial court erred in failing to instruct on common-law robbery because there was no evidence that anyone threatened the life of Mrs. Ross. We do not find this argument persuasive. State's evidence showed clearly that the three robbers planned to subdue Mr. and Mrs. Ross. At the trailer, however, defendant forced Mr. Ross into the room with Mrs. Ross. Evidence showed that when Mr. Ross attempted to get up and help his wife, he was struck on the head with the lug wrench. This blow with the lug wrench to her husband in Mrs. Ross' presence constituted a threat to her as well. Further, the uncontradicted evidence also showed that when defendant and Debbie entered the trailer, Debbie, who subdued Mrs. Ross, carried a pry bar, and Mrs. Ross started screaming almost immediately. A pry bar could be used to inflict a deadly blow and, in

the hands of a middle-of-the-night intruder, would be perceived by a four-foot, eleven-inch-tall woman as a dangerous, life-threatening weapon.

> [W]here the uncontradicted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser offense, the trial court does not err in failing to instruct the jury on the lesser included offense of common law robbery.

Peacock, 313 N.C. at 562, 330 S.E.2d at 195. In the present case uncontradicted evidence showed that both Mr. and Mrs. Ross were threatened with a deadly weapon; hence, we conclude the trial court did not err in failing to instruct on common-law robbery.

[3] Defendant's next contention is that the court erred in refusing to dismiss the charges of armed robbery and first-degree kidnapping of Mrs. Ross and second-degree kidnapping of Mr. Ross. As to the robbery of Mrs. Ross, defendant contends the evidence was insufficient to show use of a deadly weapon in the taking of her property. In light of our discussion above, this contention must fail. As to the kidnapping charges, defendant argues there was no evidence of restraint except that incident to a robbery not accomplished by use of weapons. We disagree.

Any person who unlawfully confines, restrains, or removes from one place to another any other person sixteen years of age or older without the latter's consent is guilty of kidnapping if the confinement, restraint, or removal is done for the purpose of facilitating the commission of any felony. N.C.G.S. § 14-39(a)(2) (1993). "Restraint" connotes a restraint separate and apart from that inherent in the commission of the other felony. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). If the restraint is an inherent, inevitable element of a joined armed robbery, then no separately punishable offense of kidnapping can exist. *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981); *accord State v. Pigott*, 331 N.C. 199, 209, 415 S.E.2d 555, 561 (1992). The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or "subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

State's evidence showed that first defendant threatened to kill Mr. Ross with the lug wrench. At the same time, Debbie, a heavy woman,

jumped on Mrs. Ross' chest, thereby restraining her, and covered Mrs. Ross' mouth and nose. Next defendant forcibly removed Mr. Ross from his bedroom to the living room sofa. Defendant then called Becky in, handed her the lug wrench, and instructed her to guard Mr. Ross. Becky observed that Mr. Ross' hands had been taped together. Defendant next bound Mrs. Ross' hands and feet. After she fell silent, Mr. Ross attempted to get up and help her, but someone struck him on the head with the lug wrench. Thereafter, his hands and feet were tied.

Applying the foregoing principles, we conclude there was ample evidence of restraint not inherent in the armed robbery to support the charges of kidnapping. After Mr. Ross' life was threatened, it was not necessary to remove him from one room to another in order to commit the robbery. Thus, the instant case is distinguishable from *Irwin*, wherein the defendant's objective was to steal drugs and he forcibly removed the victim to a safe at the prescription counter near the back of the store. 304 N.C. at 103, 292 S.E.2d at 446. Moreover, the evidence showed clearly Mr. Ross was exposed to further danger by his removal and further restraint in the living room, since when he attempted to help his wife, he was struck on the head. We conclude that all the restraint necessary and inherent to the armed robbery was exercised by defendant's threatening Mr. Ross with the lug wrench. When defendant removed Mr. Ross to the living room, where he was struck and then tied up, Mr. Ross was exposed to a greater danger than that inherent in the armed robbery itself. Further, in light of Mrs. Ross' physical condition, the multiple restraints actually used on her exposed her to greater danger, even death, than that inherent in the armed robbery. For all the foregoing reasons, we hold the trial court did not err in refusing to dismiss the two kidnapping charges.

[4] Defendant's third contention is that the court erred in admitting evidence of defendant's prior bad acts, thereby violating N.C.G.S. § 8C-1, Rules 404(b) and 608(b). Again, we disagree.

During cross-examination of State's witness Becky Hill, the following exchange took place:

> Q. Ms. Hill, that is not the first time you've been caught with things that have been stolen and blamed it on [defendant], is it?
>
> A. What do you mean?
>
> Q. Exactly what I said. This [case] is not the first time you've been caught with things in your possession that were stolen and

claimed that [defendant] stole them, is it?

A. No.

Q. It's not the first time, is it?

A. No.

Q. Tell the jury about the other time?

A. I had been caught with a check. There was [sic] some checks in my belongings that [defendant] had given me.

On redirect examination, the prosecutor attempted to inquire into the matter of the stolen checks. Defense counsel's objection was sustained. In a bench conference, the prosecutor argued that since defense counsel had inquired into the matter on cross-examination, on redirect examination the State could ask its witness to explain. The trial court reversed its ruling, and the prosecutor asked Becky who stole the checks. She answered that defendant had given her the checks.

Assuming arguendo that the court erred in reversing its ruling and admitting the evidence, the error could not have been prejudicial. Defendant had just elicited the same evidence from Becky, and defendant has failed to show any reasonable possibility that the jury would have reached a different result had the prosecutor's question not been asked and answered. N.C.G.S. § 15A-1443(a) (1992).

[5] Defendant's final contention is that the court committed plain error in instructing the jury that it could find defendant guilty of conspiracy without limiting the conspiracy to only those persons named in the indictment. Again, we disagree.

We note first that although defendant failed to raise any objection before the trial court, under the appellate rules he could raise the issue before this Court if he expressly contended that it amounted to plain error. The rules also require, however, that the alleged error be made the basis of an assignment of error, N.C. R. App. P. 10(c)(4), and defendant has failed to make a proper assignment of error. Nevertheless, in the exercise of our supervisory powers and in the interest of judicial economy, we elect to consider defendant's contention based on plain error.

Recently this Court stated the following concerning plain error:

In *Odom*, this Court adopted the "plain error" rule "to allow for review of some assignments of error normally barred by waiv-

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

State v. Collins, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Reviewing the entire record before us, we are convinced that the trial court did not commit plain error in failing to include the names of Debbie Hemmert and Rebecca Hill in its instructions on conspiracy. Both women testified for the State; and in the details of their testimony, each corroborated the other's account of the conspiracy made by the three in order to rob the Rosses. In addition, no evidence showed that defendant conspired with any other persons. Therefore, we hold the trial court did not err.

For the foregoing reasons, we hold defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. FREDRICK CAMACHO

No. 14A92

(Filed 29 July 1994)

1. Homicide § 550 (NCI4th)— first-degree murder—conflict about underlying felony or lying in wait—submission of lesser offenses

For all murder cases prosecuted under N.C.G.S. § 14-17 (1993), when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait,

all lesser degrees of homicide charged in the indictment pursuant to N.C.G.S. § 15-144 and supported by the evidence must be submitted to the jury.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

2. Homicide § 557 (NCI4th)— first-degree murder—conflicting evidence as to lying in wait—submission of lesser offenses

There was a conflict in the evidence as to whether defendant committed a murder by lying in wait where the State's evidence tended to show that defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, but defendant testified that he was in the victim's room only to retrieve some personal belongings when he was overcome with "head rushes" resulting from his excessive use of alcohol and cocaine, that he was trying to pick up some tools he had dropped when the victim entered the room and initiated a struggle by attacking him with a knife, and that during the struggle he struck her with a hammer, causing her death. Because of this conflict in the evidence, the trial judge should have given the jury an instruction upon any version of the crime supported by the evidence favorable to defendant, *i.e.*, any version of the crime which did not involve lying in wait, and which was supported by other evidence and charged in the indictment.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

3. Homicide § 557 (NCI4th)— first-degree murder—conflict as to lying in wait—submission of second-degree murder required by evidence

In a prosecution for first-degree murder wherein the evidence was conflicting as to whether defendant committed the offense by lying in wait, the trial court should have submitted the lesser included offense of second-degree murder to the jury where defendant's evidence tended to show that after the victim assaulted him with a knife, he intentionally beat her with a hammer,

causing her death, and defendant testified that he did not intend to kill the victim but he did intend to beat the victim in the head with the hammer, since the jury could reasonably infer from this evidence that the killing was with malice but not with premeditation and deliberation.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

4. Homicide § 562 (NCI4th)— first-degree murder—conflict as to lying in wait—provocation by victim—submission of voluntary manslaughter required by evidence

In a prosecution for first-degree murder wherein the evidence was conflicting as to whether defendant committed the offense by lying in wait, the trial court should have submitted the lesser included offense of voluntary manslaughter to the jury where defendant's evidence tended to show that defendant, whose mind was already clouded from cocaine and alcohol use, became enraged after seeing the victim with another man and after being attacked by the victim with a knife, and that he struck the victim with a hammer, causing her death, since the jury could find legal provocation by the victim.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

5. Criminal Law § 803 (NCI4th); Homicide § 550 (NCI4th)— necessity for instructions on lesser included offenses—due process—N.C. law

The Due Process Clause of the Fourteenth Amendment and North Carolina law require that all lesser included offenses charged in the bill of indictment and supported by the evidence be submitted to the jury. The trial court's erroneous failure in a first-degree murder prosecution to submit the lesser offenses of second-degree murder and voluntary manslaughter, being of constitutional dimension, entitled defendant to a new trial where it could not be concluded beyond a reasonable doubt that the verdict would have been the same if the lesser offenses had been submitted. N.C.G.S. §§ 15-17, 15-172.

Am Jur 2d, Trial §§ 876 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

Justice MITCHELL concurring.

Appeal pursuant to N.C.G.S. § 7A-27(a) (1989) from a judgment imposing a sentence of death entered by Kirby, J., at the 11 November 1991 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first-degree murder and recommendation of the death penalty. Heard in the Supreme Court 10 May 1994.

Michael F. Easley, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

Kenneth J. Rose for defendant-appellant.

EXUM, Chief Justice.

Defendant was tried on a true bill of indictment pursuant to N.C.G.S. § 15-144 (1983) charging that defendant "did unlawfully, wilfully, and feloniously and of malice aforethought kill and murder Rhonda Leonard Price." The case was prosecuted as a first-degree murder on the theory that the murder of Rhonda Leonard Price was perpetrated by means of lying in wait in violation of N.C.G.S. § 14-17 (1993). The jury was instructed to find the defendant guilty or not guilty of first-degree murder by lying in wait but received no instruction concerning any lesser degrees of homicide. Following the guilt-innocence phase of trial the jury returned a verdict of guilty of first-degree murder. At a separate sentencing proceeding, the jury recommended, and the trial court imposed, a sentence of death.

Defendant has submitted forty-three assignments of error, but, because we find error necessitating a new trial in the second assignment, we need not discuss the others. The question presented in the second assignment of error is whether the trial court erred in failing to submit to the jury second-degree murder and voluntary manslaughter as lesser degrees of homicide charged in the indictment and supported by the evidence. We conclude this was error entitling defendant to a new trial.

I.

The State presented evidence at trial which tended to show as follows:

Defendant Fredrick Camacho and the victim, Rhonda Leonard Price, also referred to as Sue Price, began dating after defendant's honorable discharge from the Marine Corps. They met in Lexington, North Carolina, approximately 18 months before her death; eventually they both relocated to Charlotte. Their relationship consisted of a series of break-ups and attempts at reconciliation.

On 24 February 1986 defendant broke into Room 524 at the Uptown Motor Inn in Charlotte, a room then occupied by the victim, and assaulted the victim with a hammer. As a result, the victim obtained warrants charging defendant with assault on a female and damage to personal property. On 1 March 1986, defendant was informed by his landlord that the police had been by the house with a warrant for his arrest. The landlord told defendant to go downtown and straighten everything out with the police before returning home.

According to a written statement given by defendant after his arrest, he next went to the victim's room at the Downtown Motor Inn where the victim was then living, pried the door open with a screwdriver, sat in the closet, and started thinking about "Sue's" treatment of him. When the victim returned to her room, the defendant "jumped out of the closet" and started hitting her in the head with a hammer "until [he] got exhausted." Dr. John D. Butts, a forensic pathologist, testified that the victim died from blunt force trauma to the head.

At approximately 12:08 a.m. on 2 March 1986, investigators E.L. Kirchen and J.V. Lombardo were called to the victim's room. When the investigators entered the room, they saw defendant standing with a hammer in one hand and his tool belt in the other. When they ordered Camacho to drop the hammer, he did so and stated, "I killed her." When Kirchen remarked, "I don't see how anyone could do something like this," defendant responded, "She deserved it."

Officer Lombardo testified that defendant told him during the processing of his arrest that his "landlord said the cops came out to my house looking for me." Defendant said he "was going to get [Sue] back because I know she sent them looking for me." Defendant told this investigator that he was hiding in the closet on the night of the murder prior to the victim entering her room. Later that morning, after going over his Miranda rights form with another investigator, defendant stated: "I told the bitch. I told her. She got what she deserved."

The defendant presented evidence at trial which tended to show as follows:

Defendant testified that a major source of his problems with the victim was their substance abuse. The victim took tranquilizers, and defendant had used drugs since he was 13 and had also had continuing problems with alcohol abuse. In early February of 1986 defendant admitted himself to Charter Pines Hospital because of his addiction to cocaine and alcohol. He had to leave the four-week program around 21 February because he lacked the funds to remain there. On 24 February, he spoke to the victim and went by her hotel room to talk with her. They had an argument and fought. He shoved her against a wall and broke a window.

The night before the murder, defendant said he had been drinking heavily and therefore did not go to work the next morning. The day of the murder, defendant caught a ride downtown to do some side work. Instead of doing the work, he snorted six "lines" of cocaine and drank heavily for two hours. He then went to the victim's hotel room to retrieve some property she was holding for him. He popped the door open, walked in, and began collecting his property, but he soon decided against this and left.

When defendant later returned to the victim's room, he knocked on the door but got no answer. He entered the room and began having some "super, super heavy rushes, head rushes" from the cocaine and alcohol. While in this mental state, he noticed some of his clothes in the closet and stood up to go over and retrieve them. As he stood, he had a rush and fell to his knees, dropping his tools and reaching out and grabbing the curtain covering the closet.

He was halfway in and out of the closet and was picking up his tools when the victim and her friend Ronnie Seymour entered the room. Defendant stood up and Seymour ran out of the room. The victim looked at defendant and yelled, "Oh my God, it's not what you think." Defendant responded, "I'm not that stupid." The victim then grabbed his hair and attacked him with a knife. He felt his head being struck and jerked downward. They began to fight, and he went blank and began to strike her with his hammer. He did not recall hitting her more than once before he went "off the deep end." He did not recall cutting her with the knife, nor did he remember telling any of the investigators that "she deserved it."

The defendant further testified that he never denied killing the victim. He admitted being there and admitted being responsible for her death. He said he felt sad and remorseful for the killing and that

she did not deserve what happened to her. He said he loved her and that her rejection hurt him.

Defense witness Officer Lombardo heard defendant say that he "didn't mean to hit her so many times," and that he "couldn't stop hitting her." After being shown his previous testimony, Officer Lombardo stated that defendant said at the scene of the crime that he "didn't mean to hit her [at all]."

II.

In his second assignment of error, defendant contends the trial court erred in failing to charge the jury on second-degree murder and voluntary manslaughter as lesser degrees of homicide charged in the indictment and supported by the evidence. Defendant maintains the evidence as to whether he committed the homicide by lying in wait is in conflict; therefore the trial court's failure to instruct the jury on lesser degrees of homicide is error entitling him to a new trial. We agree.

In *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946), we decided the trial court erred by not submitting a verdict of second-degree murder to the jury where the evidence on whether defendant was lying in wait was in conflict. We held that when "more than one inference may be drawn from the evidence in respect to lying in wait, it is error for the trial court to fail to charge the jury that a verdict of murder in the second degree may be returned." *Id.* at 30, 40 S.E.2d at 466.

In *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), the State prosecuted defendant solely on a felony-murder theory, contending that the defendant acted in concert with another in the commission of the underlying felony of discharging a firearm into an occupied structure during the course of which the homicide occurred. There was, however, conflicting evidence on whether defendant committed the underlying felony. The indictment was drafted pursuant to N.C.G.S. § 15-144 (1983).

After noting our decisions that an indictment drafted pursuant to N.C.G.S. § 15-144 was effective to charge first-degree murder and all lesser degrees of homicide, we held in *Thomas* that where the evidence was in conflict regarding whether defendant committed the underlying felony, the lesser offense of involuntary manslaughter should have been submitted because absent defendant's commission of the underlying felony the evidence supported a verdict of guilty of involuntary manslaughter. *Thomas*, 325 N.C. at 599, 386 S.E.2d at 564.

We stated, "in a felony murder prosecution under an indictment in the form prescribed by N.C.G.S. § 15-144 evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support." *Id.* at 592, 386 S.E.2d at 560 (citing *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973)).

In *State v. Leroux*, 326 N.C. 368, 390 S.E.2d 314, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990), the evidence showed that defendant, under cover of darkness, made a secret assault upon an officer who defendant knew had come to apprehend him. Referring to both *Gause* and *Thomas*, we stated "when the evidence permits more than one inference with respect to lying in wait, the trial court must instruct the jury on second-degree murder." *Id.* at 378, 390 S.E.2d at 322. Because, however, there was no conflict in the evidence suggesting that defendant committed the crime by means other than lying in wait, we concluded there was no error in not submitting any lesser degrees of homicide to the jury. *Id.* at 379, 390 S.E.2d at 322.

[1] Thus it is clear that for all murder cases prosecuted under N.C.G.S. § 14-17 (1993), when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to N.C.G.S. § 15-144 and supported by the evidence must be submitted to the jury.

A.

[2] Here the evidence is in conflict as to whether the crime was committed by lying in wait. The State's evidence tends to show that it was, but the defendant's evidence tends to show that it was not.

Homicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946), intentionally assaults the victim, *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), proximately causing the victim's death, *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). *See* N.C.P.I.—Crim. 206.16 (1987).

In *Brown*, the defendant announced his intention to kill the victim, walked alone to the window next to the victim's office, waited for the victim to bend down, and then shot him to death. We decided "even a moment's deliberate pause before killing one unaware of the impending assault and consequently 'without opportunity to defend

himself' satisfies the definition of murder perpetrated by lying in wait." *Brown*, 320 N.C. at 190, 358 S.E.2d at 10 (quoting *State v. Wiseman*, 178 N.C. 784, 790, 101 S.E. 629, 631 (1919)). *See also State v. Allison*, 298 N.C. 135, 257 S.E.2d 417 (1979). In *Allison*, we stated:

> [I]t is not necessary that [the assailant] be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. . . . The fact that he reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait.

Id. at 148, 257 S.E.2d at 425.

Here, the State's evidence tends to show that the defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, leading to her death. This evidence clearly supports submission of murder by lying in wait to the jury.

Defendant's evidence, however, tends to show he did not lie in wait for his victim. Defendant testified that he was in the victim's room only to retrieve some personal belongings when he was overcome with "head rushes" resulting from his excessive use of alcohol and cocaine. He testified he was trying to pick up some tools he had dropped when the victim entered the room and then initiated the struggle by attacking him with a knife. During the ensuing struggle he struck her with a hammer, causing her death.

B.

Because of this conflict in the evidence regarding whether defendant lay in wait, the trial judge should have given the jury an instruction based upon any version of the crime supported by the evidence favorable to defendant, i.e., any version of the crime which did not involve lying in wait, and which is supported by other evidence and charged in the indictment. *Leroux*, 326 N.C. 368, 390 S.E.2d 314; *Thomas*, 325 N.C. 583, 386 S.E.2d 555. An indictment for homicide under N.C.G.S. § 15-144 charges not only murder in the first degree but all lesser degrees of homicide, i.e., murder in the second degree, voluntary manslaughter, and involuntary manslaughter. *Leroux*, 326 N.C. 368, 390 S.E.2d 314; *Thomas*, 325 N.C. 583, 386 S.E.2d 555. Thus, the question becomes which of these crimes is supported by evidence

other than the evidence of lying in wait. We believe this evidence supports submission to the jury of second-degree murder and voluntary manslaughter.

Second-degree murder is defined as "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979) (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963)). A specific intent to kill is not a necessary element of second-degree murder, and malice may be inferred from the intentional use of a deadly weapon. *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978).

[3] Defendant's evidence shows that after the victim assaulted him with a knife, he intentionally beat her with a hammer, causing her death. Defendant testified that he did not intend to kill the victim but he did intend to beat the victim in the head with a hammer. The hammer, as used, easily qualifies as a deadly weapon. From this evidence the jury could reasonably infer that the killing was with malice, but not with premeditation and deliberation. This evidence could, therefore, support a verdict of guilty of second-degree murder.

Voluntary manslaughter is defined as "the unlawful killing of a human being without malice and without premeditation and deliberation." *Fleming*, 296 N.C. at 562, 251 S.E.2d at 432 (quoting *State v. Benge*, 272 N.C. 261, 263, 158 S.E.2d 70, 72 (1967)). Voluntary manslaughter often occurs when the defendant acts in a heat of passion produced by legal provocation. *See generally State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968). Legal provocation exists when the victim's actions against the defendant rise to the level of an assault or threatened assault. *State v. Rogers*, 323 N.C. 658, 374 S.E.2d 852 (1989); *State v. Montague*, 298 N.C. 752, 259 S.E.2d 899 (1979). The doctrine of heat of passion is "meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection." *State v. Forrest*, 321 N.C. 186, 193, 362 S.E.2d 252, 256 (1987) (citing *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1 (1980)).

[4] Here, defendant's evidence tends to show that defendant, whose mind was already clouded from cocaine and alcohol use, became enraged after seeing the victim with another man and after being attacked by the victim with a knife. Such an attack suffices as legal

provocation. *See State v. McConnaughey*, 66 N.C. App. 92, 311 S.E.2d 26 (1984) (victim's charging at and wrestling with defendant was sufficient legal provocation to instruct the jury on voluntary manslaughter). This evidence could, therefore, support a verdict of voluntary manslaughter.

III.

[5] We are also persuaded by defendant's argument that the Due Process Clause of the Fourteenth Amendment and North Carolina law require that all lesser included offenses charged in the bill of indictment and supported by the evidence be submitted. *See* N.C.G.S. § 15-170 (1983) ("upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime"); N.C.G.S. § 15-172 (1983) ("the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree"); *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980). Such a requirement "aids the prosecution when its proof may not be persuasive on some element of the greater offense, and it is beneficial to the defendant 'because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.' " *Thomas*, 325 N.C. at 599, 386 S.E.2d at 564 (quoting *Beck*, 447 U.S. at 633, 65 L. Ed. 2d at 400). This requirement also alleviates concern that

> [i]n a case in which "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction" despite the existing doubt, because "the jury was presented with only two options: convicting the defendant . . . or acquitting him outright."

Id. at 599, 386 S.E.2d at 564 (quoting *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973)) (emphasis in original).

In the instant case, while the evidence is in conflict regarding whether defendant was lying in wait before he killed the victim, all the evidence points to criminal culpability on defendant's part. Therefore, the jury should have been permitted to consider whether defendant was guilty of the lesser degrees of homicide of second-degree murder and voluntary manslaughter. The jury should not have been required to choose only between guilty as charged or not guilty.

We conclude, for the reasons given, that the trial court's failure to instruct the jury on the lesser degrees of homicide of second-degree

murder and voluntary manslaughter is error. This error, being of constitutional dimension, *Beck*, 417 U.S. 625, 65 L. Ed. 2d 392, entitles defendant to a new trial unless we can conclude beyond a reasonable doubt, based on the State's case, that the verdict would have been the same even if the lesser offenses had been submitted. N.C.G.S. § 15A-1443(b) (1988); *see State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981) (when error is of constitutional dimension, prejudice is presumed and burden is on State to prove otherwise). On the state of the evidence before us, we cannot make this conclusion.

The verdict and judgment below are, therefore, vacated and defendant is given a

NEW TRIAL.

Justice MITCHELL concurring.

The result reached by the majority here is consistent with this Court's decision in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). I dissented from the decision of the majority in *Thomas*, and I continue to believe that the reasoning of my dissent in that case was correct. *Id.* at 600-606, 386 S.E.2d at 564-68 (Mitchell, J., dissenting, joined by Webb, J.). However, the doctrine of *stare decisis*—which commands that courts abide by established binding precedent except in the most extraordinary circumstances—requires that I now accept *Thomas* as authoritative and concur in the decision of the majority in the present case.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NORTH CAROLINA NATURAL GAS CORPORATION; CAPE INDUSTRIES, INC.; FEDERAL PAPER BOARD COMPANY, INC.; LIBBEY-OWENS-FORD COMPANY; MICHAEL F. EASLEY, ATTORNEY GENERAL; AND PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.; ALUMINUM CO. OF AMERICA; AND CITIES OF GREENVILLE, MONROE, ROCKY MOUNT AND WILSON AND THE GREENVILLE UTILITIES COMMISSION

No. 277PA93

(Filed 29 July 1994)

Utilities § 286 (NCI4th)— natural gas expansion fund—economic development—findings

In an order of the Utilities Commission establishing a natural gas expansion fund, findings concerning economic development and the benefits to existing customers in unserved areas were supported by the evidence where a review of the record indicates that numerous witnesses who were knowledgeable about the favorable economic impact of natural gas facilities on local economies and the benefits to customers of wider availability of natural gas facilities testified before the Commission and written reports and studies of the matter were also presented to the Commission. Although there may have been contrary evidence before the Commission, substantial evidence is not uncontradicted evidence. Appellants' other arguments were sufficiently like those in *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. ——, to warrant the same resolution. N.C.G.S. § 62-158; N.C.G.S. § 62-2(9).

Am Jur 2d, Public Utilities §§ 273 et seq.

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

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 North Carolina Natural Gas Corporation and approving initial funding of the expansion fund pursuant to N.C.G.S. § 62-158, entered 8 February 1993 in Docket No. G-21, Sub 306. Heard in the Supreme Court 1 February 1994.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy and Jeffrey N. Surles, for applicant-appellee North Carolina Gas Corporation.

Michael F. Easley, Attorney General, by John R. McArthur, Chief Counsel; Margaret A. Force, Associate 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-North Carolina Utilities Commission.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant Carolina Utility Customers Association, Inc.

LeBoeuf, Lamb, Leiby & MacRae, by David R. Poe, M. Toler Workman, and Kristen K. Eldridge, for intervenor-appellant Aluminum Company of America.

Poyner & Spruill, by J. Phil Carlton, Ernie K. Murray and Nancy Bentson Essex, for intervenor-appellants Cities of Rocky Mount, Wilson, Monroe, and Greenville, and the Greenville Utilities Commission.

Baddour, Parker, Hine & Wellons, P.A., by E.B. Borden Parker, for Wayne County, Duplin County, Onslow County, Wayne County Economic Development Commission, Duplin County Economic Development Commission, Wayne County Chamber of Commerce, Mount Olive Chamber of Commerce, and Celotex, Inc., amici curiae.

FRYE, Justice.

In *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332 (1994), decided today, we considered, *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.[1] We held that "N.C.G.S. § 62-158 as enacted pursuant to

1. N.C.G.S. § 62-158(b) also authorizes the use of expansion surcharges and other sources as funding.

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." *Id.*

North Carolina Natural Gas Company (NCNG) is a local distribution company within the meaning of N.C.G.S. § 62-158. NCNG filed a petition to authorize establishment of an expansion fund with the North Carolina Utilities Commission (Commission), requesting the use of supplier refunds and an expansion surcharge for funding. On 8 February 1993, the Commission entered an order establishing an expansion fund for NCNG and directed NCNG to transfer the sum of $3,713,822 in supplier refunds plus applicable interest to the fund. The Commission did not approve a surcharge "at this time." The parties did not appeal the denial of the surcharge and this matter is not before the Court.

The intervenor-appellants in this matter are as follows: Carolina Utility Customers Association (CUCA), an organization of utilities customers that frequently intervenes and participates in proceedings before the Commission; Aluminum Company of America (ALCOA), a customer of NCNG; and the Cities of Greenville, Monroe, Rocky Mount and Wilson, and the Greenville Utilities Commission (CITIES), customers on NCNG's system, and as such, the only municipal gas distribution systems in the State that are customers of a natural gas public utility. Each city maintains its own natural gas distribution system and provides service to areas not served by NCNG.

Several issues raised by various appellants in the present case are identical to those discussed and resolved today in *Carolina Utility Cust. Assn.*, 336 N.C. 657, 446 S.E.2d 332. Although the arguments of the parties in the instant case are worded somewhat differently from those of the parties in *Carolina Utility Customers Association*, their arguments are substantially alike on the following issues so as to warrant the same resolution here as in that case on these issues: whether the expansion fund mechanism embodied in N.C.G.S. § 62-2(9) and N.C.G.S. § 62-158 contravenes numerous provisions of the federal and state constitutions; whether the Commission misapprehended the scope of its discretion under N.C.G.S.§ 62-158 in making the decision to grant or deny NCNG's petition; and whether the Commission erred when it concluded that it did not have the authority to determine the constitutionality of N.C.G.S. § 62-158.

For the reasons stated and applied by this Court today in *Carolina Utilities Customers Association*, we reject the appellants' arguments on these issues. Appellants' arguments regarding the Commission's factual findings require further attention, however.

N.C.G.S. § 62-65(a) provides 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). "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).

CUCA and the CITIES argue that the Commission's findings concerning the economic development prospects for NCNG's franchised but unserved areas lack evidentiary support.

The Commission found as fact that:

> 7. 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 unserved areas of the State where it would not be economically feasible to expand with traditional methods in order to provide infrastructure to aid industrial recruitment and economic development.
>
> 8. The establishment of an expansion fund for NCNG for the purpose of constructing lines into unserved areas in NCNG's territory that are otherwise infeasible to serve in order to provide infrastructure to aid industrial recruitment and economic development is consistent with G.S. 62-2(9) and G.S. 62-158 and is in the public interest.
>
> 9. The availability of natural gas service is an important factor in industrial recruitment. Some of the unserved areas in NCNG's franchised territory have lost industrial prospects because they do not have natural gas service available.
>
> 10. There is a reasonable prospect that the expansion of natural gas facilities into unserved areas by use of expansion funds will assist in the economic development of unserved areas in NCNG's franchised territory. 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 presented at the hearing:

> Several parties addressed the issue of public interest in their testimony and the Commission finds that this testimony bolsters the finding of interest in this case.
>
> NCNG witness Wells testified that the development of natural gas facilities in unserved areas of eastern North Carolina would help attract new industry to NCNG's territory. Wells noted that the economic development that would result from wider availability of natural gas would give the State a larger tax base, provide more employment opportunities and contribute to a better quality of life. He also noted that expansion of natural gas facilities would provide a more economical fuel to homes. Witness Wells' testimony concerning benefits to the public from expansion of natural gas to unserved areas of eastern North Carolina was affirmed by the 15 public witnesses who testified in this proceeding. These public witnesses have extensive experience in industrial recruitment, economic development and local government in eastern North Carolina. The public witnesses from Elizabeth City and Wayne, Duplin, Martin and Bertie Counties all testified to specific examples of their areas losing industrial prospects as a result of not having natural gas facilities in place.

CUCA and the CITIES contend that these "bare expressions of opinions" of various witnesses are not sufficient to support the Commission's finding that "there is a reasonable prospect that the expansion of natural gas facilities into unserved areas by use of expansion funds will assist in the economic development of unserved areas in NCNG's franchised territory." Both appellants point to contrary evidence before the Commission regarding the prospects of economic development as support for their position.

Similar arguments are made by appellants in support of their position that the Commission's factual findings concerning the potential benefits to existing customers in NCNG's unserved areas are not supported by substantial evidence. The one argument raised by the CITIES that differs in scope from those raised by CUCA is that its evidence showed that participation by the CITIES in NCNG's expansion fund would restrict their own development into unserved areas. In

the portion of the order designated Evidence and Conclusions for Findings Of Fact Nos. 16-19, the Commission noted that the CITIES' witnesses "acknowledged that a portion of their revenues are provided by customers outside city limits and that utility operations are profitable and make considerable contributions to the [CITIES'] general fund." Public Staff witness Hoard testified that he did not see any basis for the customers of the CITIES to be treated differently than a customer situated in a municipality served directly by NCNG. The Commission concluded that it was appropriate for all classes of customers to participate in the funding of the expansion fund and that "granting some customers exemptions [would] open the door to many other 'special' circumstances."

Though there may have been contrary evidence before the Commission which supported appellants' positions regarding the prospects of economic development and the potential benefits arising from creation of the expansion fund, substantial evidence is not uncontradicted evidence but instead "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *North Carolina Fire Ins. Rating Bureau*, 292 N.C. at 80, 231 S.E.2d at 888. A review of the record indicates that numerous witnesses who were knowledgeable about the favorable economic impact of natural gas facilities on local economies and the benefits to customers of wider availability of natural gas facilities testified before the Commission. Written reports and studies of the matter were also presented to the Commission for its consideration. After a careful review of the record, we conclude that the Commission's findings are supported by substantial evidence.

CUCA is the only appellant who has specifically raised the issue of whether the Commission made adequate findings and conclusions in its order. Quoting *State ex rel. Utilities Comm. v. Conservation Council of North Carolina*, 312 N.C. 60, 62, 320 S.E.2d 679, 682 (1984), CUCA contends that the order lacks the required "summary of [CUCA's argument] and its rejection of the same" in contravention of N.C.G.S. § 62-79 which deals with the required specificity of final orders and decisions of the Commission.

As we concluded today in *Carolina Utility Cust. Assn.*, 336 N.C. at 670, 446 S.E.2d at 340, "by making this argument, CUCA engrafts a requirement upon N.C.G.S. § 62-79 which does not exist." We hold that the order taken as a whole is "sufficient in detail to enable the court on appeal to determine the controverted ques-

tions presented in the proceedings" and contains the necessary findings of fact and conclusions of law. N.C.G.S. § 62-79(a) (1989). For these reasons, this argument is rejected.

We hold that the Commission's order 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.

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

STATE OF NORTH CAROLINA v. JOHN DENNIS DANIELS

No. 506A90

(Filed 29 July 1994)

1. **Constitutional Law § 343 (NCI4th)— first-degree murder—presence of defendant—ruling on pretrial motion—communicated by telephone**

There was no error in a capital prosecution for first-degree murder, and, assuming error, there was no prejudice, where the trial judge heard arguments on a suppression motion on a Friday, indicated that she would make her ruling before opening statements and would telephone counsel to give them her ruling, she made separate telephone calls to counsel to announce her ruling on Sunday, the conversations were not recorded, and defendant was not present. The trial judge's telephone call to the prosecution was a stage of the trial at which defendant's presence was not mandatory because the judge's statements indicate that the decision had already been made and there is no indication that the issue was open to further discussion or that further discussion or argument actually occurred. Defendant's absence could not have adversely affected his opportunity to defend. Assuming error, there was no prejudice because defendant was present during the discussion of the matter in court on Friday and had an opportunity to express any objection to the ruling on Monday when it was announced in open court, and the judge acknowledged the communication on the record and indicated the substance of the calls.

Am Jur 2d, Criminal Law §§ 910 et seq.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions. 23 ALR4th 955.

2. **Constitutional Law § 343 (NCI4th)— first-degree murder—presence of defendant—pretrial conference concerning juror ultimately excused**

There was no prejudicial error in a first-degree murder prosecution where a prospective juror stated during voir dire that she

had an airline ticket for a vacation and did not know whether it was refundable but could still render a fair decision; she discovered that her ticket was nonrefundable and could not be used for another feasible flight and that her vacation accommodations were likewise nonrefundable after being selected as a juror; in a discussion on the record, she said the financial loss that would result from her jury service would prevent her from being fair and impartial; the trial judge asked to see counsel for an in-chambers conference; and the juror was ultimately excused. Although it is error for the trial court to conduct a chambers conference with counsel for the State and counsel for defendant in defendant's absence, the State established beyond a reasonable doubt that the error was harmless because defendant was present during the juror's statements regarding her personal situation and was fully apprised of the facts underlying the reasons for the juror's excusal, and the court excused the juror from further jury service on the record in open court, with defendant being present and fully apprised of both the ruling and the facts underlying it and having full opportunity to be heard and to lodge any objection he might have.

Am Jur 2d, Criminal Law §§ 695, 696.

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

3. Arrest and Bail § 135 (NCI4th)— first-degree murder—right to communicate with friends and counsel after arrest—no violation

There was no error in a first-degree murder prosecution from the introduction of a letter defendant wrote to the governor after he was arrested in which he stated that he was not crazy and that what he did was premeditated where defendant contended that the letter was obtained in violation of his statutory right to be informed of his right to communicate with friends and counsel without unnecessary delay. Defendant was arrested between 12:45 and 12:50 a.m. and gave his letter to an officer shortly after they arrived at the Law Enforcement Center at 1:20 a.m.; at most, one hour had elapsed between the time of defendant's arrest and his delivery of the letter and the officer was engaged in considerable activity during this time, much of it involving interactions between himself and defendant. There had been no unnecessary

delay in advising defendant of his rights under N.C.G.S. § 15A-501(5) at the time defendant wrote the letter and handed it to the officer.

Am Jur 2d, Criminal Law §§ 737, 738.

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

4. Evidence and Witnesses § 2101 (NCI4th)— first-degree murder—defendant's mental state following confession—officer's testimony excluded—no error

The trial court did not err in a first-degree murder prosecution by excluding portions of the testimony of a law enforcement officer regarding defendant's mental state following his confession where defendant's first questions were improper because they pertained only to whether defendant "could have waived" his rights and his last question, as to whether defendant understood the *Miranda* form, was also improper as calling for a legal conclusion. Witnesses may testify as to whether defendants had the capacity to understand certain words on the *Miranda* form, such as "right" or "attorney," but may not testify as to whether defendants had the capacity to waive their rights.

Am Jur 2d, Expert and Opinion Evidence § 167.

5. Evidence and Witnesses § 2840 (NCI4th)— first-degree murder—police officer not allowed to refresh memory—transcript of telephonic transmission—no prejudicial error

There was no prejudicial error in a first-degree murder prosecution where defendant asked a police officer on cross-examination whether he had told another officer that defendant was "all coked up"; the officer had responded that he did not recall making that statement; and the trial court refused to allow defendant to refresh the officer's memory with a transcript of a tape recording of a telephonic transmission. Although the court erred in not permitting defendant to refresh the officer's recollection, there was no prejudice because there was substantial evidence before the jury, offered by both the State and defendant, pertaining to defendant's substance use on the day of the offense.

Am Jur 2d, Witnesses §§ 440 et seq.

Refreshment of recollection by use of memoranda or other writings. 82 ALR2d 473.

Evidence: admissibility of memorandum of telephone conversation. 94 ALR3d 975.

6. Evidence and Witnesses § 2593 (NCI4th); Attorneys at Law § 38 (NCI4th)— first-degree murder—condition of defendant after arrest—testimony of defendant's attorney

The trial court did not err in a first-degree murder prosecution by excluding the testimony of the public defender, in whose office one of defendant's attorneys worked, or by denying that attorney's motion to withdraw, where the shift supervisor at the jail refused to accept defendant after his arrest because of information indicating potential suicidal tendencies; the shift supervisor requested that the Public Defender seek an emergency commitment of defendant to allow for a mental evaluation; the Public Defender spoke to defendant for ten to fifteen minutes; she observed that defendant was shaking and failed to make eye contact, was unresponsive and indirect, and she had to repeat some questions several times; and the trial court refused to allow defendant's attempt to elicit testimony from the Public Defender about the interview or to allow the withdrawal of one of defendant's attorneys who worked in the Public Defender's office. The substance of the Public Defender's testimony was revealed through other testimony. If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify and, because evidence was admitted that adequately substituted for the Public Defender's testimony, defendant's right to present evidence was neither implicated nor violated by the trial court's refusal to allow his attorney to withdraw.

Am Jur 2d, Attorneys at Law §§ 173-175; Witnesses §§ 225 et seq.

Defense attorney as witness for his client in state criminal case. 52 ALR3d 887.

Disqualification of attorney because member of his firm is or ought to be a witness in case—modern cases. 5 ALR4th 574.

7. Homicide § 563 (NCI4th)— first-degree murder—instructions—quarrel or struggle—requested instruction not given

There was no error in a first-degree murder prosecution where the trial court failed to give defendant's requested instruc-

tion to the jury concerning a killing committed during a quarrel or struggle where the instruction was not supported by the facts of the case.

Am Jur 2d, Homicide §§ 525 et seq.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

8. Homicide § 271 (NCI4th)— felony murder—money taken as afterthought—evidence sufficient

There was no error in submitting the felony murder theory with the predicate felony of common law robbery where defendant admitted in his confession that he intended to and did ask the victim for money; when she responded that she was going to call his mother, defendant punched her, strangled her, and took $70.00 to $80.00 from her wallet; defendant stated that he was having financial problems and that he could lose his house; and defendant said, "Bills set me off." Although defendant contends that the evidence shows only that he took the money as an afterthought and that the State has failed to prove that the money was taken from the victim's presence, defendant's statements that he went to the victim's house to ask for money and that he did ask for money are sufficient to establish that the taking of money and the use of force were part of a single transaction.

Am Jur 2d, Homicide § 442.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR3d 397.

9. Evidence and Witnesses § 2296 (NCI4th)— first-degree murder—psychiatric expert—defendant not personally interviewed

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to testimony by the State's psychiatric expert where the expert had not personally interviewed defendant. While diagnoses based on live interviews may be more reliable, there is no evidence that opinions based upon extensive research of psychiatric files of a defendant, written evaluations of defendant by other doctors, and interviews with defendant's friends and family are inherently unreliable. N.C.G.S. § 8C-1, Rule 702 does not require that an expert personally interview a defendant in order to express an opinion about

that defendant's mental condition; any deficiency in the evaluation may be adequately revealed by cross-examination.

Am Jur 2d, Expert and Opinion Evidence § 187.

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

There was no error in a first-degree murder prosecution in the instructions on the mitigating circumstance of no significant history of prior criminal conduct where the instruction on the circumstance limited it to the previous ten years as defendant had done when he presented the evidence. Thus, the trial court instructed the jury in the only way supported by the evidence. Any possible prejudice to defendant that may have resulted from the limitation of the instruction was rendered harmless by the peremptory instruction that defendant was never convicted of a felony.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 1363 (NCI4th)— first-degree murder—nonstatutory mitigating circumstances—instructions on mitigating value

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could refuse to consider nonstatutory mitigating evidence if it deemed that the evidence had no mitigating value. The North Carolina Supreme Court has repeatedly determined that nonstatutory mitigating circumstances did not necessarily have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599.

12. Criminal Law § 1349 (NCI4th)— first-degree murder—statutory mitigating circumstances—instructions—mitigating value

The trial court did not err in a first-degree murder prosecution by not specifically instructing the jury that the statutory mitigating circumstances have mitigating value where defendant contended that the jurors would have become confused based on the fact that they were told to determine whether nonstatutory mitigating circumstances had mitigating value. The court instructed the jury as to statutory mitigating circumstances before it gave its instructions as to the nonstatutory circum-

stances and the instructions given were in accord with the pattern jury instructions.

Am Jur 2d, Criminal Law §§ 598, 599.

13. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's arguments—jury's responsibility

Any impropriety in a prosecutor's closing argument in a sentencing hearing for first-degree murder was not so gross that the trial court should have intervened *ex mero motu* where defendant contended that the prosecutor erroneously diminished the jury's responsibility but the overall context of the prosecutor's statements emphasized that recommending death was tantamount to saying that the aggravating circumstances found were sufficient to warrant the imposition of the death penalty and that it would be the judge who would impose the sentence, and that the jurors should not think of the sentence as "taking out a vendetta" or "bringing politics into the court," but as simply "following the law."

Am Jur 2d, Trial §§ 572 et seq.

14. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—Biblical references

Biblical references in the prosecutor's argument in a first-degree murder sentencing hearing were not so grossly improper as to require intervention of the trial court *ex mero motu* where the Supreme Court did not perceive prejudice and in light of defense counsel's use of the Bible in his closing argument.

Am Jur 2d, Trial §§ 572 et seq.

15. Criminal Law § 1341 (NCI4th)— first-degree murder—aggravating circumstances—pecuniary gain

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance of pecuniary gain where the evidence showed that defendant had confessed that he intended to and did ask the victim for money and that he killed her and took money from her purse when she refused to give it to him.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1325 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—instructions

The trial court did not err in a capital sentencing hearing by instructing the jury that each juror "may" consider mitigating cir-

cumstances found to exist when weighing the aggravating and mitigating circumstances. This instruction was found to be without error in *State v. Lee*, 335 N.C. 244.

Am Jur 2d, Trial §§ 1441 et seq.

17. Constitutional Law § 371 (NCI4th)— death penalty—not unconstitutional

The North Carolina death penalty is not unconstitutional based upon the heinous, atrocious, or cruel aggravating circumstance being vague and arbitrary.

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.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.

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

A death penalty was not disproportionate where the aggravating circumstances were supported by the evidence, the jury did not sentence defendant while under the influence of passion, prejudice, or any other arbitrary factor, and the sentence was not disproportionate. Defendant entered the home of his aunt asking for money; when she said she would not give him any money and threatened to call his mother, defendant proceeded to strike his aunt numerous times and then strangled her with a cord he wrapped around her neck three times; he dragged the body down the hall, making sure not to leave any fingerprints on the body; he left to spend the money he had stolen on cocaine and then went to his house, where he smoked cocaine and brutally and viciously beat his wife and son with a hammer; and he did not attempt to get medical attention for any of his victims.

Am Jur 2d, Criminal Law § 628.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstances 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.

19. Criminal Law § 1042 (NCI4th)— assault—conviction for lesser offense—consolidated judgment including greater offense

A defendant was entitled to a new sentencing for three assault convictions where the indictments included the felony of assault with a deadly weapon inflicting serious injury, the jury found defendant guilty of the lesser charge of assault with a deadly weapon, a misdemeanor, and the judgment and commitment sheet indicate that the judge sentenced defendant on the basis of the felony. Even though defendant's assault convictions were consolidated, the misapprehension may have affected defendant's sentence.

Am Jur 2d, Criminal Law § 537.

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

Chief Justice EXUM concurring in part and dissenting in part.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Fulton, J., at the 27 August 1990 Criminal Session of Superior Court, Mecklenburg 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 assault with a deadly weapon with intent to kill inflicting serious injury, two counts of assault with a deadly weapon, and attempting to burn a dwelling house was allowed 14 February 1992. Heard in the Supreme Court 13 May 1992.

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

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

MEYER, Justice.

Defendant was properly indicted for and found guilty at a capital trial of murder in the first degree of his aunt, Isabelle Daniels Crawford; common law robbery of Ms. Crawford; assault with a deadly weapon with intent to kill inflicting serious injury against his wife, Diane Daniels; assault with a deadly weapon against his neighbor, Glenn Funderburke; and attempting to burn a dwelling house. He was also indicted for assault with a deadly weapon inflicting serious injury against his son, Jonathon Maurice Daniels, but the jury only

found defendant guilty of assault with a deadly weapon against his son. His conviction of first-degree murder was based on theories of both felony murder and premeditation and deliberation. The jury then heard evidence relating to sentencing for first-degree murder, after which the jury found the existence of three aggravating circumstances and eleven mitigating circumstances and recommended that the defendant be put to death. The trial court sentenced defendant to death for first-degree murder, to a consecutive term of twenty years' imprisonment on the combined assault convictions, and to a consecutive term of ten years' imprisonment for attempting to burn a dwelling house. Judgment was arrested on the common law robbery conviction. We find no error in either the guilt-innocence phase of defendant's trial or in his capital sentencing proceeding. Therefore, we affirm the death sentence.

Evidence presented by the State in the guilt phase, which included defendant's *Mirandized* statement following his arrest, tended to show the following:

By 3:00 p.m. on 17 January 1990, defendant, John Dennis Daniels, had consumed two beers. Later, he consumed a fifth of wine and became "somewhat drunk." In the late afternoon or early evening, defendant went to the home of his seventy-seven-year-old aunt, Isabelle Daniels Crawford, to ask for money and to ask if Crawford would permit defendant's wife, Diane, and his twelve-year-old son, Maurice, to stay with Crawford. Defendant was behind on his rent, and he was having marital problems. Upon arrival at Crawford's house, defendant asked Crawford for money and asked her to take in his wife and son. Crawford did not give defendant any money and told defendant that she intended to phone his mother. Defendant told Crawford not to call his mother and then punched Crawford in the mouth, knocking her to the floor. Defendant, using an electrical cord he wrapped around his aunt's neck three times, strangled Crawford and dragged her body to the back of the house. He located Crawford's purse, removed $70.00 to $80.00, and left. In his pretrial statement, defendant stated, "I don't know why I killed her. Bills set me off. My lady has got bills. I tried to kill my lady."

After purchasing some cocaine, defendant walked around Charlotte and then returned to his home around 10:30 p.m. At home, he spoke briefly with his wife, Diane, and smoked some cocaine in their bathroom. After smoking the cocaine, defendant left the bathroom, holding a hammer. He approached his wife, who was lying on the bed in their bedroom, and began striking her in the head with the hammer. A struggle ensued during which defendant lost the hammer. Respond-

ing to defendant's wife's cries for help, their son, Maurice, joined the altercation. The fight moved into the hallway, where defendant hit his wife on the head with a kerosene heater. Defendant then chased his wife and son into the kitchen and den as defendant's wife attempted to get out of the house. Once in the den, defendant got a rock out of the aquarium and struck Maurice with it; defendant then found the hammer and hit Maurice in the head with it. Defendant's wife and son were finally able to run out the front door. Defendant pursued his wife outside and again hit her in the head with the hammer; he then returned to his house.

The Daniels' neighbor, Glenn Funderburke, was aroused by the commotion and went outside. Funderburke discovered defendant's son, Maurice, in his yard and took him into Funderburke's house. He then phoned the police and went to defendant's house to investigate. Upon entering defendant's house, Funderburke noticed flames near defendant. Defendant, holding a knife, threatened to kill Funderburke if Funderburke did not leave. Funderburke immediately returned to his home and again phoned the police.

At about 12:30 a.m., Charlotte Police Officer Thomas Griffith arrived on the scene, joining two other officers and a fire truck that had already arrived. Griffith observed the house on fire. After extinguishing the fire, the firemen brought defendant from the house and gave him oxygen. After defendant refused further medical treatment, Officer Griffith told defendant that he was going to jail for assault. At about 12:50 a.m., Griffith left the scene with defendant and proceeded toward the Law Enforcement Center.

In the car, defendant repeatedly urged Griffith to go to "Mint Street." When Griffith asked defendant why he was making this request, defendant responded: "I think I might have killed my aunt." Griffith then changed course slightly, followed defendant's directions, and at 12:55 a.m. arrived at the house identified by Daniels. After knocking on the back door and receiving no response, Officer Griffith entered the home. Inside, Griffith found a trail of blood beginning in a hallway. Following the trail to a bedroom, Griffith found Crawford's lifeless body lying face down on the floor, with a cord wrapped around her neck. A wastebasket was overturned, and the carpet disturbed; the remaining contents of the house were intact.

Griffith then took defendant to the Law Enforcement Center, arriving at 1:15 a.m. After smoking a cigarette and using the bathroom, defendant was placed in a room and given a pen and paper,

which he had requested. A few minutes later, defendant returned the paper, requesting that it be sent to the Governor. On it he had written:

> Dear sir
>
> I'm not crazy
> What I did was premediated! [sic]
> Time 1:42 1/18/90
>
> John D. Daniels
>
> I do not want a trial
> I do not want my family around
> I do not want news report [sic]

Shortly after receiving this letter, Griffith heard a noise in the room. He entered the room to find defendant on the floor with the drawstring from his pants around his neck. Another string was attached to a filing cabinet that was four feet, three inches high. Defendant was not injured.

At 2:00 a.m., Investigator Robert A. Holl arrived at the Center and spoke with Griffith. The two men took defendant to an interview room, and Holl left to investigate the crime scene. Holl returned between 4:30 a.m. and 4:45 a.m. Holl advised defendant of his *Miranda* rights, and at 5:05 a.m., defendant waived his rights by signing a waiver form. Holl proceeded to interview defendant. The interview, which concluded at 6:00 a.m., yielded a confession that detailed the events of the night before. After being taken to jail, defendant was committed to Dorothea Dix Hospital for two weeks. He was then returned to jail to await trial.

Dr. James Sullivan, the Mecklenburg County medical examiner and an expert in forensic pathology, performed an autopsy on Crawford. His examination revealed that Crawford had bled from the nose and mouth, her left eye was bruised, her lip was cut and bruised, and her nose was broken. There were also two contusions to her frontal scalp. There were abrasions on the sides and back of her neck and indications that the victim had been dragged. Crawford also had bruises on her right arm and hand which were consistent with defensive-type wounds.

Defendant's evidence was largely directed to showing a lack of premeditation and deliberation and an inability to understand his rights before making his confession. It tended to show as follows:

Lieutenant G.W. Bradshaw of the Mecklenburg County Sheriff's Department, the shift supervisor at the intake center on 17 and 18 January, saw defendant at 7:15 a.m. on 18 January when Holl and other officers brought defendant to the intake center. Pursuant to jail policy, Bradshaw had refused to accept defendant because of information given to Bradshaw indicating potential suicidal tendencies. Bradshaw requested that Public Defender Isabel Scott Day seek an emergency commitment of defendant to allow for a mental evaluation. Bradshaw and defendant spoke during the morning, but defendant did not always seem to understand what Bradshaw was saying. Mrs. Day spoke with defendant in Bradshaw's presence, but at times defendant did not respond to her.

Dr. William Tyson, a clinical psychologist, testified as an expert in clinical and forensic psychology. He interviewed defendant for one and one-half to two hours, administered psychological tests, and reviewed material from previous evaluations of defendant. According to Dr. Tyson, defendant had a chronic and pervasive mixed personality disorder, marked by unstable moods and behavior. Defendant was dependent on cocaine and alcohol and had a history of abusing and experimenting with drugs, including amphetamines, LSD, heroin, and tranquilizers. His substance abuse aggravated his personality disorder. As a result of these problems, defendant's emotional and social development skills were those of an eleven- or twelve-year-old child. According to Dr. Tyson, defendant's ability to think or evaluate his behavior would have been compromised to the point of being "inconsequential."

Psychiatrist John N. Bolinsky, Jr., also testified as an expert in psychiatry. Dr. Bolinsky had interviewed defendant twice and had reviewed defendant's medical records, including records for treatment of alcoholism. Dr. Bolinsky testified that defendant had an unspecified personality disorder. Based on this disorder and defendant's chronic substance abuse, coupled with his use of alcohol and cocaine on 17 January, Dr. Bolinsky testified that defendant would have been "perhaps 'paranoid' " and extremely impulsive. According to Dr. Bolinsky, defendant's ability to form a specific intent to kill his aunt "would have been profoundly impaired, if not in essence absent." Dr. Bolinsky explained that the combination of defendant's psychological problems, his chronic substance abuse, and his substance abuse on the day of the slaying would have made defendant impulsive and paranoid, causing him to act reflexively, without thinking.

GUILT PHASE ISSUES

[1] Defendant first challenges an *ex parte* communication made by the trial judge to the prosecutor as violating his right to be present at every stage of his trial.

On Friday, 14 September 1990, the jury was selected and the trial judge heard arguments on a suppression motion. The trial judge then indicated that although she would try to make a ruling later that day, she would certainly rule before opening statements. She stated that she would telephone the prosecutor and a defense attorney over the weekend to give them her ruling. They all said they could be contacted in their offices. Judge Fulton did not make a ruling that day.

On Sunday, 16 September, Judge Fulton made separate phone calls to counsel for the State and defense counsel to announce her ruling. Defendant was not present at these conversations, and the conversations were not recorded.

On Monday, 17 September, in open court, with defendant and all counsel present and after hearing brief additional argument by the prosecution, the trial judge stated:

> Okay. On the motion to suppress, which was heard on—evidence was presented on August 31 and arguments were heard on September 14—I notified counsel by telephone yesterday about a ruling. With regard to my ruling, as I indicated to counsel yesterday, the Court has denied the defendant's motion to suppress with regard to the statement that was given en route to the police station on January 17 or 18. The Court is denying the defendant's motion to suppress with regard to the letter to the governor. The Court is also denying the defendant's motion to suppress with regard to the written statement that was taken by Investigator Holl on January 18. The Court has indicated that its ruling is that the Court would grant the motion to suppress with regard to the statement that was taken on February 1. Ms. Shappert, with regard to your argument, I will consider those cases.

The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution "guarantees an accused the right to be present in person at every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). "[A] defendant charged with capital murder 'has the right to be, and must be, personally present at all times in the course of his trial, when anything is done or said affecting him as to the charge against him . . . , in any material respect.' " *State v. Brog-*

den, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991) (quoting *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887)) (alteration in original). This protection may apply to proceedings occurring outside the courtroom if they constitute a stage of the trial. *State v. Buchanan*, 330 N.C. 202, 221, 410 S.E.2d 832, 843 (1991) (citing cases involving the jury room and judges' chambers). Due to the public interests implicated, a capital defendant may not waive his right to presence. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (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).

If the defendant's absence from a proceeding constitutes error, a new trial is required unless the State demonstrates the error was harmless beyond a reasonable doubt. *Id.* at 34-35, 381 S.E.2d at 654. A record of what occurred at the proceeding may show the harmlessness of the error. *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991). So may a subsequent memorialization on the record which reflects the substance of an off-the-record communication. *State v. Davis*, 325 N.C. 607, 627, 386 S.E.2d 418, 428, *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1989); *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (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 contends that the trial judge's phone call to the prosecution was a stage of the trial at which his presence was mandatory. We conclude that the judge's communication to counsel of her ruling was not such a stage of defendant's trial. *See State v. Hudson*, 331 N.C. 122, 136, 415 S.E.2d 732, 739 (1992) (doubtful that conversation between judge and jurors concerning courtroom cameras is a "stage" of trial), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 136, *reh'g denied*, —— U.S. ——, 122 L. Ed. 2d 776 (1993); *State v. Buchanan*, 330 N.C. at 216-22, 410 S.E.2d at 840-44 (contains a full and well-documented discussion of what constitutes a stage of the trial at which, under the North Carolina Constitution, defendant is entitled to be present). The judge's statements indicate that the decision had already been made when counsel for prosecution and defense were contacted. There is no indication that the issue was open to further discussion or that further discussion or argument actually occurred. Since the judge was merely informing counsel of her predetermined decision, the defendant's absence could not have adversely affected his opportunity to defend. *Cf. State v. Buchanan*, 330 N.C. at 223-24, 410 S.E.2d at 845 (unless the defendant's confrontation rights are implicated, defendant has a right to be present at an unrecorded bench conference only

if his "presence would have a reasonably substantial relation to his opportunity to defend"); *State v. Payne*, 320 N.C. at 139, 357 S.E.2d at 612 (defendant had a right to presence especially because it could have had a "reasonably substantial relation" to his defense). We find no error in the *ex parte* communication.

Assuming *arguendo*, however, that there was error in the *ex parte* communication on the ground that it was a stage of the trial, we conclude the error was harmless beyond a reasonable doubt. Defendant was present during the discussion of the matter in court on Friday, 14 September, and had an opportunity to express any objection to the ruling on Monday, 17 September. *See State v. Brogden*, 329 N.C. at 541-42, 407 S.E.2d at 163 (charge conference among attorneys and judge in chambers harmless error where parties were subsequently afforded opportunity to argue in open court). Further, the judge acknowledged the communication on the record and indicated the substance of the calls. Read in context, the record is clear regarding the substance of the trial court's *ex parte* communications. *See State v. Hudson*, 331 N.C. at 137-38, 415 S.E.2d at 739-40 (*ex parte* communication between judge and jurors is harmless error where it is subsequently recorded and the communication was inconsequential to the case); *cf. State v. Payne*, 320 N.C. at 139-40, 357 S.E.2d at 612-13 (judge's "admonitions" are insufficient to indicate substance of communications by judge to jury). Having before us a sufficient record of the substance of the *ex parte* communications and given defendant's opportunity to challenge the ruling in open court when it was announced in his presence, we are convinced beyond a reasonable doubt that defendant was not prejudiced by the communications. Defendant's assignment of error on these grounds is without merit.

[2] Defendant next challenges a conference held in chambers, out of his presence, between the trial judge, defense counsel, and the prosecution.

During voir dire, Shelly Richardson, a prospective juror, stated that she had an airline ticket for a vacation in mid-September and that she did not know whether the ticket was refundable. She stated that while she would be concerned if the ticket was not refundable, she could still render a fair decision. After being selected as a juror, Richardson discovered that her ticket was nonrefundable and could not be used for another feasible flight. Her vacation accommodations were likewise nonrefundable. Richardson then said the financial loss that would result from her jury service would prevent her from being

fair and impartial. After this discussion on the record between the trial court and Richardson, the trial judge asked to see counsel for an in-chambers conference. Upon returning, the record reflects that the judge stated, "Ms. Richardson, what I'm going to do is take what you have said under consideration and not make a decision right now but I will notify you prior to the 13th. I will notify you." On 12 September, the judge excused Richardson, stating:

> Madam Reporter, if you could take this for the record. It's a matter involving Shelly Richardson. That she was selected as a juror, designated Juror No. 7. That subsequent to her selection as a juror and being informed of her duties as a juror, she contacted the clerk in this courtroom and indicated that she was having some personal problems and that she needed to come back into court. That the Court permitted her to reappear on Monday at approximately 4:30 P.M. That Ms. Richardson stated that she found out some additional information about her plane ticket that she indicated she had already paid for, and that she indicated it would not be a problem if she could get a refund. She also indicated she found out certain accommodations had been made for a trip and she was beginning to feel resentful and did not feel at that point that she would be fair and impartial. That based on that information and after consultation with counsel for the State and for the defendant, the Court has excused her from service as a juror, and we need to replace her. Okay.

As we said above, a capital defendant has a nonwaivable right to be present at every stage of the trial. This includes chambers discussions between the court and counsel. *State v. Brogden*, 329 N.C. at 541-42, 407 S.E.2d at 163. If defendant's absence is error, it is subject to harmless error analysis. *Id.* at 541, 407 S.E.2d at 163.

The State and defendant both rely on *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832. We note that while *Buchanan* dealt with bench conferences at which the defendant was absent, it clearly also governs a chambers conference at which the defendant was absent.

As we held in *State v. Brogden*, it is error for the trial court to conduct a chambers conference with counsel for the State and counsel for defendant in defendant's absence. 329 N.C. at 541-42, 407 S.E.2d at 163. The State, however, has established beyond a reasonable doubt that the error was harmless. Defendant was present during juror Robinson's statements regarding her personal situation and was fully apprised of the facts underlying the reasons for the juror's

excusal, all of which are matters of record. After the chambers conference, Judge Fulton announced on the record in open court that she had not made a decision regarding Richardson but would "take what [Richardson] . . . said under consideration." Later, on the record in open court, Judge Fulton excused Richardson from further jury service, giving her reasons for ruling as set out above. Defendant, being present and fully apprised of both the ruling and the facts underlying it, had full opportunity to be heard and to lodge any objection he might have. As we did in *Brogden* under almost identical circumstances, we conclude that any error committed in the conduct of the chambers conference was harmless beyond a reasonable doubt.

Defendant argues that the State cannot prove harmlessness because "the record does not show whether the trial court made its own decision to excuse Ms. Richardson for cause or whether the trial court ultimately decided to excuse her because all counsel stipulated to her excusal during that conference." Defendant notes that under *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991), he, and not his counsel, has the right to make the final decision regarding whether a juror should be peremptorily excused.

We find defendant's argument without merit. The record indicates that Judge Fulton in fact excused juror Richardson for cause, in which case defendant was not harmed by his absence from the conference. After the chambers conference, Judge Fulton stated to Richardson that she would "not make a decision right now." This statement is inconsistent with the assertion that the parties may have stipulated to the excusal at the conference. Further, the court stated that Richardson felt she could not be "fair and impartial." This conclusion is fully supported by the record, including Richardson's own assertions, and it is reason for excusal under N.C.G.S. § 15A-1212(9), which states that "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . is unable to render a *fair and impartial* verdict." N.C.G.S. § 15A-1212(9) (1988) (emphasis added). Finally, the court made no reference to "stipulations," but instead stated that "*the Court* has excused her from service as a juror." (Emphasis added.) We conclude that defendant's assignment of error is without merit.

[3] Defendant next challenges the admission into evidence of the letter he wrote to the Governor on the ground it was obtained in violation of his statutory right to be informed of his right to communicate with friends and counsel without unnecessary delay.

N.C.G.S. § 15A-501 provides in part:

> Upon the arrest of a person, . . . a law-enforcement officer:
>
> . . . .
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

N.C.G.S. § 15A-501(5) (1988). A substantial violation of Chapter 15A requires suppression of evidence obtained as a result of the violation. N.C.G.S. § 15A-974(2) (1988).

Defendant moved before trial to suppress (1) "statements . . . made by Defendant to law enforcement officers"; (2) "evidence related to or derived from samples of blood, hair, photographs, and fingerprints obtained from Defendant"; and (3) "evidence seized from Defendant's person, residence or belongings." During the hearing on the motion to suppress, defendant argued that N.C.G.S. § 15A-501 had been violated as a ground for suppressing the evidence described in the motion. The trial court denied defendant's motion.

We conclude that at the time defendant wrote the letter and handed it to Officer Griffith, there had been no unnecessary delay in advising defendant of his rights under N.C.G.S. § 15A-501(5). Daniels was arrested between 12:45 and 12:50 a.m. He gave his letter to Griffith shortly after they arrived at the Law Enforcement Center at 1:20 a.m. At most, one hour had elapsed between the time of defendant's arrest and his delivery of the letter. During this time, Officer Griffith was engaged in considerable activity, much of it involving interactions between him and defendant. After defendant was arrested, Griffith placed him in a vehicle and proceeded toward the Law Enforcement Center. On the way to the Law Enforcement Center, defendant requested that Griffith go to Crawford's house. Griffith went to the home, knocked on the back door, and eventually entered after hearing no response to his knock. Inside, he found Crawford's body and performed a cursory investigation. Griffith radioed his supervisor, waited for him to arrive, and spoke to him at that time. Griffith then proceeded to the Law Enforcement Center with defendant. Once at the Law Enforcement Center, defendant went to the bathroom, smoked a cigarette, and returned to the room. Within a few minutes, defendant submitted his letter to Griffith.

In *State v. Payne*, we held that a ninety-minute delay in bringing defendant before a magistrate was not an "unnecessary delay." 328 N.C. at 397, 402 S.E.2d at 594. Although delays in bringing defendants before magistrates entail different considerations than delays in informing defendants of their rights, under the circumstances here, we conclude there was no unnecessary delay within the meaning of N.C.G.S. § 15A-501(5).

Since the statute had not been violated when the letter was obtained, the statute is no bar to the introduction of the letter into evidence, and the admission of the letter cannot have been error.

[4] Defendant next challenges the ruling of the trial court excluding during the suppression hearing portions of the testimony of a law enforcement officer regarding defendant's mental state following his *Mirandized* confession.

Less than two hours after Holl and Davis completed their interrogation of defendant, he was taken to the intake center of the jail, where he was observed by Lieutenant G.W. Bradshaw of the Mecklenburg County Sheriff's Department. At a hearing to suppress Daniels' *Mirandized* statements to Holl and Davis, the defense called Bradshaw to testify as to his observations of defendant. After determining that Bradshaw was familiar with the *Miranda* waiver form, the following exchange occurred:

> Q. Based on your experience and familiarity with the Miranda form, do you have an opinion whether or not Mr. Daniels could have waived his Miranda rights?
>
> [PROSECUTION]: Objection.
>
> THE COURT: Sustained.
>
> Q. Lt. Bradshaw, you were in Mr. Daniels' presence for approximately how long?
>
> A. About an hour.
>
> Q. And based upon your involvement with him and your observation of him during that over-an-hour period of time, do you have an opinion as to whether or not he could waive his Miranda rights?
>
> [PROSECUTION]: Objection.
>
> THE COURT: Sustained.

Q. Do you have an opinion as to whether or not he understood that form?

[PROSECUTION]: Objection. The form wasn't there.

THE COURT: Sustained.

Defendant then made an offer of proof in which he asked Bradshaw whether defendant could have understood his rights, and Bradshaw responded that defendant could not understand anything that was going on.

Any witness "who has had a reasonable opportunity to form an opinion" may give an opinion on a person's mental capacity. *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E.2d 375, 383 (1987). A witness may not, however, testify that a legal standard has or has not been met. *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988) (expert testimony that defendant could not have "premeditated or planned or deliberated" properly excluded). A witness may, therefore, testify as to whether the defendant had the capacity to understand certain words on the *Miranda* form, such as "right" or "attorney," but he may not testify as to whether the defendant had the capacity to waive his rights. *State v. Sanchez*, 328 N.C. 247, 251, 400 S.E.2d 421, 424 (1991).

Defendant's first questions pertained only to whether defendant "could have waived" his rights; therefore, they were improper. Defendant's last question, as to whether defendant understood the *Miranda* form, was also improper as calling for a legal conclusion. It was tantamount to asking whether defendant had the capacity to waive his rights, since the *Miranda* form contains a waiver provision. Even in the offer of proof, defendant's questions focused on whether defendant could have understood his "rights," clearly meaning *Miranda* rights; they thus called for legal conclusions. Here, no attempt was made to frame the questions in terms of whether defendant had the capacity to understand various key words that were put to him during the *Mirandizing* procedure, such as "right," "attorney," "waiver," etc. The trial court correctly excluded the questions that required a legal conclusion. Defendant's assignment of error is without merit.

[5] Defendant next challenges the trial court's refusal to permit him to refresh the memory of a witness. The prosecution called Officer Griffith to testify. On cross-examination, defense counsel asked whether on the night of the arrest Griffith had told Sergeant DeLuca

that Daniels was "all coked up." Griffith responded that he did not recall making that statement. The defense then attempted to refresh Griffith's memory with the following transcript from a tape recording of a telephonic transmission between DeLuca and Deputy Captain Martin:

> THE TIME NOW IS 0113.13.
>
> OFFICER: Captain, this is Deluca.
>
> DUTY CAPT.: Deluca, this is Captain Martin, what can I do for you.
>
> OFFICER: Alright [sic], let me tell you what happened. Tommy Griffith had the suspect in the ADW on Clanton, he refused treatment after stating he was losing conscious [sic] and a little bit combative, nothing out of the ordinary and he is coked up, okay. . . .

The trial court refused to permit defense counsel to let Griffith refer to the transcript to refresh his memory.

A party may use any material to refresh the memory of a witness, including statements made by persons other than the witness. *State v. Royal*, 300 N.C. 515, 528, 268 S.E.2d 517, 526 (1980). We conclude the trial court erred in not permitting defendant to refresh Officer Griffith's recollection by using the transcription of the telephonic transmission. We conclude, however, that the error did not sufficiently prejudice defendant so as to require a new trial.

The State introduced evidence of defendant's *Mirandized* confession to investigators Davis and Holl in which defendant stated that he had used alcohol and cocaine on the day of the offenses. Defendant's estranged wife testified that defendant smoked cocaine prior to assaulting her, and defendant's son further confirmed that defendant was "spaced out" and not acting like himself. Because there was substantial evidence before the jury, offered by both the State and defendant, pertaining to defendant's substance use on the day of the offense, the trial court's erroneous refusal to permit the defense to refresh Griffith's testimony as to what Griffith might have said on this same point was harmless beyond a reasonable doubt.

[6] Defendant next challenges the trial court's refusal to permit the testimony of the public defender, in whose office one of defendant's attorneys worked, and the denial of that attorney's motion to withdraw.

After defendant's interrogation, he was taken to the intake center of the jail. Lieutenant Bradshaw, shift supervisor at the intake center, refused to admit defendant based on evidence of potential suicidal tendencies. Instead, Bradshaw went to the public defender's office to ask Mrs. Isabel Scott Day, the public defender, to seek an emergency commitment of defendant for a mental evaluation. At 8:15 or 8:20 a.m., Mrs. Day spoke to defendant for ten to fifteen minutes. Mrs. Day observed that defendant was shaking and failed to make eye contact. He was unresponsive and indirect, and Mrs. Day had to repeat some questions several times. Defendant told Mrs. Day that he thought his wife had been hurt. During a voir dire hearing, defendant attempted to elicit testimony from Mrs. Day regarding her interview with defendant, but the trial court refused to allow it on the ground that one of defendant's two attorneys, Mr. Jessup, worked in Mrs. Day's office. The trial court further denied Mr. Jessup's motion to withdraw.

A party's attorney or any other member of the attorney's firm ordinarily may not testify as a witness. N.C. Rules of Professional Conduct, Rule 5.2, Annotated Rules of North Carolina (Michie 1994). If other witnesses are available who can provide the information sought, it is not error not to permit an attorney for a party to testify. *State v. Simpson*, 314 N.C. 359, 373, 334 S.E.2d 53, 62 (1985).

Here, the substance of Mrs. Day's testimony about defendant's behavior was revealed through other testimony. Bradshaw observed defendant on the morning of 18 January for over an hour and was in the room for the entire ten to fifteen minutes during which Mrs. Day spoke with defendant. Bradshaw stated that he could hear everything being said during the conversation between Mrs. Day and defendant. Bradshaw further observed defendant after Mrs. Day left. Based on his conversations with defendant and his observations, Bradshaw testified that defendant was "[w]ithdrawn" and just stared at the floor. He further surmised that defendant was shaking and "possibly . . . in shock." Bradshaw testified that defendant did not seem to understand what was being said to him and that he was unresponsive to Mrs. Day.

Because adequate testimony to the same effect from Officer Bradshaw was admitted, it was not error to exclude Mrs. Day's testimony.

Defendant's second contention under this argument is that the trial court should have permitted Mr. Jessup to withdraw in order to enable Mrs. Day to testify. Counsel's motion to withdraw is usually committed to the sound discretion of the trial court, but where the

defendant's constitutional right to present testimony in his behalf is implicated, that decision is reviewed as a matter of law. *Cf. State v. Hutchins*, 303 N.C. 321, 336, 279 S.E.2d 788, 798 (1981) (ruling on whether appointed counsel shall be replaced is reversed only if an abuse of discretion, unless Sixth Amendment right is affected). Because evidence was admitted that adequately substituted for Mrs. Day's testimony, defendant's right to present evidence was neither implicated nor violated by the trial court's refusal to allow Mr. Jessup to withdraw. *Cf. State v. McNeil*, 46 N.C. App. 533, 538, 265 S.E.2d 416, 420, *disc. rev. denied*, 300 N.C. 560, 270 S.E.2d 114 (1980). Neither did the ruling amount to an abuse of discretion.

[7] Defendant next challenges the trial court's failure to give his requested instruction to the jury concerning a killing committed during a quarrel or struggle. "If . . . [a] killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree." *State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 795-96 (1981); *accord State v. Corn*, 303 N.C. 293, 298, 278 S.E.2d 221, 224 (1981). "The critical question . . . [is] whether 'defendant did indeed deliberate, as distinguished from premeditate, the killing or did he form the intent to kill during a sudden passion provoked by the deceased [himself] which precluded any such deliberation.' " *Misenheimer*, 304 N.C. at 114, 282 S.E.2d at 796 (quoting *State v. Patterson*, 288 N.C. 553, 575, 220 S.E.2d 600, 616 (1975) (Exum, J., dissenting), *sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211 (1976)). Defendant, citing *State v. Exum*, 138 N.C. 599, 618, 50 S.E. 283, 289 (1905), and *State v. Corn*, 303 N.C. at 297, 278 S.E.2d at 223, submitted to the trial court a written request for an instruction that "[t]he intent to kill must arise from 'a fixed determination previously formed after weighing the matter.' " At the charge conference, the trial court refused to submit the requested instruction. After the charge conference, defendant objected to the failure to include "an instruction on deliberation and intent to kill from State versus Misenheimer . . . [and] from State versus Corn."

We find that there was no error in refusing to give this instruction since it is not supported by the facts of this case. Defendant went to Crawford's house to ask for money and to ask Crawford to take in defendant's wife and son. After asking Crawford for money and whether she would take in his wife and son, Crawford told defendant that she was going to call defendant's mother. Defendant then told Crawford not to call, and defendant punched Crawford in the mouth.

Defendant then proceeded to strangle his seventy-seven-year-old aunt with a cord. The doctrine set forth in *Misenheimer* does not encompass this situation. *Cf. State v. Corn*, 303 N.C. at 298, 278 S.E.2d at 224 (where evidence showed that victim violently approached defendant, argued with him, fought with him, and accused him of being a homosexual, "evidence tends to show that defendant shot Melton [the victim] after a quarrel, in a state of passion, without aforethought or calm consideration"). Since defendant's proposed instruction is not supported by the facts, it was not error to refuse to give it.

[8] Defendant next challenges the trial court's submission of the felony murder theory on the ground that there was insufficient evidence to establish that he committed the predicate felony, common law robbery.

To support a conviction for common law robbery, "the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person's will, by violence or putting the person in fear." *State v. Davis*, 325 N.C. at 630, 386 S.E.2d at 430. Where the taking occurs after the force was used, the defendant is guilty if the theft and force are "aspects of a single transaction." *State v. Faison*, 330 N.C. 347, 359, 411 S.E.2d 143, 150 (1991).

In his confession, defendant admitted that he intended to and did ask Crawford for money. When she responded that she was going to call his mother, defendant punched her, strangled her, and took $70.00 to $80.00 from her wallet. Defendant also stated that he was having financial problems and that he could lose his house. Defendant said, "Bills set me off."

Defendant contends that the evidence shows only that he took the money as an afterthought and that the State has failed to prove that the money was taken from Crawford's presence. We disagree.

In *State v. Faison*, we upheld a conviction of armed robbery where defendant was short on cash, intended to get money from the victim, violently assaulted the victim, stole items, and ransacked the house. 330 N.C. at 359, 411 S.E.2d at 150. With the exception of ransacking the house, the elements in *Faison* are present here. Defendant was having financial problems and feared that he could not pay his rent. Defendant went to Crawford's house intending to ask for money; while there, defendant beat and strangled Crawford and stole her money. *See also State v. Davis*, 325 N.C. 607, 630-31, 386 S.E.2d

418, 430-31 (common law robbery upheld where items were taken from victim near the time of her murder, defendant was seen near victim's apartment, defendant possessed stolen items, and victim's apartment was ransacked). Although defendant did not ransack Crawford's house, his statements that he went there to ask for money and that he did ask for money are sufficient to establish that the taking of money and the use of force were part of a single transaction. We conclude that it was not error to submit the felony murder theory with the predicate felony of common law robbery.

SENTENCING PROCEEDING ISSUES

[9] Defendant's first assignment of error in the sentencing proceeding is that the trial court erred by overruling defendant's objection to testimony by the State's psychiatric expert because the expert had not personally interviewed defendant. We conclude that N.C.G.S. § 8C-1, Rule 702, which addresses the admission of an expert's opinion, does not require that an expert personally interview a defendant in order to express an opinion about that defendant's mental condition.

In *State v. Smith*, 315 N.C. 76, 101, 337 S.E.2d 833, 849 (1985), this Court held that "defendant erroneously concludes that a medical expert's testimony is limited to conditions he has personally observed." We held that the "correct limitation[] [is] that facts must be 'within his knowledge.' " *Id.* (quoting *State v. Bright*, 301 N.C. 243, 255, 271 S.E.2d 368, 376 (1980)). In *Smith*, we allowed a doctor to testify, based on a review of medical reports, that the victim had been sexually abused; the doctor was not required to actually examine the victim. In *State v. Bright*, 320 N.C. 491, 499, 358 S.E.2d 498, 502 (1987), we concluded that a doctor may rely on reports of an agency as the basis of his opinion on whether sexual abuse occurred. In *State v. Bonney*, 329 N.C. 61, 72-73, 405 S.E.2d 145, 151-52 (1991), a clinical psychiatrist testified that another expert may have incorrectly diagnosed a defendant based on flaws in the expert's interviewing technique and testing. The clinical psychiatrist, in effect, stated that contrary to the beliefs of defendant's expert's opinion, defendant did not have multiple personalities. The clinical psychiatrist reached this conclusion without actually interviewing the defendant.

In *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090 (1983), the United States Supreme Court rejected the contention that a defendant must be personally interviewed by a psychiatrist before the psychiatrist can testify about defendant's future dangerousness. The Court

noted that the defendant wanted the Court to adopt a rule which stated that psychiatric testimony about future dangerousness must be based on personal examination of the defendant and not on hypothetical questions presented to the expert at trial. The Court rejected this suggestion and held that the fact that experts do not examine defendants goes " 'to the weight of their testimony, not to its admissibility.' " *Id.* at 904, 77 L. Ed. 2d at 1111 (quoting *Barefoot v. State*, 596 S.W.2d 875, 887 (Tex. Crim. App. 1980), *cert. denied*, 453 U.S. 913, 69 L. Ed. 2d 996 (1981)). The Court took note of the fact that the American Psychiatric Association ("APA") believed that opinions based on hypothetical questions, where no personal interviews had taken place, were unreliable. However, the Court determined that these conclusions of the APA should not be the basis for a constitutional rule barring an entire category of expert testimony. *Id.* at 899, 77 L. Ed. 2d at 1108. The Court was not persuaded that an opinion not based on a personal interview was entirely unreliable. *Id.* While diagnoses based on live interviews may be more reliable, there is no evidence that opinions based upon extensive research of psychiatric files of a defendant, written evaluations of defendant by other doctors, and interviews with defendant's friends and family are inherently unreliable. N.C.G.S. § 8C-1, Rule 702 provides that a witness qualified as an expert may testify in the form of an opinion if it will assist the trier of fact in understanding the evidence. The rule does not require that an opinion be based on a personal interview. Professor Kenneth Broun notes that an opinion of an expert based upon the opinion of another expert or even upon hearsay may be admissible. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 188 (4th ed. 1994).

In this case, Dr. White's opinion was based on: (1) her review of the evaluations of other doctors who had interviewed defendant; (2) a personal discussion with a doctor in whose care defendant had been placed; and (3) interviews of defendant's friends, employers, and family. An opinion reached by an expert based on this type of information could assist the jury in understanding the evidence and is not inherently unreliable.

Defendant contends that an expert's opinion that diagnoses a defendant with antisocial personality disorder ("APD") may not be made without a personal interview of the defendant. Yet, the major symptoms of APD are based on behavior, and an evaluation for APD should rely "heavily on historical data from the patient and others." 3 Harold I. Kaplan et al., *Comprehensive Textbook of Psychiatry/III*

2822 (3d ed. 1980). A doctor should delve deeply into a patient's "performance in school, dealings with various school and legal authorities, job performance, and sexual and marital history" to reach a conclusion as to this diagnosis. *Id.* at 2824. In fact, in regard to the specific diagnosis made by Dr. White in this case, psychiatric authority has found that a diagnosis may be made based simply upon historical data and not based on an actual interview with the patient. *Id.* Dr. White did just what has been recommended by psychiatric authority: She talked to defendant's spouse, she found out about defendant's school history through his high-school classmates, she talked to a supervisor about his time in the military, she evaluated his military records, and she talked to an employer about his job performance. Dr. White also reviewed the police reports, the psychiatric evaluations of defendant by Drs. Bolinsky and Tyson, and the psychiatric assessment of defendant done by Dr. Gross. Defendant's own expert admitted that he reviewed records from other psychiatrists to form his opinion. In fact, while defendant's expert did interview defendant for one and a half to two hours, his overall determination of diagnosis may not have been as thorough as that of the State's witness. Defendant's witness did not interview defendant's wife, his military supervisor, or any of defendant's classmates.

Defendant relies on additional authority from the APA and case law from other states which states that, in general, a psychiatric diagnosis made without the benefit of a personal interview is inherently unreliable. Nothing in North Carolina case law or the Rules of Evidence supports such a conclusion, and the United States Supreme Court has chosen not to bar an entire category of expert testimony based on the APA's conclusions. *Barefoot v. Estelle*, 463 U.S. at 899, 77 L. Ed. 2d at 1108. In *Barefoot*, the Supreme Court was addressing the use of hypothetical questions. We conclude that an opinion based upon reviews of evaluations of doctors who had interviewed defendant and personal discussions with doctors in whose care defendant had been placed would be just as reliable as an opinion based on a hypothetical question. In this case, Dr. White spent many hours interviewing many people and discussing defendant's condition with other doctors before she reached her opinion. There can be no question that such an opinion is as reliable as any opinion reached as a result of one hypothetical question, a practice allowed by our Rules of Evidence, N.C. R. Evid. 703 official commentary (1991), and by the United States Supreme Court, *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090.

Any deficiency in Dr. White's evaluation may be adequately revealed by cross-examination. In this case, Dr. Bolinsky was highly critical of Dr. White's failure to conduct a personal examination of defendant in reaching her decision. We believe, as did the Supreme Court in *Barefoot v. Estelle*, that the jury and the procedures of our adversary system are competent to recognize and take account of shortcomings that may be present in psychiatrists' opinions that are not based on personal interviews. *See Barefoot v. Estelle*, 463 U.S. at 899, 77 L. Ed. 2d at 1108.

While it may be better practice to actually interview a defendant before reaching a decision on his mental capacity, a personal interview is not required by our case law, the case law of the United States Supreme Court, or our Rules of Evidence for an opinion of a psychiatrist to be reliable and admissible. We conclude that the trial court did not err in admitting this expert testimony.

[10] Defendant next argues that the trial court erred in instructing on the mitigating circumstance of no significant history of prior criminal conduct. The court instructed the jury as follows:

> First you will consider whether the defendant has no significant history of prior criminal convictions in the last ten years. . . . You would find this mitigating circumstance if you find that the defendant's prior criminal history is the conviction of driving while impaired, communicating threats, and simple assault, and that this was not a significant history of prior criminal activity in the last ten years.

The court also instructed the jury that another mitigating circumstance was that defendant has never been convicted of a felony. As to the felony mitigating circumstance noted, the judge instructed the jury that the evidence was uncontradicted and that the jury should write "yes" in the space provided, indicating that the circumstance was found and deemed mitigating.

We conclude that the jury in this case was correctly instructed on the mitigating circumstance based upon the evidence presented at trial and that any possible prejudice to defendant that may have resulted from the limitation of the instruction was rendered harmless by the peremptory instruction as to the mitigating circumstance that defendant was never convicted of a felony.

Defendant began his sentencing phase presentation by introducing into the record evidence in support of the mitigating circumstance

that "defendant has no significant history of prior criminal convictions *in the last ten years.*" (Emphasis added.) Defendant noted that the State and defendant had agreed or stipulated to the following prior convictions "in the last ten years": communicating threats and simple assault, misdemeanor in breaking and entering, and driving while impaired. The State presented no evidence as to this mitigating circumstance.

Defendant bears the burden of establishing that a mitigating circumstance exists. *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586-87, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982). In this case, defendant made no objections to the manner in which this mitigating circumstance was presented to the jury and specifically presented evidence that only supported the submission of the circumstance as it related to the previous ten years.

The Criminal Procedure Act provides that in capital sentencing proceedings, "[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 in determining sentence." N.C.G.S. § 15A-2000(b) (1988). The trial court is not required to instruct on a mitigating circumstance unless substantial evidence supports the circumstance. *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S.876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991). In the case of the mitigating circumstance of no significant history of criminal activity, mere record silence as to criminal activity does not substantially support the circumstance. *State v. Gibbs*, 335 N.C. 1, 57, 436 S.E.2d 321, 353 (1993). "[S]ome substantial evidence concerning the defendant's history of prior criminal activity—or lack of it—must be presented to the jury before the trial court may determine as a matter of law that the jury could reasonably find this mitigating circumstance from the evidence." *State v. Laws*, 325 N.C. at 111, 381 S.E.2d at 627.

In *State v. Laws*, defendant assigned as error the fact that the trial court did not submit the mitigating circumstance that the " 'defendant has no significant history of prior criminal activity.' " *Id.* at 110, 381 S.E.2d at 626 (quoting N.C.G.S. § 15A-2000(f)(1) (1988)). We noted that the trial court is not required to instruct upon a statutory mitigating circumstance "unless substantial evidence has been presented to the jury which would support a reasonable finding by

the jury of the existence of the circumstance." *Id.* In *Laws*, we determined that based upon the lack of evidence presented about defendant's criminal history, a jury finding of this circumstance would have been based solely upon speculation and conjecture, not upon substantial evidence, and the submission of the instruction would be unreasonable as a matter of law. *Id.* at 111, 381 S.E.2d at 627.

In *Laws*, we also noted that the trial court had given the jury a peremptory instruction to find as a nonstatutory mitigating circumstance that the defendant had not been previously convicted of a felony involving violence. *Id.* We noted that assuming *arguendo* that it was error not to submit the statutory mitigating circumstance of no significant history of prior criminal activity, the error would be harmless beyond a reasonable doubt "[g]iven the lack of any substantial evidence on the matter of prior criminality of the defendant and the trial court's erroneous peremptory instruction—favorable to the defendant—that the jury must find the non-statutory mitigating circumstance of no prior convictions for violent felonies." *Id.* at 112, 381 S.E.2d at 628. We concluded that the peremptory instruction as to "no prior convictions for violent felonies" provided defendant with "virtually the same benefit" as an instruction on the statutory mitigating circumstance of "no significant history of prior criminal activity." *Id.* at 112-13, 381 S.E.2d at 628.

In this case, the trial court instructed the jury on the mitigating circumstance because it was supported by the evidence, limiting it to the previous ten years as defendant had done when he presented the evidence. Thus, the trial court instructed the jury in the only way supported by the evidence. We find no error in the trial judge's instruction in this regard. Assuming *arguendo*, however, that it was error to limit the mitigating circumstance in the manner done by the trial court, the error was harmless based on the fact that, as in *Laws*, the jury here was also instructed on the mitigating circumstance that defendant had never been convicted of a felony. In regard to this circumstance, the jury was peremptorily instructed to find that it existed and to give the circumstance some value as indicated by the trial court's instruction that "the evidence as to this mitigating circumstance [defendant has never been convicted of a felony] is uncontradicted, and you will find that this circumstance exists and write 'Yes' in the space provided." The jurors had previously been instructed that as to nonstatutory mitigating circumstances, they would only mark "yes" in the space provided if they found that the circumstance existed and that the circumstance had some mitigating value. We con-

clude that the trial court did not err in the submission of this mitigating circumstance.

[11] Next, defendant argues that the trial court erred by instructing the jury that it could refuse to consider nonstatutory mitigating evidence if it deemed that the evidence had no mitigating value. Under this assignment of error, defendant also argues that the trial court failed to instruct that statutory mitigating circumstances were deemed to have mitigating value.

This Court has repeatedly determined that nonstatutory mitigating circumstances do not necessarily have mitigating value. *See State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (1993); *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669; *State v. Fullwood*, 323 N.C. 371, 397, 373 S.E.2d 518, 533 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). In *State v. Fullwood*, the Court held that it is "for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value." 323 N.C. at 396, 373 S.E.2d at 533. "Although evidence may support the existence of the nonstatutory circumstance, the jury may decide that it [the circumstance] is not mitigating." *Id.* at 397, 373 S.E.2d at 533. "[B]efore the jury 'finds' a nonstatutory mitigating circumstance, it must make two preliminary determinations: (1) that the evidence supports the existence of the circumstance *and* (2) that the circumstance has mitigating value." *State v. Huff*, 325 N.C. at 59, 381 S.E.2d at 669. This proposition has recently been reiterated in *State v. Gay*, 334 N.C. 467, 492, 434 S.E.2d 840, 854 (jurors may reject nonstatutory mitigating circumstances if they do not deem them to have mitigating value). We find no reason to alter our previous decisions and conclude that the trial court did not err in its instructions on nonstatutory mitigating circumstances.

[12] Defendant also argues that the trial court erred by not specifically instructing the jury that the statutory mitigating circumstances have mitigating value. The trial court instructed the jurors that if they found a statutory mitigating circumstance to exist, they should mark "yes" in the space provided. Defendant argues that failure to specifically instruct the jury that statutory mitigating circumstances have mitigating value could have resulted in a finding by a juror that a statutory mitigating circumstance did not have mitigating value. Defendant argues that the jurors would have become confused based on the fact that when they were instructed as to nonstatutory mitigating circumstances they were told to determine if the circumstance

existed and if the circumstance had mitigating value before marking "yes" in the space provided.

We note that the trial court instructed the jury as to the statutory mitigating circumstances before it gave its instructions as to the nonstatutory circumstances. The trial court described the statutory circumstance and then instructed the jurors that "[i]f one or more of you find by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreperson write 'Yes' in the space provided after this mitigating circumstance on the Issues and Recommendation form." After explaining how to address the three statutory mitigating circumstances, the court explained the nonstatutory mitigating circumstances, instructing that "[i]f one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also deem it to have mitigating value, you would so indicate by having your foreperson write 'Yes' in the space provided." These instructions are in accord with the pattern jury instructions. We conclude that the instructions here were given in accordance with the law and that the jury was able to follow the instructions as they were given. "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)) (alteration in original), *cert. denied*, —— U.S. ——, 126 L. Ed. 2d 602 (1993). We conclude that the trial court did not err when giving the instructions for statutory and nonstatutory mitigating circumstances.

[13] Defendant next argues that the trial court erred by not intervening during the prosecutors' final arguments. Defendant argues that he was prejudiced by statements of the prosecutor that minimized the jury's sentencing responsibility and that the prosecutor argued that the Bible supported a sentence of death. We note that no objection was made during the prosecutor's closing argument. However, in a capital case, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial.[1]

1. Defendant attempted to limit the prosecutor's closing argument by filing a pretrial motion *in limine*, requesting that the prosecutor be foreclosed from making any argument that implies that the jury's verdict of the death penalty would not be real, would not be carried out, or is subject to further review, and to limit any argument in favor of the death penalty for any reasons not specifically listed as aggravating circumstances in N.C.G.S. § 15A-2000(e). There is no evidence in the record or transcript that the trial court ever ruled on the motion *in limine* or that it was even discussed at

In order to prevail under such an argument, however, "the impropriety of the argument must be gross indeed," *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), such that this Court would "hold that a trial judge abused his discretion in not recognizing and correcting [the argument] *ex mero motu*," *id.* In order to constitute such an abuse of discretion, the prosecutor's comments must have " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (quoting *Donnelly v. Christoforo*, 416 U.S. 637, 40 L. Ed. 2d 431 (1974)).

Defendant argues that two separate portions of the prosecutor's closing argument were erroneous. First, defendant argues that the prosecutor erroneously diminished the jury's responsibility in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), by arguing:

> You have heard Judge Fulton explain the details of this case to you yesterday before the guilt phase was over; you heard it during the voir dire about the procedure; you were very well educated in how this works. But there is always some reluctance. To say that this is not so is to say that the citizens are making a recommendation that someone die, and they are not. Some people, when they sit on a jury, think or tell the lawyers, "Who am I to decide whether someone lives or dies?" That subject can come up in any atmosphere, and particularly in the courtroom, and I want to address it directly.
>
> If you are going to follow the law, and we know you will, you are not making that decision. You are saying that the factors that we have found outweigh—aggravating factors we have found—outweigh the mitigating factors. You're saying yes. You're saying

any time during trial, and defendant does not make an assignment of error based on this failure of the trial court. N.C. R. App. P. 10(b)(1) states that

> [i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.*

N.C. R. App. P. 10(b)(1) (emphasis added). In light of defendant's failure to satisfy the requirements of the rule to preserve assignments of error, we find that this assignment of error was not correctly preserved for appeal. *See State v. Wilson*, 289 N.C. 531, 537, 223 S.E.2d 311, 314 (1976) (it is not enough to preserve an issue for appellate review by merely filing a pretrial motion to suppress evidence).

that this case is sufficiently substantial to warrant the death penalty. You're saying yes. And your job is over, and the Court will sentence the defendant. That is what you are doing. You are not making a personal moral decision. You are not debating the death penalty. You are not taking out a vendetta. You're not bringing politics into this court. You're following the law. . . .

. . . When you came through that door, you knew you would be hearing the words you're hearing now. You know [sic] that the prosecutor would look right at you and say, "We're asking you to recommend death." The lives that you live, the jobs that you hold or held at one time, or the occupations you're in now, you must think your way through these things. Who am I to decide is almost like who am I to live. You all are living by your own hands and your own minds. We ask not for your heart in this case. We ask for your minds to follow the law, and we know you will.

In reviewing the remarks at issue in this case, we consider the context in which the remarks were made and the overall factual circumstances to which they referred. We also note that trial counsel are allowed wide latitude in jury arguments. *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992). Additionally, the prosecutor has a duty to strenuously present the State's case and " 'use every legitimate means to bring about a just conviction.' " *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980) (quoting *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 130 (1975)). In a capital case, that duty may be extended to present arguments for the sentence of death. N.C.G.S. § 15A-2000(a)(4) (1988).

In *State v. Green*, 336 N.C. 142, 187, 443 S.E.2d 14, 40 (1994), we addressed the question of whether the following statement diminished the jury's responsiblity and constituted prejudicial error: "The 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." We found that the statements did not constitute prejudicial error. We conclude that the statements made here also did not constitute prejudicial error when the closing argument is viewed in its entirety. The prosecutor's statement that "the Court will sentence the defendant" is a correct statement of law under N.C.G.S. § 15A-2002, which states that the "judge shall impose a sentence." The statement, "If you are going to follow the law, . . . you are not making that decision [of death]," is presented in the same vein as the statement in *Green*, that "[y]ou're not deciding

on the sentence." Viewing the statements in context, the prosecutor was telling the jury that its job was to weigh the aggravating and mitigating circumstances and to determine if the aggravating circumstances outweighed the mitigating circumstances. If it did, then the jury would answer "yes," which would mean that the case is sufficiently substantial to impose the death penalty. This is also a correct statement of the law under N.C.G.S. § 15A-2000(b) (1988). We conclude that the overall context of the prosecutor's statements emphasized that if the jurors recommended death, that was tantamount to saying that the aggravating circumstances found were sufficient to warrant the imposition of the death penalty and that it would be the judge who would impose the ultimate sentence. But the jurors should not think of the sentence as "taking out a vendetta" or "bringing politics into [the] court"—they were simply "following the law." Any impropriety of the statements was not so gross that the trial court should have intervened *ex mero motu*.

[14] Defendant also objects to the portions of the prosecutor's argument referring to the Bible. The prosecutor began her argument with numerous references to the Bible, stating that she believed that defendant was also going to quote from the Bible. The prosecutor quoted from passages that stated that he who kills is a murderer and shall be put to death. The prosecutor quoted a passage from the New Testament which stated that "[w]hoever then relaxes one of the least of these commandments and teaches men to do so, shall be called the least in the kingdom of heaven." This quote was made to stress that the New Testament, which the defendant might quote to emphasize forgiveness and "turning the other cheek," also stated that the commandments of God should still be followed. Finally, the prosecutor also quoted from a passage in Romans which stated that "there is no authority except from God, and those that exist have been instituted by God. Therefore, he who resists the authorities resists what God has appointed, and those who resist will incur judgment, for rulers are not a terror to good conduct, but to bad."

We note that "more often than not" this Court has found biblical arguments to fall within permissible margins given counsel in arguing "hotly contested cases." *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500; *see also State v. Gibbs*, 335 N.C. 1, 69-70, 436 S.E.2d 321, 361; *State v. Hunt*, 323 N.C. 407, 427, 373 S.E.2d 400, 413 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, —— U.S. ——, 120 L. Ed. 2d 913 (1992); *State v. Brown*, 320 N.C. 179, 206, 358 S.E.2d 1,

19, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987); *State v. Oliver*, 309 N.C. 326, 359-60, 307 S.E.2d 304, 326 (1983). A review of the passages quoted by the prosecutor convinces us that the biblical references made here were not so grossly improper as to require the trial court's intervention *ex mero motu*.

We have previously held that the use of these passages or similar passages was not grossly improper. In *Artis*, 325 N.C. at 330, 384 S.E.2d at 499, the prosecutor quoted the passage noting that a murderer shall be put to death. Also in *Artis*, 325 N.C. at 330, 384 S.E.2d at 500, the prosecutor, in an attempt to rebut any defense counsel argument that the New Testament teaches forgiveness, argued that earlier biblical passages remain unaffected by the New Testament. This Court found that these arguments were not so improper as to require intervention by the trial court *ex mero motu*. In *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), we held that a quote stating in part that "there is no power but of God" was not so improper as to require a trial court's intervention *ex mero motu*. *Id.* at 268, 357 S.E.2d at 920.

In determining the error in a prosecutor's reference to the Bible, we have additionally considered if defense counsel also discussed passages from the Bible. In *State v. Oliver*, we noted that defense counsel had, as anticipated by the prosecutor, argued that the New Testament teaches forgiveness and mercy. 309 N.C. at 360, 307 S.E.2d at 326. In such a situation, we found nothing in the prosecutor's biblical references that amounted to plain error and justified reversal. In this case, the defense counsel, as predicted by the prosecutor, also quoted from the Bible, noting that the Bible states: "I set before you this day life and death. Choose life." Defense counsel also stated that the Bible says: "You shall not do injustice in judgment. You shall stand forth against the life of your brother. I am the Lord. You shall not take vengeance or bear any grudge against the sons of your people. You shall love your neighbor as yourself. I am the Lord."

In light of our perceived lack of prejudice and in light of defense counsel's use of the Bible in his closing argument, we conclude that the statements made by the prosecutor were not so grossly improper as to require intervention of the trial court *ex mero motu*.

[15] Defendant next argues that the trial court erred in submitting the aggravating circumstance that the killing was committed for pecuniary gain. Defendant argues that the evidence was insufficient

to support this circumstance. We disagree. The trial court instructed the jury as to this aggravating circumstance as follows:

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends to or expects to obtain money or some other thing which can be valued as money, either as compensation for committing it or as a result of the death of the victim. If you find from the evidence, beyond a reasonable doubt, that when the defendant killed the victim, the defendant intended to or expected to obtain money from the victim, you would find this aggravating circumstance . . . .

The evidence showed that defendant had confessed that he intended to and did ask the victim for money. When she did not give it to him, he killed her and then took money from the victim's purse. This evidence is sufficient to support a finding of the pecuniary gain aggravating circumstance. *See State v. Hunt*, 323 N.C. at 432, 373 S.E.2d at 416; *State v. Jerrett*, 309 N.C. 239, 269, 307 S.E.2d 339, 355 (1983) (evidence that defendant took money, gun shells/cartridges, and a car after shooting the victim was "plenary evidence to support a finding that the murder was committed for pecuniary gain").

[16] Next, defendant argues that the trial court erred by instructing the jury that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances. Specifically, the trial judge instructed the jury:

> 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 juror deems to exist by a preponderance of the evidence in Issue No. Two.

(Emphasis added).

The defendant contends that this instruction violated the Eighth and Fourteenth Amendments and principles set forth in *Penry v. Lynaugh*, 492 U.S. 302, 318, 106 L. Ed. 2d 256, 277 (1989), and *Eddings v. Oklahoma*, 455 U.S. 104, 114, 71 L. Ed. 2d 1, 11 (1982), which held that the sentencer in a capital case may not refuse to consider any relevant mitigating evidence offered by the defendant as basis for a sentence less than death. Defendant seems to argue that the use of the word "may" allowed some jurors to disregard found relevant mitigating evidence.

We have recently reviewed the exact instruction challenged here and found it to be without error. *State v. Lee*, 335 N.C. 244, 287, 439 S.E.2d 547, 569 (1994). Specifically, we held in *Lee* that these pattern jury instructions would be interpreted by any reasonable juror to mean that all mitigating circumstances found by that juror to exist and have mitigating value must be considered. *Id.* at 287, 439 S.E.2d at 570. The instructions specifically state that the evidence in aggravation must be weighed against the evidence in mitigation. We continue to believe that the pattern jury instructions as given here are correct. *See State v. Green*, 336 N.C. at 175, 443 S.E.2d at 33-34. Thus, this assignment of error is without merit and is overruled.

[17] Defendant also argues that the North Carolina death penalty statute is unconstitutional. Specifically, he argues that the statute is unconstitutional because the heinous, atrocious, or cruel aggravating circumstance is vague and arbitrary. We have consistently held against defendant on this issue and have specifically upheld the constitutionality of the heinous, atrocious, or cruel aggravating circumstance in *State v. Syriani*, 333 N.C. 350, 391-92, 428 S.E.2d 118, 141, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994). We conclude that because the trial court specifically instructed the jury pursuant to the North Carolina pattern jury instructions, which incorporate a narrowing definition adopted by this Court and expressly approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 255, 49 L. Ed. 2d 913, 924 (1976), there is no merit to defendant's argument.

PROPORTIONALITY

[18] Finding no error in either the guilt-innocence phase or the capital sentencing proceeding, 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) The capital felony was committed for pecuniary gain.

. . . .

(2 The capital felony was especially heinous, atrocious, or cruel.

. . . .

(3) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

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

As noted above, we have already concluded that the aggravating circumstance that the murder was committed for pecuniary gain was supported by the evidence. Upon conducting a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we conclude that the jury's finding of the other two aggravating circumstances was also supported by the evidence. We further conclude, based upon this thorough review, that the jury did not sentence the 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. N.C.G.S. § 15A-2000(d)(2) (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). Proportionality review is necessary to serve "[a]s 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. 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).

In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly sim-

ilar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition.

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).

We begin our analysis by comparing the instant case with those seven cases in which this Court has determined that the sentence of death was disproportionate: *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; *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 defendant was convicted of first-degree murder based solely upon the theory of felony murder; the victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. This Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant was simply attempting to rob the victim, as he fired at the victim's legs and not a more vital portion of the body. 323 N.C. at 329, 372 S.E.2d at 523. In addition, defendant Benson "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 defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder under the theory of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. The Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they "committed the same crime in the same manner." 319 N.C. at 27, 352 S.E.2d at 664.

In *State v. Rogers*, the defendant was convicted of first-degree murder based on a shooting of the victim in a parking lot during an argument. Only one aggravating circumstance was found, that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence

against another person or persons." 316 N.C. at 234, 341 S.E.2d at 731. The Court found that this seemingly senseless shooting simply did "not contain the viciousness and the cruelty present" in other death cases that involved only the "course of conduct" aggravating circumstance. *Id.* at 236, 341 S.E.2d at 733.

In *State v. Young*, the Court noted that in armed robbery cases where death is imposed, the jury has found the aggravating circumstance that the defendant was engaged in a course of conduct that included the commission of violence against another person and/or that the crime was especially heinous, atrocious, or cruel. 312 N.C. at 691, 325 S.E.2d at 194. Neither of these circumstances was found by the jury in *Young*. The especially heinous, atrocious, or cruel circumstance was submitted and rejected by the jury. *Id.*

In *State v. Hill*, the defendant shot a police officer while engaged in a struggle near defendant's automobile. This Court found the death sentence disproportionate:

> 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 . . . .

311 N.C. at 479, 319 S.E.2d at 172.

In *State v. Bondurant*, the defendant shot his victim after defendant had spent the night drinking; there was no motive for the killing, and immediately after the victim was shot defendant made sure the victim was taken to the hospital. Defendant himself entered the hospital to seek medical assistance for the victim. 309 N.C. at 694, 309 S.E.2d at 182-83.

In *State v. Jackson*, the victim had been shot in the head two times at close range. The defendant had earlier flagged down the victim's car, telling his companions that he intended to rob the victim. The defendant was convicted of murder in the first degree, kidnapping, and robbery with a dangerous weapon and was sentenced to death. This Court found the evidence insufficient to support the kidnapping and robbery with a dangerous weapon convictions and found the death sentence disproportionate because there was "no evidence

of what occurred after defendant left with McAulay [the victim]." 309 N.C. at 46, 305 S.E.2d at 717.

We conclude that this case is not similar to any of the above cases, where death was found to be a disproportionate sentence. Defendant in this case entered the home of his aunt asking for money; when she would not give him any money and threatened to call his mother, defendant proceeded to strike his aunt numerous times and then strangled her with a cord he wrapped around her neck three times. He finally dragged the body down the hall, making sure not to leave any fingerprints on the body. After killing her, defendant left his aunt's home; he proceeded to spend the money he stole to buy cocaine. He then went to his house, smoked some cocaine, and proceeded to brutally and viciously beat his wife and son with a hammer. He did not attempt to get medical attention for any of his victims.

In reviewing the proportionality of a sentence, 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. While we "will not undertake to discuss or cite all of those cases" we have reviewed, *State v. McCollum*, 334 N.C. 208, 244, 433 S.E. 2d 144, 164 (1993), 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. 47, 82, 301 S.E.2d 335, 356, *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 examining the pool, we review cases with similar facts and with similar aggravators and mitigators.

Here, defendant was convicted of first-degree murder on the theories of premeditation and deliberation and of felony murder. In addition, the jury found the three submitted aggravating circumstances existed in this case: the murder was especially heinous, atrocious, or cruel; it was committed for pecuniary gain; and it was part of a course of conduct that included crimes of violence to others. The jury also found eleven of the fourteen submitted mitigating circumstances to exist. The mitigating circumstances found were: defendant has no significant history of prior criminal convictions in the last ten years; the capital felony was committed while the defendant was under the influence of mental or emotional disturbance; the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; immediately after defendant's arrest in unrelated charges, he confessed to the murder

charge; defendant had a long history of alcohol and drug dependency; defendant's two suicide attempts were a direct result of realizing what he had done; defendant has the potential for rehabilitation with proper psychological treatment and restraint from drugs and alcohol; defendant has been able to conform to jail life without exhibiting aggressive behavior; defendant is peaceful and quiet when he is without the use of drugs and alcohol; defendant willingly cooperated with the police concerning the location of the victim's body, how to gain entry into the house, and the location of the victim's wallet; and defendant has never been convicted of a felony. The jury did not find that defendant had shown remorse; that he had suffered mental and verbal abuse, alienation of affection, and lived as the scapegoat of the family problems in the environment in which he lived; or the catchall mitigator.

In reviewing the cases in the pool, we have found several where the jury has returned a sentence of death in a robbery-murder case involving a course of conduct that included crimes of violence to others. 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), the jury recommended a sentence of death, and we found the sentence proportionate. In *Gardner*, the defendant killed two people in a restaurant. Two aggravators were found: that the murder was committed for pecuniary gain and that the murder was part of a course of conduct that included the commission by the defendant of another crime of violence against another person. Both of these circumstances were found by the jury in this case.

In *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983), the jury sentenced both defendants to death after finding the same three aggravators as exist in this case. The facts of that case were also similar in that the case involved the severe beating of one victim who was not killed but who had his wallet stolen and the stabbing and resulting death of a second victim who was killed after she told the defendants she had no money to give them when they demanded it. *Id.* at 464, 302 S.E.2d at 751. Defendants took the victim's pocketbook from her after they killed her. *Id.*

In the case of *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), the defendant was not committing murder for pecuniary gain; however, the murder was part of a course of conduct that included the commission by the defendant of another crime of violence against another person, and it was

determined that the murder was especially heinous, atrocious, or cruel. In addition, the jury found the mitigators that the defendant was acting under a mental or emotional disturbance and that defendant did not have the capacity to appreciate the criminality of his conduct. Nevertheless, the jury still recommended a sentence of death, and we found the sentence to be proportionate. *Id.* at 38, 301 S.E.2d at 330. As noted earlier, the two aggravating circumstances present in *McDougall* are present in this case; additionally, the two statutory mitigators found by the jury in *McDougall* were also found by the jury in this case.

We have also reviewed other first-degree murder cases where the jury has found the defendant guilty under premeditation and deliberation as well as felony murder based upon robbery. We found that while many of the robbery-murder cases resulted in life sentences, most of those cases did not involve the infliction of violence on a person other than the murder victim during the course of the crime.

Our review of the cases in the pool convinces us that the sentence here was not disproportionate.

Finally, we note that "[e]arly in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared," is not " 'the last word on the subject of proportionality' " but merely serves as an initial point of inquiry. *State v. Green*, 336 N.C. at 198, 443 S.E.2d at 46-47 (quoting *Williams*, 308 N.C. at 80-81, 301 S.E.2d at 356). The issue of whether the death penalty is proportionate in a particular case must rest in part on the experienced judgment of the members of this Court, not simply on a mere numerical comparison of aggravators, mitigators, and other circumstances. *Id.* Based upon our review of the cases in the pool and the experienced judgment of members of this Court, 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 the trial and sentencing proceeding as well as the record and 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 a fair sentencing proceeding free of prejudicial error before an impartial judge and jury. The conviction 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.

[19] Finally, we note that we have discovered an error in the judgment entered for the assault convictions. Defendant was indicted for the felony of assault with a deadly weapon inflicting serious injury upon his son in indictment number 90CRS4586. The jury found defendant guilty of the lesser charge of assault with a deadly weapon upon his son, which is a misdemeanor. However, the judgment and commitment sheet indicates that the trial judge sentenced defendant on the basis that he had been convicted of the felony of assault with a deadly weapon inflicting serious injury. Even though defendant's convictions for assault were consolidated, we believe the misapprehension under which the judge seems to have sentenced defendant may have affected defendant's sentence. We therefore believe that defendant is entitled to a new sentencing in regard to the three assault convictions.

Defendant was also convicted of attempting to burn a dwelling house. Although he gave notice of appeal of this conviction, defendant does not bring forward any assignments of error or make any argument with respect to it in his brief. We find no error in this conviction.

NO. 90CRS4580, FIRST-DEGREE MURDER: NO ERROR.

NO. 90CRS4582, ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY: NO ERROR IN CONVICTION; REMANDED FOR RESENTENCING.

NO. 90CRS4586, ASSAULT WITH A DEADLY WEAPON: NO ERROR IN CONVICTION; REMANDED FOR RESENTENCING.

NO. 90CRS4587, ASSAULT WITH A DEADLY WEAPON: NO ERROR IN CONVICTION; REMANDED FOR RESENTENCING.

NO. 90CRS4590, ATTEMPTING TO BURN DWELLING HOUSE: NO ERROR.

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

Chief Justice EXUM concurring in part and dissenting in part.

I concur with the majority in rejecting defendant's assignments of error relating to the guilt phase of his trial. I cannot agree, however,

with the majority's conclusion that the trial court did not err in admitting the testimony of Dr. White at the sentencing proceeding. I believe this error warrants a new sentencing proceeding.

Since the majority opinion fails to recite thoroughly the evidence presented at the sentencing proceeding I shall summarize that evidence here.

The State's evidence consisted primarily of the testimony of Dr. Cynthia Bernice White, an expert in psychiatry. Through her testimony the State sought to establish that defendant was an aggressive, unremorseful person who was hostile toward society and whose condition was untreatable.

Dr. White diagnosed Daniels as suffering from antisocial personality disorder (APD).[1] She described those with APD as having a "careless disregard for normal social norms" and "poor impulse control," causing them to behave in an "irritable" and "aggressive" manner. When they inflict harm on others, they feel justified and lack remorse for their actions. Treatment for those with APD is generally ineffective.

Dr. White conceded that she diagnosed Daniels without the benefit of a personal interview or any observations of him. Her diagnosis of Daniels was based in large part on his actions on the day of the offenses as reflected in the police report. From the statement in Daniels' confession "I killed my aunt," for example, she concluded that Daniels lacked remorse and felt justified in his actions. Dr. White determined that Daniels' remaining in his burning house and tying the drawstring around his neck were "suicide gestures," or "apparent attempts" to take his life by means which were not in fact life threatening. She said persons with APD make suicide gestures to "manipulate their environment" and to "gain sympathy." She characterized Daniels' letter to the Governor as a "cunning" maneuver by someone who felt justified in his actions and who lacked remorse; she also described it as "grandstanding." Dr. White's conclusion that Daniels suffered from APD was based on these characterizations which she made of Daniels' behavior.

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1. As a leading text describes APD: "In common use, 'antisocial personality' has been used interchangeably with the term 'sociopath' or 'psychopath.' " 3 Harold I. Kaplan et al., Comprehensive Textbook of Psychiatry/III 2817 (3d ed. 1980). Those with this affliction "behave in a manner that is completely out of keeping with their society's standards." *Id. See also* Leland E. Hensle & Robert J. Campbell, Psychiatric Dictionary 48 (4th ed. 1970).

Dr. White also testified that Daniels was not mentally impaired at the time of the murder despite his use of drugs that day. On the basis of Daniels' confession and other reports, Dr. White concluded that Daniels was a chronic drug abuser. This chronic abuse made Daniels tolerant of the effects of the drugs he had abused over several years. He was, therefore, in her opinion, tolerant of the effects of alcohol such that he would have been aware of his levels of aggression and violence at and beyond the time of its consumption.[2]

Defendant's psychiatric evidence portrayed him quite differently than the testimony of Dr. White. It tended to show that he was not depraved but rather depressed, that he was mentally impaired at the time of the crimes due to his consumption of alcohol and cocaine, and that his prospects for rehabilitation were favorable.

Defendant introduced the testimony of Dr. John Bolinsky, an expert in psychiatry, who had testified earlier in the guilt phase. His opinions were based on personal interviews and examinations of defendant, defendant's statements to officers after his arrest, conversations with Dr. Tyson, and the mental health records from Dorothea Dix Hospital, Black Mountain Alcohol Rehabilitation Center, and Randolph Clinic.

Dr. Bolinsky's opinion was that Daniels suffered from chronic depression and chronic substance abuse; he did not suffer from APD. His diagnosis of chronic depression was based on his mental status examination[3] of Daniels, which was consistent with depression and tended to negate APD. It was also based on Daniels' past suicide incidents involving an attempted shooting and the ingestion of

2. Cross-examination revealed that Dr. White's opinion about Daniels' mental state at the time of the murder was based on a report that Daniels had consumed a fifth of wine. When informed that Daniels had also used beer and cocaine, she stated her opinion would remain the same due to Daniels' tolerance of those substances.

3. Although the transcript does not elaborate on a "mental status" examination, a leading psychiatric text states that a mental status examination is designed to "classify and describe all the areas and components of mental functioning that are involved in modern diagnostic classifications." 1 Kaplan et al., Comprehensive Textbook of Psychiatry/III 912 (3d ed. 1980). This examination requires that the examiner observe and note the following characteristics: appearance, psychomotor activity, attitude, speech, mood, perception, thought process, consciousness, orientation, memory, judgment, insight and reliability. *Id.* at 916-19. Another source states: "At a minimum, each [psychiatric] examination should include [an evaluation of the following:] general behavior, attitude toward examiner, cooperativeness; brightness; restlessness; coherence; mood; sense of remorse, guilt, recrimination or shame; and personality." Henry A. Stone, Forensic Psychiatry 43-44 (2d ed. 1965).

kerosene, which were revealed through the personal interview. He said chronic depression is treatable.

Dr. Bolinsky also testified that Daniels' use of alcohol and cocaine on the day of the offenses impaired his capacity to plan his behavior. He explained that based in part on his interview with Daniels, Daniels' substance abuse was not the chronic daily type which leads to increased tolerance levels. Instead, since Daniels' use was marked by days or weeks of sobriety followed by a binge on drugs and alcohol, Daniels' abuse was the chronic episodic type, which does not lead to tolerance. Thus, Daniels' use of alcohol and cocaine on the day of the offenses would have caused him to be mentally impaired.

Dr. Bolinsky testified that based on his interview with Daniels and on his review of Daniels' records, it is improbable that Daniels would have killed his aunt absent his chronic depression, chronic substance abuse and acute substance abuse on the day of the homicide. Dr. Bolinsky also concluded that Daniels felt remorse for his actions, expressly contesting Dr. White's testimony to the contrary. In support of his conclusion Dr. Bolinsky referred to Daniels' letter to the Governor and his statements following his arrest, which he interpreted as showing remorse.

Turning to the legal issue which is the subject of this dissent, it must first be noted that the majority opinion focuses primarily on aspects of Dr. White's opinion which are not at issue. The issue is not whether an expert may rely in part on the statements of others, which we addressed in *State v. Smith*, 315 N.C. 71, 337 S.E.2d 833 (1985), or whether reliance on a certain item of evidence is reasonable, which we addressed in *State v. Bright*, 301 N.C. 243, 271 S.E.2d 368 (1980), or whether an expert may criticize the techniques of another expert, which we addressed in *State v. Bonney*, 329 N.C. 61, 405 S.E.2d 145 (1991), or whether it is an unconstitutional violation of due process to permit an expert to testify about a defendant's mental condition without having personally examined him, which the Supreme Court addressed in *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090 (1983).

The issue before us is whether under this State's evidentiary rules it was error for the trial court to permit Dr. White to testify as to defendant's mental condition without having personally examined him. Although wholly absent from the majority opinion, the principle around which this inquiry revolves is that "opinion testimony based

on inadequate data should be excluded." *State v. Rogers*, 323 N.C. 658, 664-65, 374 S.E.2d 852, 856 (1989). Expert opinion not supported by a sufficient foundation is inadmissible under Rule 702 since it will not "assist the trier of fact." *State v. Clark*, 324 N.C. 146, 160, 377 S.E.2d 54, 62 (1989). This principle is implicit in Rule 703, 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 188 n.303 (4th ed. 1993), and is espoused by numerous pre-Rules cases not inconsistent with Rules 702 and 703. *Donavant v. Hudspeth*, 318 N.C. 1, 24, 347 S.E.2d 797, 811 (1986); *Service Co. v. Sales Co.*, 259 N.C. 400, 411, 131 S.E.2d 9, 18 (1963); *Branch v. Dempsey*, 265 N.C. 733, 747, 145 S.E.2d 395, 405 (1965).

Thus, an expert opinion may be inadmissible due to the inadequacy of its foundation even though the individual components of that foundation are not themselves improper under Rule 702. The issue is, therefore, whether Dr. White had an adequate foundation on which to base her differential diagnosis that defendant suffered from APD and whether Dr. White had an adequate foundation on which to base her opinion that defendant was not affected by his alcohol and cocaine abuse on the day of the offense.

In deciding whether Dr. White's foundation was adequate it bears emphasis that this Court's expertise rests in matters of law. As to subjects that are beyond our training and experience, such as psychiatry and psychology, we must give considerable weight to the recognized authorities in the relevant field. On the issue before us the authorities are unanimous that absent a personal interview and examination, the differential diagnosis of a mental health expert as to an individual's mental condition is unreliable and should be excluded.

The American Psychiatric Association has explained:

> Absent an in-depth examination and evaluation, the psychiatrist cannot exclude alternative diagnoses; nor can he assure that the necessary criteria for making the diagnosis in question are met. As a result, he is unable to render a medical opinion with a reasonable degree of certainty.

Amicus Curiae Brief for the American Psychiatric Association at 9, 25, *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090 (1983) (quoted in American Bar Association, Criminal Justice Mental Health Standards § 7-3.11, at 137 n.12). Indeed, the American Psychiatric Association has taken the following position:

> On occasion psychiatrists are asked for an opinion about an individual who is in the light of public attention, or who has disclosed information about himself/herself through public media. It is unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination and has been granted proper authorization for such a statement.

American Psychiatric Association, Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry § 7, annot. 3 (1985).

The American Bar Association Criminal Justice Mental Health Standards reflect this same distrust of a mental health diagnosis not based on a personal interview:

> [N]o witness should be qualified by the court to present expert testimony of a person's mental condition unless the court determines that the witness . . . has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter[s] upon which the witness is being called to testify.

American Bar Association, Criminal Justice Mental Health Standards § 7-3.11(a)(iii) (1989).

The concerns voiced by these authorities are supported by at least one study which indicates that diagnoses based on live interviews are significantly more reliable than those based on case summaries. Steven E. Hyler et al., *Reliability in the DSM-III Field Trials*, 39 Archives Gen. Psychiatry 1275, 1276 (1982) (reliability of diagnoses based on personal interview was "extremely good"; reliability of diagnoses based on case summaries was "only fair").

Legal authorities in this area also admonish the practice of diagnosing an individual's mental health without the benefit of a personal interview on the ground that such a diagnosis is inherently unreliable. *See* McCormick on Evidence § 44 (4th ed. 1992); Gerald Bennett, A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial, 53 Geo. Wash. L. Rev. 375, 400 (1985); Note, Psychiatric Evaluation of Abnormal Witnesses, 59 Yale L. J. 1324, 1331-32 (1950).

Thus, the authorities on diagnosing mental afflictions which we should heed are of one accord that a diagnosis not based on a personal interview and examination is unreliable and should be excluded from evidence in a court of law.

This Court has likewise recognized the integral value of a personal examination to a reliable psychiatric diagnosis. We said in *State v. Wade*, 296 N.C. 454, 463, 251 S.E.2d 407, 412 (1979):

> The assertion of *State v. Alexander*, [179 N.C. 759, 765, 103 S.E. 383, 386 (1920)] that "[c]onversation with one alleged to be insane is, of course, one of the best evidences of the present state of his mind" is still true. Conversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. When it is conducted with the professional safeguards present here, it provides a sufficient basis for the introduction of an expert diagnosis into evidence.

In addition to the authorities cited above, which seriously impugn the reliability of a diagnosis by a mental health expert who has not personally examined his patient, this Court must also consider the particular facts of the case before us. These facts, like the authorities cited above, all indicate that the testimony of Dr. White was unreliable and should have been excluded.

Dr. Bolinsky testified quite explicitly that because of Daniels' peculiar symptoms and the possible diagnoses which they afforded, a reliable differential diagnosis could not be made in the absence of a personal interview and examination. More specifically, without such a personal assessment of Daniels, a differential diagnosis that he suffered from APD as opposed to depression would be inherently unreliable. A personal mental status examination of Daniels would have revealed an abnormal mental status, which, in turn, would have tended to negate a diagnosis of APD, and would have been consistent with depression.[4] Also, Dr. White's conclusions were made without the benefit of critical facts, such as Daniels' episodic substance abuse and quite likely his previous suicide attempts, which defendant revealed to Dr. Bolinsky in his interview; these facts would have been revealed through a personal examination and might have caused her to make the same diagnosis as Dr. Bolinsky.

Dr. Bolinsky's testimony in this respect is echoed in a leading text on psychiatry, which states that a mental status examination is necessary to a diagnosis of APD in order to rule out other disorders.

4. Dr. White, in her testimony, agreed that "persons with antisocial personality disorders have a normal mental status exam . . . ." *See also* 3 Kaplan et al., Comprehensive Textbook of Psychiatry/III 2816, 2824 (3d ed. 1980) (normal mental status is an "associated feature" of APD); *accord* Diagnostic and Statistical Manual of Mental Disorders 343 (3d ed. 1987).

3 Harold I. Kaplan et al., Comprehensive Textbook of Psychiatry/III 2824 (3d ed. 1980) [hereinafter Kaplan]. Kaplan states:

> Isolated or even repeated episodes of violence or criminal behavior unrelated to the other descriptive diagnostic behaviors [associated with APD] should be described as such and, unless the other behaviors are present, should not be labeled antisocial behavior. In the past, with DSM-II, there was a tendency to place unlikable people or unproductive people into this diagnostic category, and its use as a pejorative label has been frequent.

Id.

Dr. Bolinsky's testimony regarding the need to examine Daniels for depression is likewise supported in Kaplan, which states that "[d]epression is one of the most common illnesses to which humans are subject. Paradoxically, it is probably one of the most frequently overlooked [illnesses.]" 1 Kaplan at 1019. "A complete psychiatric examination should be obtained in each case" where a patient may suffer from depression. *Id.* at 1327. Such a differential diagnosis for depression is especially necessary where there is a history of suicide attempts, since "suicidal action or recurrent thoughts of suicide" is a symptom of depression. *Id.*

The majority correctly recognizes that "the evaluation [of APD] relies heavily on historical data from the patient and others . . ." and that the doctor in making this diagnosis must delve deeply "into performance in school, dealings with various school and legal authorities, job performance, and sexual and marital history." 3 Kaplan at 2822, 2824. The majority fails to recognize, however, that historical data obtained solely from secondhand sources may lack critical information and will invariably be inferior to historical data obtained in a clinical interview of the subject. As recognized in Kaplan, the "interpersonal and interactional characteristics [of APD] are usually elicited in the clinical interview." *Id.* at 2822.[5] Further, the lack of a personal interview deprives the expert of the ability to test various hypotheses and make the differential diagnosis which is crucial to a diagnosis of APD. 3 Kaplan at 2924. The risks of relying solely on secondhand information are demonstrated in the case at hand by Dr. White's failure to determine Daniels' mental status and her failure to discern the nature of defendant's substance abuse.

5. Although not expressly stated, Kaplan seems to contemplate that any diagnosis of APD will necessarily entail a personal interview. It concludes the passage referred to in the text by stating that "[a]ny data from other sources are useful." 3 Kaplan at 2924.

Thus, while failure to conduct a personal clinical interview may not be fatal to the admission of all expert mental health testimony in all cases, under the circumstances here it rendered Dr. White's differential diagnosis unreliable.

Other jurisdictions under similar circumstances have held psychiatric diagnoses inadmissible in the absence of a personal clinical interview of the subject. In *Holloway v. State*, 613 S.W.2d 479, 502-03 (Tex. App. 1981), an expert witness for the State testified as to defendant's future dangerousness. Although the expert had spoken with a co-defendant, the defendant's mother, and arresting and interrogating officers, the court ordered a new trial because the expert's failure to interview the defendant caused his testimony to lack "any value" and rendered it inadmissible. In *People v. Wilson*, 518 N.Y.S.2d 690, 693, 133 A.D.2d 179, 183-84 (N.Y. App. 1987), the court reversed the trial court for permitting a forensic psychologist, who had witnessed defendant only through his testimony in court, to testify as to defendant's mental capacity. The court reasoned that since the record did not establish that the process used for the psychological evaluation was a "reliable substitute for clinically derived evaluation of a subject's mental processes," the opinion lacked a proper foundation. In *Hill v. State*, 339 So.2d 1382, 1384-85 (Miss. 1976), the Mississippi Supreme Court reversed the trial court for permitting a psychiatrist to testify that defendant had no psychiatric illness since the psychiatrist interviewed the defendant for only seventy-five minutes and recommended further testing.[6]

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6. Numerous decisions from other jurisdictions recognize the integral role of the personal interview to a reliable psychological diagnosis. In *Rollerson v. United States*, 343 F.2d 269, 274 (D.C. Cir. 1964) the court stated:

> The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject. More than three or four hours are necessary to assemble a picture of a man . . . . From hours of interviewing, and from the tests and other materials, a skilled psychiatrist can construct an explanation of personality and inferences about how such a personality would react in certain situations. (Citations omitted.)

See also State v. Edmon, 28 Wash. App. 98, 621 P.2d 1310 (1981) (A psychiatrist giving an evaluation of the defendant must personally interview him.); *United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968) (An interview is the only "reliable means" of determining the defendant's sanity.); *People v. Bassett*, 69 Cal. 2d 122, 70 Cal. Rptr. 193, 443 P.2d 777 (1968) (A psychiatric opinion not based on an interview is not "substantial" so as to rebut defendant's expert opinion that he lacked capacity.); *Zirt v. Pollock*, 25 A.D.2d 920, 270 N.Y.S.2d 85 (1966) (An evaluation of a testator's competency that lacks a personal interview is "weak[]."); *see also In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1223, 1250-56 (D.C.N.Y. 1985), *aff'd*, 818 F.2d 187 (1987), *cert. denied sub nom. Lombardi v. Dow Chem. Co.*, 487 U.S. 1234, 101 L. Ed. 2d 932 (1987) (Testimony by experts as to causation lacked a sufficient foundation where the

The majority deals with the weaknesses underlying Dr. White's opinion with use of the general principle that deficiencies in a particular piece of evidence affect the weight of that evidence and not its admissibility. That principle, however, has no applicability where the reliability falls below a judicially acceptable level. In *State v. Peoples*, for example, we held that "[h]ypnotically refreshed testimony is simply too unreliable to be used as evidence in a judicial setting." 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984). Recognizing the "scholarly literature" on hypnosis, which indicated that "hypnosis has not reached a level of scientific acceptance," and our need to "defer" to that expertise, we expressly overruled earlier cases holding that deficiencies in such testimony affect weight and not admissibility. *Id.* at 519, 533, 319 S.E.2d at 180, 188. *See also State v. Foye*, 254 N.C. 704, 708, 120 S.E.2d 169, 172 (1961) (results of lie detector test are inadmissible largely because there is "no general scientific recognition of the efficacy of such tests" and such tests are "correct in their diagnosis" only seventy-five percent of the time). Concerning expert opinion testimony, this Court has repeatedly held that substantial shortcomings underlying such testimony which render it inherently unreliable require that it be excluded. *See State v. Clark*, 324 N.C. 146, 377 S.E.2d 54; *State v. Rogers*, 323 N.C. 658, 374 S.E.2d 852; *Donovant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797; *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E.2d 9; *Branch v. Dempsey*, 265 N.C. 733, 145 S.E.2d 395.

Finally, there is a reasonable possibility that the admission of Dr. White's testimony affected the jury's decision to sentence defendant to death. *See* N.C.G.S. § 15A-1443(a) (1988). The State's case for death was substantially enhanced by Dr. White. She testified, in summary, that Daniels was unremorseful, his suicide efforts were mere "gestures" and a "scheme" to gain sympathy, his letter to the Governor was "cunning" and "grandstanding," he suffered from untreatable antisocial personality disorder, and he was aware of his levels of aggression and violence at the time of the offenses.

We do not know how many jurors might have rejected some of the mitigating circumstances found by one or more jurors on the basis of this testimony. We do know the jury unanimously rejected the mitigating circumstance of remorse and found that the aggravating and mitigating circumstances warranted the imposition of death.

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experts failed to take into account plaintiffs' specific medical histories and habits; court also based its decision on the fact that the experts failed to rule out other possible causes.); *Emigh v. Consolidated Rail Corp.*, 710 F. Supp. 608, 612-13 (W.D. Pa. 1989) (Since doctors who testified that plaintiff died of asbestosis had not interviewed or examined plaintiff and since it was not clear from record whether they knew of or considered the effect of plaintiff's smoking, their opinions were unreliable and inadmissible.).

Based on the error in the admission of the testimony of Dr. White and on its likely prejudicial effect, defendant should be awarded a new sentencing hearing.

STATE OF NORTH CAROLINA v. KENNETH MICHAEL BRYANT

No. 166A91-2

(Filed 29 July 1994)

1. Criminal Law § 762 (NCI4th)— noncapital first-degree murder—instructions—reasonable doubt

There was no error in a noncapital first-degree murder trial under *Cage v. Louisiana*, 498 U.S. 39, from the use of the phrase "honest substantial misgiving" in defining reasonable doubt where, read in context and considering the instruction as a whole, the jury would not have interpreted the instruction to have overstated the level of doubt required for acquittal. Moreover, there is no reasonable likelihood that the jury would have understood "moral certainty" to be disassociated from the evidence in the case. The phrase would not have allowed the jury to return a verdict of guilty based on a subjective feeling rather than upon an evaluation of the evidence.

Am Jur 2d, Trial § 1385.

2. Evidence and Witnesses § 339 (NCI4th)— noncapital first-degree murder—other acts of violence and threats—admissible

The trial court did not err in a noncapital first-degree murder prosecution by allowing a prosecution witness to testify concerning other alleged acts of violence and threats of violence by defendant where the testimony was corroborative of other testimony, was corroborated by other testimony, and tended to show malice, an essential element of first-degree murder. The evidence was thus relevant to an issue other than defendant's character. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 437 et seq.; Homicide § 310.

3. Evidence and Witnesses § 775 (NCI4th)— noncapital first-degree murder—alibi testimony excluded as hearsay—no prejudicial error

There was no prejudicial error in a noncapital first-degree murder prosecution where the court excluded testimony concerning defendant's plans on the night of the murder, which defendant contends were relevant to show that defendant did not go to the victim's trailer but went to look for men from whom he had arranged to buy stolen goods. Evidence of a declarant's intent to engage in a future act has been held to be admissible, but there was no prejudice from the exclusion here because the evidence offered an additional explanation for defendant's presence in the area of the scene of the crime rather than an alibi, defendant was able to get the evidence before the jury, and defendant put on extensive evidence to support a different alibi.

Am Jur 2d, Appeal and Error §§ 797-804.

4. Evidence and Witnesses § 2891 (NCI4th)— noncapital first-degree murder—witness to whom defendant confessed—cross-examination—sexual relations with defendant

The trial court did not err in a first-degree murder prosecution by excluding testimony on cross-examination that a witness to whom defendant confessed had sexual relations with defendant after the confession. Although defendant contended that this evidence was admissible to impeach the witness, who claimed that she was shocked and scared by the confession, and to corroborate other witnesses who testified that the witness and defendant were affectionate on the night of the shooting, evidence of the witness's response to the confession was admitted, evidence that she had sex with defendant did not tend to prove any fact in issue, any impeachment value from the apparent strangeness of her behavior was tenuous because the witness had testified that she was drinking and using cocaine on the night of the killing, and defendant was not deprived of the opportunity to corroborate other testimony because evidence that the witness and defendant were affectionate was admitted.

Am Jur 2d, Witnesses §§ 484 et seq.

5. Criminal Law § 442 (NCI4th)— noncapital first-degree murder—prosecutor's argument—vengeance—no prejudicial error

There was no prejudicial error in the prosecutor's argument in a noncapital first-degree murder prosecution where defendant contended that the prosecutor argued that it was the jury's duty to avenge the victim's death where the prosecutor did not explicitly argue that the jury had a duty to avenge the victim's death and, while his choice of language as he discussed the historical context is not to be condoned, when read in context, the argument did not result in the jury being misled regarding its duty or the proper basis for its verdict.

Am Jur 2d, Trial §§ 567 et seq.

On remand by the Supreme Court of the United States, — U.S. —, 128 L. Ed. 2d 42 (1994), for further consideration in light of *Victor v. Nebraska*, 511 U.S. —, 127 L. Ed. 2d 583 (1994).

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

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

FRYE, Justice.

Defendant was tried noncapitally at the 2 October 1990 Criminal Session of Superior Court, Edgecombe County, and convicted by a jury of first-degree murder. On 5 October 1990, judgment was entered sentencing defendant to life imprisonment. On appeal, this Court found error in the reasonable doubt instruction based on *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1991). *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) (*Bryant I*). However, the Supreme Court of the United States vacated the judgment and remanded the case to this Court for further consideration in light of *Victor v. Nebraska*, 511 U.S. —, 127 L. Ed. 2d 583 (1994). *North Carolina v. Bryant*, — U.S. —, 128 L. Ed. 2d 42 (1994).

The evidence presented at trial is summarized in this Court's prior opinion. *Bryant*, 334 N.C. at 335-37, 432 S.E.2d at 292-93. We will discuss only those facts necessary for a complete consideration of the questions before us on remand.

[1] In *State v. Cage*, 554 So. 2d 39 (La. Sup. Ct. 1989), the Supreme Court of Louisiana upheld the following jury instruction defining reasonable doubt:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*. If after giving a fair and impartial consideration to all the facts in the case you find the evidence unsatisfactory or lacking of one any [sic] single point indispensibly [sic] necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

Id. at 41 (emphasis in original). The Supreme Court of Louisiana concluded that "[t]he use of 'grave uncertainty' and 'moral certainty,' if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury. However, taking the charge as a whole, we find that reasonable persons of ordinary intelligence would understand the definition of 'reasonable doubt.' " *Id.*

Defendant's petition for certiorari was allowed by the United States Supreme Court and that Court, in a per curiam opinion, held that the instruction violated the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342. The Court explained:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruc-

> tion to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

This Court applied *Cage* in *Bryant I* to analyze a constitutional challenge to the following instruction:

> A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt.
>
> A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane, rational doubt arising out of the evidence or lack of evidence or from its deficiency.
>
> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a *moral certainty* in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is *an honest substantial misgiving* generated by the insufficiency of the proof. An insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the defendant.

(Emphasis added.)

Relying on *Cage*, this Court found the instruction to be constitutionally infirm. We concluded that "the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* [was] 'moral certainty,' " and that "[t]he correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty." *Bryant*, 334 N.C. at 342, 432 S.E.2d at 297. We noted that the instruction in *Bryant I* was essentially identical to the instruction in *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992), where two members of this Court concluded that "the trial court used a combination of terms so similar to the combination disapproved of in *Cage* that there is a 'reasonable likelihood' that the jury applied the challenged instruction in a way that violated the Due

Process Clause." *Id.* at 573, 417 S.E.2d at 750. We discussed the distinction between a jury believing that defendant is morally guilty and a finding of guilt based on the evidence presented at trial, concluding that

> when reasonable doubt is defined in terms of "grave uncertainty," "actual substantial doubt," or in terms which suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard, and the jury is then told that what is required for conviction is moral certainty of the truth of the charge, the instruction will not pass muster under *Cage*.

Bryant at 343, 432 S.E.2d at 297. Implicit in our holding was our conclusion that the term "honest substantial misgiving" is a term which suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard and, since the jury was also told that what was required for conviction was moral certainty of the truth of the charge, the instruction was error under *Cage*.

Our reading of *Cage* has now been enhanced by *Victor v. Nebraska* in which the Supreme Court of the United States reexamined the constitutionality of jury instructions defining reasonable doubt. In *Victor*, the Court held that certain reasonable doubt instructions which included the terms "moral certainty" and "substantial doubt" did not violate the Due Process Clause. In each of two cases, the Court found that the instruction, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury.[1] In the case of petitioner Sandoval, the jury was instructed:

> Reasonable doubt is defined as follows: It is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

Victor, 511 U.S. at —-, 127 L. Ed. 2d at 591-92 (emphasis in original). The Court acknowledged that the term "moral certainty" had lost some of its historical meaning and that a modern jury might understand it to allow conviction on a standard of proof less than the rea-

1. The *Victor* opinion consolidated two cases, *Victor v. Nebraska*, No. 92-8894, and *Sandoval v. California*, No. 92-9049, which were briefed and argued together in the U.S. Supreme Court.

sonable doubt standard. The Court concluded however that the remainder of the instruction, particularly the abiding conviction language, helped define the phrase and properly directed the jury on the reasonable doubt standard. The Court also considered Sandoval's argument that with this instruction a juror could be convinced to a *moral certainty* of defendant's guilt even though the prosecutor had not presented *proof* beyond a reasonable doubt as is constitutionally required. The Court rejected this argument, referring again to other language in the instruction which "explicitly told the jurors that their conclusion had to be based on the evidence in the case." *Id.* at —, 127 L. Ed. 2d at 597. The Court noted that this instruction differed from the *Cage* instruction which "simply told [the jurors] that they had to be morally certain of the defendant's guilt." *Id.* at —, 127 L. Ed. 2d at 596.

In petitioner Victor's trial the jury was instructed:

> 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Victor, 511 U.S. at —, 127 L. Ed. 2d at 598 (emphasis in original). The Court considered the argument that "substantial doubt" implies a greater doubt than that required for acquittal under *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970). The Court found that use of this phrase was problematic, but that any ambiguity was removed by reading the phrase in the context of the sentence in which it was used. That sentence distinguishes between an "actual and substantial

doubt" and "a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." The Court noted that such an explicit distinction was not present in *Cage* where "substantial doubt" was used in conjunction with "grave uncertainty" and permitted an interpretation of the two phrases that would overstate the degree of doubt required for acquittal. *Victor*, 511 U.S. at —-, 127 L. Ed. 2d at 599. Further, the Court noted that the *Victor* instruction provided an alternative definition of reasonable doubt: "a doubt that would cause a reasonable person to hesitate to act." *Id.*

The Court also considered petitioner Victor's objection to use of the phrase "moral certainty" in this instruction. The Court pointed to other portions of the instruction which served to put the phrase in context:

> Instructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract. . . . The instruction also equated a doubt sufficient to preclude moral certainty with a doubt that would cause a reasonable person to hesitate to act. . . . The jurors were told that they must be convinced of Victor's guilt "after full, fair, and impartial consideration of all the evidence."

Victor, 511 U.S. at —-, 127 L. Ed. 2d at 600. The jurors were also instructed that they should decide any issues of fact based solely on the evidence.

Finally, the Supreme Court in *Victor* removed any lingering doubt regarding the proper standard of review for challenges to the constitutionality of reasonable doubt instructions. "[T]he proper inquiry is not whether the instruction "could have" been applied in [an] unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it." *Victor*, 511 U.S. at —-, 127 L. Ed. 2d at 591 (citing *Estelle v. McGuire*, 502 U.S. —-, —- & n.4, 116 L. Ed. 2d 385, 399 & n.4 (1991)).

Reconsidering the reasonable doubt instruction in the present case, in light of *Victor*, we first examine the use of the phrase "honest substantial misgiving." This Court continues to recognize, as did the United States Supreme Court in *Cage* and in *Victor*, that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Victor*, 511 U.S. at —-, 127 L. Ed. 2d at 599.

However, when read in context and considering the instruction as a whole, we conclude that the jury would not have interpreted the instruction to have overstated the level of doubt required for acquittal.

First, we note 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." *Id.* In *Victor*, as in the present case, there is a single reference to "substantial doubt" or "substantial misgiving" which is qualified by other language in the instruction. In the present case the jury was also instructed that a reasonable doubt is "not a mere possible doubt," that it is "not a vain, imaginary or fanciful doubt" and that it is "not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony." In this instruction "substantial" was used to refer to the "existence rather than the magnitude of the doubt," and therefore there is no concern that its use would have been interpreted to overstate the degree of doubt required for acquittal. *Id.*

We next consider defendant's argument that the use of the phrase "moral certainty" in this instruction would allow a jury to return a verdict of guilty based on a subjective feeling rather than upon an evaluation of the evidence. The Court in *Victor* acknowledged the distinction drawn in *Cage* between "moral certainty" and "evidentiary certainty." *Victor*, 511 U.S. at —, 127 L. Ed. 2d at 596. The Court stated, however, that in *Cage*, "the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase." *Id.* In *Victor*, the jury was explicitly told to base its conclusion on the evidence in the case, and there were other instructions which reinforced this message.

Likewise, in the present case, the jury was instructed that a reasonable doubt existed "if, *after considering, comparing and weighing all the evidence*, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt." The jury was also instructed that a reasonable doubt is "a sane, rational doubt *arising out of the evidence or lack of evidence* or from its deficiency" and that it is "an honest substantial misgiving generated by the *insufficiency of the proof*." We therefore conclude that, under *Victor*, "there is no reasonable likelihood that the jury would have understood moral certainty

to be disassociated from the evidence in the case." *Victor*, 511 U.S. at —-, 127 L. Ed. 2d at 597. Thus, on remand, we hold, contrary to our previous decision in this case, that there is no *Cage* error entitling defendant to a new trial. *Id.*

In *Bryant I* we also addressed defendant's argument that the trial court erred in refusing to grant his motion to dismiss. We found the evidence sufficient to withstand the motion to dismiss and that portion of our opinion remains undisturbed. *Bryant*, 334 N.C. at 337-338, 432 S.E.2d at 293-294. We now address assignments of error raised by defendant and not addressed in *Bryant I*.

[2] First, defendant contends that the trial court erred by allowing a prosecution witness to testify concerning other alleged acts of violence and threats of violence by defendant which were irrelevant to this case. State's witness Bob Skaggs testified in pertinent part as follows:

Q: Now, on the Thursday before Christmas, in 1989, did you have a conversation with the defendant?

A: Yes, sir.

. . .

Q: What did he tell you?

A: He said he was going —.

Mr. Surles: Okay. Objection

Court: Overruled.

Mr. Copeland: Go ahead.

Witness: He said he was going to cut up somebody with a knife.

Q: And, did he say where he was going to do this?

A: He said in North Carolina.

Q: And, did he say who?

A: No, sir.

Q: Now, after that Thursday before Christmas, when was the next time you saw him?

A: He came back about the week later. I don't remember the dates exactly.

Q: Then, when you got back the week later, did you have a conversation with him again?

A: Yes.

Q: And, when you talked with him then, what did he say?

A: He said he had cut the boy with the knife.

Defendant contends that he was not referring to the victim in these statements, that the State produced no evidence showing that the stabbing was related to the victim's death and that the stabbing was not relevant to show motive, opportunity, intent, plan, identity or any other proper purpose under Rule 404(b). Thus, according to defendant, this was improper character evidence which should have been excluded. We disagree.

We first note that Skaggs' testimony corroborated Doris Bryant's testimony that a fight had occurred between defendant and the victim in which defendant cut the victim and the victim and his brother hit defendant in the face with a shotgun. The testimony of Bryant and Skaggs was corroborated by Detective Wiggs who testified that during the course of his investigation he determined that the victim and defendant previously had been involved in a fight in which defendant cut the victim.

Under Rule 404(b) of the North Carolina Rules of Evidence,

> [e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. 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). "Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused." *State v. Simpson*, 327 N.C. 178, 185, 393 S.E.2d 771, 775 (1990). Here, evidence of defendant's prior assault on the victim tended to show malice, an essential element of first-degree murder. The evidence was thus relevant to an issue other than defendant's character and was properly admitted. *See also State v. Kyle*, 333 N.C. 687, 697, 430 S.E.2d 412, 417 (1993) (evidence of prior incident in which defendant struck victim in the head and threatened her with a knife admissible under Rule 404(b)); *State v. Terry*, 329 N.C. 191, 197, 404 S.E.2d 658, 661 (1991) (evidence

of "prior malicious behavior toward the very person defendant was accused of murdering" admissible under Rule 404(b)); *Simpson*, 327 N.C. at 185, 393 S.E.2d at 775 (evidence of prior incident in which defendant stabbed the victim admissible under Rule 404(b)); *State v. Spruill*, 320 N.C. 688, 693, 360 S.E.2d 667, 69 (1987) (evidence of defendant's prior assaults on victim admissible under Rule 404(b)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988). This assignment of error is therefore rejected.

[3] In his next assignment of error defendant contends that the trial court erred by excluding testimony concerning defendant's plans on the night of the murder. This evidence, defendant contends, was admissible under an exception to the hearsay rule. Defendant's sister, Francis Deans, testified that defendant left her home about 6:45 p.m. and returned about 10:30 p.m. Objections were sustained to questions regarding where defendant said he was going and the purpose of his leaving his sister's house that night. Later in direct examination, defendant again tried to elicit this information and the witness testified as follows:

Q: Do you know whether or not [the defendant] had any money with him?

A: Yes, sir.

Q: Tell us what you know about that. What you know about it?

A: Mike reached in his pocket and had two one hundred dollar bills, and I guess roughly around—I didn't count the twenties but he had at least five or six twenties and tens and fives going to go buy stolen merchandise.

Q: Did he tell you where he was going to make this buy?

Mr. Copeland: Objection. Calls for a conclusive response.

A: No, sir.

Court: Jury will disregard the witness' answer what he was going to do with the money that he showed her.

On further direct examination, the witness was allowed to testify that defendant had an appointment to keep that night. Over a sustained objection, the witness testified that defendant was supposed to meet "two guys."

According to defendant, it is evident from the stricken testimony of this witness that defendant was attempting to introduce into evi-

dence the fact that he told his sister that he planned to meet two men to purchase some stolen merchandise when he left her house on the evening of the murder. Defendant and the State agree that although no offer of proof was made, the evidence that defendant was offering is ascertainable from the transcript and thus there is an adequate record available for appellate review. Defendant argues that this evidence was admissible under Rule 803(3) and was relevant to show that defendant did not go to the victim's trailer when his girlfriend, Cheryl Marlowe, dropped him off, but rather went to look for the men from whom he had arranged to buy stolen goods.

Rule 803(3) provides that the following type of evidence is not excluded by the hearsay rule: "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." N.C.G.S. § 8C-1, Rule 803(3) (1992). We have applied this rule in a number of cases to find evidence of a declarant's intent to engage in a future act to be admissible. In *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990), defendant was charged with committing a murder during an attempted robbery of a gas station. This Court considered the admissibility of testimony by a defense witness that another man, Joe Reid, told the witness that he planned to rob the store and asked the witness to drive him to the store. We stated that

> "Rule 803(3) allows the admission of a hearsay statement of a then-existing intent to engage in a future act." *State v. McElrath*, 322 N.C. 1, 17, 366 S.E.2d 442, 451 (1988). Therefore, [the witness'] testimony as to Reid's declaration that he wanted to go rob Tripp's Service Station was admissible as evidence of Reid's then-existing intent to engage in a future act.

Sneed at 271, 393 S.E.2d at 534. *See also State v. Taylor*, 332 N.C. 372, 386, 420 S.E.2d 414, 422 (1992) (victim's statement to his employer, requesting time off work in order to meet the defendant and then buy a boat, admissible under Rule 803(3)); *State v. Coffey*, 326 N.C. 268, 286, 389 S.E.2d 48, 59 (1990) (statement by child murder victim that she was going fishing with a nice gray-haired man on the day she disappeared admissible under Rule 803(3)).

In the present case, defendant's statement to his sister that he was going to meet two guys to buy stolen merchandise was admissible under Rule 803(3) as a statement of his then-existing intent to engage in a future act. Thus, assuming *arguendo* the proffered evidence met the test of relevancy, the trial court erred by refusing to

admit it. We now consider whether, under the appropriate standard of review, such error entitles defendant to a new trial. *See* N.C.G.S. § 15A-1443(a) (1988).

Defendant argues that he was prejudiced by this error because the excluded evidence created an alibi for the five minutes he was absent from Marlowe's car, that is, the jury may have believed that defendant spent the five minutes searching for his prospective sellers rather than visiting the victim's trailer. First, this evidence did not actually provide an alibi. An alibi is an assertion by defendant that "at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime." *State v. Cox*, 296 N.C. 388, 392, 250 S.E.2d 259, 262 (1979). The proffered evidence in this case did not put defendant in a location making it impossible for him to have gone to the victim's home and fired the fatal shot through the door. In fact, a reasonable jury could have believed that defendant went to the area to purchase the stolen goods and that he also went to the victim's home, shot him, and then returned to Marlowe's vehicle. Thus, at most, this evidence offered an additional explanation for defendant's presence in the area of the scene of the crime. Further, defendant was able to get this evidence before the jury. Cheryl Marlowe testified on cross-examination that defendant told her that he was supposed to meet some guys that night about buying some stuff. Finally, we also note that defendant put on extensive evidence, through six witnesses, to support a different alibi—that he was at a completely different location playing cards with friends at the time of the shooting. In light of this alibi defense, defendant should not be heard to complain about the exclusion of evidence that would have placed him in the area of the scene of the crime. We conclude that defendant has failed to demonstrate that a reasonable possibility exists that, absent the error of the exclusion of this evidence, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a).

[4] In another assignment of error, defendant contends that the trial court erred by excluding testimony that Cheryl Marlowe admitted having sexual relations with defendant after defendant allegedly told her that he had fired a shot into the victim's trailer. According to defendant, this evidence was admissible to impeach Marlowe who claimed she was shocked and scared by defendant's confession, and to corroborate other witnesses who testified that Marlowe and defendant were affectionate on the night of the shooting.

On direct examination Marlowe testified that she had known defendant for three and one half years and that they had dated during that time. Marlowe testified on cross-examination that defendant was very affectionate with her after the two left the night club on the night of the murder. An objection was sustained to the question, "Tell me how he was affectionate?" Defendant then made an offer of proof for which Marlowe testified that she had made love to defendant that night after he told her that he may have shot someone. The trial judge excluded the evidence based on relevancy. Defendant contends this evidence would have impeached Marlowe by rendering her account of the night's events "bizarre and inconsistent," that is, it would be strange for her to have shared affections and had sex with defendant after he reported to her that he may have killed someone.

Under Rule 401 of the North Carolina Rules of Evidence, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). Evidence that Marlowe had sex with defendant after he reported that he may have shot someone did not tend to prove any fact in issue in this case. Marlowe's response to defendant's confession may have been relevant to her credibility and evidence of this was admitted. First, Marlowe had already described on direct examination that she was affectionate with defendant all night. On cross-examination she testified that defendant was affectionate toward her. Defendant acknowledges that the evidence excluded by the trial court's ruling amounted to a description of the *extent* of the affection shared between Marlowe and defendant. We have stated that "[t]rial courts may limit cross-examination to prohibit inquiry into . . . matters of only tenuous relevance, or to ban repetitious or argumentative questions. 1 Brandis on North Carolina Evidence 35 (1982). The legitimate bounds of cross-examination are largely within the discretion of the trial judge." *State v. Wilson*, 322 N.C. 117, 135, 367 S.E.2d 589, 600 (1988) (citation omitted). Here, the extent of the affectionate relations between Marlowe and defendant was of questionable relevance. This is the very type of situation in which the trial court is properly called upon to place some limitations on cross-examination.

We also note that Marlowe testified that she had been drinking and using cocaine on the night of the killing. Thus, any of Marlowe's behavior that night may have appeared strange and any impeachment value of the excluded evidence would have been tenuous at best. We

therefore conclude that the trial court did not abuse its discretion by not permitting cross-examination of this witness in order to show the extent of the affectionate relations between defendant and the witness after the shooting.

Defendant also argues that this evidence was admissible to corroborate testimony of defense witnesses who testified that Marlowe and defendant were affectionate with one another on the night of the shooting. As noted above, evidence that Marlowe and defendant were affectionate was admitted; thus, defendant was not deprived of the opportunity to corroborate the testimony of other witnesses on this point. This assignment of error is rejected.

[5] In his final assignment of error, defendant contends that the trial court erred by allowing the prosecutor to argue to the jury that it was the jury's duty to avenge the victim's death. This assignment of error is based on the prosecutor's closing argument as follows:

> Before we had—if there is such a way of saying a civilized society, like we had now or like we have now, you wouldn't have a courtroom.
>
> It would be very simple. There be a defendant, family of the deceased or friends of the deceased would determine who killed him and they would avenge the death.
>
> Mr. Surles: Objection.
>
> Court: Overruled.
>
> Mr. Copeland: But now, we are civilized. The state stands in the place of the victim. And through this there process, we act in the place of the victim.

Defendant contends that this argument invited the jury to ignore the evidence and convict defendant because the victim's family and friends would have sought vengeance. We disagree.

The prosecutor began his closing argument discussing the duty of the jury, the duty of the State, and the role of the law in an ordered society. He attempted within this discussion to provide some historical context, including the above-quoted language. At the time defendant objected, the prosecutor had begun to describe the response to a murder in a society that was not civilized. The basis of defendant's objection at that point is unclear and, nothing else appearing, we are unable to conclude that the trial court erred by overruling the objec-

tion at that time. Assuming, *arguendo*, that this portion of the prosecutor's argument taken as a whole resulted in the suggestion that it was the jury's duty to avenge the death of the victim, we conclude that defendant has not demonstrated that he was prejudiced thereby. N.C.G.S. § 15A-1443(a).

First, the prosecutor did not explicitly argue that the jury had a duty to avenge the victim's death. The prosecutor did argue that the State stands in place of the victim whose family would have, in an uncivilized society, avenged the death of the victim. The prosecutor made these remarks in response to defendant's argument that the jury should return a verdict it could "feel good about." The prosecutor argued that serving on the jury was not something jurors could "feel good about," but "it's a duty. It's a job." His choice of language as he discussed the historical context is not to be condoned. However, when read in context of the entire argument and the clear instructions the jury was given, the prosecutor's argument did not result in the jury being misled regarding its duty or the proper basis for its verdict. The prosecutor followed the aforementioned remarks with a review of the evidence, reminding jurors again that they were not there to feel good, but to do their duty and to consider the evidence supporting the charge. The judge also instructed the jury that it was their duty "to decide from the evidence what the facts are." Thus, even assuming error, defendant cannot demonstrate that he suffered prejudice. *See* N.C.G.S. § 15A-1443(a) (to receive a new trial, defendant must demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial"). This assignment of error is without merit.

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

NO ERROR.

MOSS v. J.C. BRADFORD AND CO.

[337 N.C. 315 (1994)]

EZRA V. MOSS, JR., EVCO CONSTRUCTION CO., INC., GARY H. WATTS, TROY D. POLLARD, BENNIE J. SPRINGS AND AUDREY SPRINGS, PLAINTIFF-APPELLEES AND CROSS-APPELLANTS v. J.C. BRADFORD AND COMPANY AND J.C. BRADFORD FUTURES, INC., DEFENDANT-APPELLANTS AND CROSS-APPELLEES

No. 332PA93

(Filed 29 July 1994)

Securities and Investment Regulations § 119 (NCI4th)— stock index futures contracts—under-margined accounts—liquidation without notice to customer

The pervasive federal regulatory scheme for futures trading, including Chicago Mercantile Exchange Rule 827, is designed to afford maximum protection to the commodities merchants and the commodities exchanges themselves and therefore permits the liquidation of a customer's under-margined account without prior demand or notice. Therefore, defendant merchant acted properly in liquidating plaintiffs' under-margined stock index futures contracts during the stock-market crash of October 1987 without notice to plaintiffs where plaintiffs had failed to meet a previous margin call and another margin call was imminent. Any terms of the customer contract contrary to the federal regulatory scheme would be unenforceable.

Am Jur 2d, Securities Regulation—State §§ 95 et seq.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 110 N.C. App. 788, 431 S.E.2d 531 (1993), affirming a judgment entered by Allen (C. Walter), J., on 5 February 1992, in the Superior Court, Mecklenburg County. Heard in the Supreme Court on 14 March 1994.

Howard M. Widis; and Hedrick, Eatman, Gardner & Kincheloe, by Hatcher B. Kincheloe, for the plaintiff-appellees/cross-appellants.

Moore & Van Allen, by James P. McLoughlin, Jr., for the defendant-appellants/cross-appellees.

Kennedy Covington Lobdell & Hickman, by James P. Cooney III, for Interstate/Johnson Lane Corporation, amicus curiae.

McDermott, Will & Emery, by Paul J. Pantano, Jr., and Patterson, Harkavay & Lawrence, by Martha A. Geer, for The Futures Industry Association, Inc., amicus curiae.

MITCHELL, Justice.

The issue before us in this case is whether the defendant-appellants (hereinafter "Bradford") wrongfully liquidated the accounts of the plaintiff-appellees (hereinafter "plaintiffs") on the Chicago Mercantile Exchange (hereinafter "CME"). We hold that they did not; therefore, we reverse the decision of the Court of Appeals.

The plaintiffs instituted this action on 15 February 1988. In their complaint, the plaintiffs alleged, *inter alia*, that by liquidating their accounts, Bradford breached the terms of an agreement the parties had executed when the plaintiffs began trading on the CME using Bradford as their broker. The complaint sought both compensatory and punitive damages. Bradford filed a motion for summary judgment and the plaintiffs filed a motion for partial summary judgment. Judge Chase Saunders denied the plaintiffs' motion and granted Bradford's motion in part, dismissing the plaintiffs' claim for punitive damages. The Court of Appeals affirmed. *See Moss v. J.C. Bradford and Co.*, 103 N.C. App. 393, 407 S.E.2d 902 (1991) (case reported without published opinion). The case was then tried before a jury at the 13 January 1992 Civil Session of Superior Court, Mecklenburg County.

Before reviewing the evidence introduced at trial, we believe a brief discussion of certain uncontested facts and of the nature of futures trading would be helpful. The present case involves trading in stock index futures contracts. A stock index futures contract is an agreement to buy or sell a "basket" of certain stocks on a specific date in the future. 1988 Report of the Presidential Task Force on Market Mechanisms, Study VI, at 18. The basket of stocks in each of the plaintiffs' contracts consisted of stocks listed in the Standard & Poor's 500 Index. The Standard & Poor's 500 Index is based on the aggregate increase or decrease in the stock prices of 400 industrial companies, forty utilities, twenty transportation companies and forty financial institutions. *Id.* The owner of the futures contract does not hold any equity interest in any of these companies. *Id.* Similarly, no actual physical transfer of the stocks takes place on the date of delivery. *Id.* Rather, a cash transfer occurs with the owner of the contract

either receiving or paying money depending upon whether the index on the date of delivery is above or below the index as it stood on the date the investor purchased the contract. *Id.* at 18-19.

While the stocks contained in each contract are "delivered" only on a quarterly basis, *id.* at 19, the stock index futures contracts are "traded" on a daily basis—that is, the daily fluctuation in the Standard & Poor's 500 Index is monitored and contract owners enjoy profits or incur losses depending upon whether the index has risen or fallen during the course of the trading day. *Id.* at 24. The CME values each index point at $500. *Id.* at 19. Thus, a one-point net increase in the index during the CME trading day would result in a $500 profit per stock index futures contract owned. A one-point net decrease in the index would result in a $500 loss per contract. The CME credits profits and debits losses at the conclusion of each trading day. *Id.* at 24. Any profits resulting from a rise in the index are immediately available to the customer. *Id.* Similarly, the day's losses are immediately due to the CME. *Id.*

The plaintiffs purchased their stock index futures contracts on "margin," which is standard industry practice. A "margin" is a minimum deposit that an index futures contract buyer must place into an account with a merchant,[1] such as Bradford, who trades on the CME. *Id.* at 23. It is intended to ensure the investor's ultimate performance of the contract and to offset losses in the meantime caused by daily fluctuations in the index. *Id.* At the time of the occurrences giving rise to this dispute, the CME had established an "initial margin" of $10,000 per stock index futures contract purchased. *Id.*

The CME had also established a "maintenance margin" of $5,000.[2] *Id.* Under such a scheme, if losses at the end of a trading day cause a customer's account to fall below the $5,000 maintenance margin, the merchant pays the CME the amount of the losses and then issues a "margin call" to the losing customer. *Id.* The margin call requires the

1. "The futures commission merchant . . . is the commodities equivalent of a securities broker." 1988 Report of the Presidential Task Force on Market Mechanisms, Study VI, at 21. Courts generally, and the parties in their original agreement and elsewhere in this case, tend to use the terms "broker" and "merchant" interchangeably in the context of futures contracts trading. The distinctions between the two are not determinative of the rights of the parties in the present case, so we will not explore them in this opinion.

2. Merchants are free to set the initial and maintenance margins at levels higher than those established by the CME. Bradford, however, used the margin levels established by the CME.

customer to restore his account to the initial margin level (i.e., the customer must restore his account to at least $10,000 per contract). *Id.* If the customer cannot "meet the margin," the merchant nevertheless is responsible to the CME for the amount of the customer's losses. Although the merchant is liable for its customers' losses, it does not share in its customers' daily profits. Rather, the merchant receives a commission only at the initial purchase of the contract and at the subsequent "delivery" of the stock.

We turn now to the evidence introduced at the trial of this matter, which tended to show the following. The plaintiffs are North Carolina residents who were engaged in futures contract trading on the CME. In September 1987, the plaintiffs purchased seven Standard & Poor's 500 Index futures contracts through the Charlotte, North Carolina, offices of Bradford, a national brokerage firm headquartered in Nashville, Tennessee.

This particular dispute arose out of the stock market crash of October 1987. Under normal trading conditions, the Standard & Poor's 500 Index moves up or down only three to five points during the trading day. On Monday, 19 October 1987, however, the index fell 80.75 points, resulting in an aggregate loss to the plaintiffs of $282,625. As a result, Bradford issued a margin call to the plaintiffs. One of the plaintiffs, Ezra Moss, represented himself and all of the other plaintiffs in their dealings with Bradford. To satisfy the Monday margin call, Moss brought 23,988 shares of stock in Southern National Corporation to Bradford's Charlotte offices. Under CME Rules, this type of "over-the-counter" stock cannot be used to satisfy a margin call. Therefore, this stock served as security for a loan from Bradford to Moss. Moss used this loan to meet the Monday margin call.

The market continued to spiral downward. Even with the loan the plaintiffs had secured using the Southern National stock as collateral, Bradford determined on Tuesday morning, 20 October 1987, that $105,000 was still needed to restore the plaintiffs' accounts to the $10,000 initial margin. Bradford employee Ed Caulfield contacted Moss by telephone at 8:00 a.m. EDT on Tuesday and informed him that the plaintiffs needed to meet an additional margin call of $105,000. Moss disputed this amount and indicated to Caulfield that the plaintiffs would have a difficult time satisfying a $105,000 margin call. Moss ultimately told Caulfield that he would be willing to bring $65,000 to Bradford's offices. Caulfield then informed Moss that Caulfield's superior, Roy Leslie, had issued the margin call and that

Leslie wanted to speak with Moss. Moss, however, refused to contact Leslie because, as Moss later explained at trial, he wanted to remain in the index futures market and he believed that Leslie would try to convince him to get out of the market.

Following his conversation with Caulfield, Moss waited ninety minutes for the CME to open and then traveled to the offices of the other plaintiffs in an attempt to raise the $65,000. He telephoned Caulfield twice during this time from the offices of the other plaintiffs. During these conversations, Caulfield reiterated that his superiors were expecting the plaintiffs to pay around $100,000 and implored Moss to contact Roy Leslie. Moss continued to dispute the amount and again refused to telephone Leslie. When Moss finally collected the $65,000 around 10:55 a.m. EDT, he contacted Caulfield and the two men agreed to meet in the parking lot outside Bradford's offices. Moss later explained at trial that he preferred to meet with Caulfield in the parking lot because he was too embarrassed to go into Bradford's offices to meet a margin call and "wasn't much in a frame [of mind] to have any small talk."

After speaking with Moss, Caulfield relayed the subject matter of the conversation to Roy Leslie, who instructed Caulfield to sell $40,000 worth of Moss' Southern National stock in order to satisfy the remainder of the $105,000 margin call. Caulfield attempted to contact Moss to inform him of the impending sale of the stock, but could not reach him.

In the meantime, the stock index futures market continued to plummet. Bradford determined that another margin call would be necessary when the index fell to 191.5. Bradford therefore decided to enter a "stop loss order" for the plaintiffs' contracts at an index of 190. This meant that if the index fell to 190, the plaintiffs' accounts would be liquidated, i.e., all of the plaintiffs' stock index futures contracts would be sold at the then-prevailing market price. Caulfield attempted to contact Moss to apprise him of Bradford's decision but could not reach him. Bradford entered the stop loss order at about 11:10 a.m. EDT. The index reached 190 at about 11:35 a.m. EDT and the plaintiffs' accounts were liquidated pursuant to the stop loss order. Moss arrived at Bradford's offices at about this time. Although Caulfield had not yet come outside, Moss chose not to enter Bradford's offices. Caulfield met Moss in the parking lot ten to fifteen minutes after Moss' arrival and informed Moss that Bradford had already liquidated the plaintiffs' accounts.

At the close of the plaintiffs' evidence and at the close of all the evidence, Bradford moved for a directed verdict. The trial court denied both motions. The jury subsequently returned a verdict in favor of the plaintiffs awarding them damages in the amount of $175,000. Bradford moved for a judgment notwithstanding the verdict, or in the alternative, a new trial. The plaintiffs moved for a judgment in the amount of $242,000, notwithstanding the verdict. The trial court denied both motions.

Both parties appealed to the Court of Appeals, which affirmed the trial court. *Moss v. J.C. Bradford and Co.*, 110 N.C. App. 788, 431 S.E.2d 531 (1993). The Court of Appeals concluded that the evidence, taken in the light most favorable to the plaintiffs, tended to show that (1) the contract between the parties required Bradford to issue a margin call and give the plaintiffs a reasonable time in which to meet the margin call before liquidating the plaintiffs' accounts, (2) Moss was making a good faith effort to meet the $105,000 margin call at the time Bradford liquidated the plaintiffs' accounts, (3) Roy Leslie believed that the $65,000 Moss was attempting to collect, combined with the $40,000 in proceeds from the sale of the Southern National stock, would meet the Tuesday $105,000 margin call and (4) Bradford never expressly informed Moss that if he did not arrive with the requisite funds by a certain time, he risked a liquidation of the plaintiffs' accounts. *Id.* at 794, 431 S.E.2d at 534. From this evidence, the Court of Appeals further concluded that the jury reasonably could have determined that Bradford had breached the agreement between the parties by liquidating the plaintiffs' accounts without providing the plaintiffs a reasonable time within which to meet the margin call. *Id.* The Court of Appeals therefore held that the trial court properly denied Bradford's motions for a directed verdict, for a judgment notwithstanding the verdict, and for a new trial. *Id.* The Court of Appeals also found no error in (1) the trial court's denial of Bradford's request for two special instructions and (2) the trial court's denial of the plaintiffs' motion for a judgment notwithstanding the verdict. *Id.* at 794-95, 431 S.E.2d at 534-35. These latter two issues are not before this Court for review, however, and thus those portions of the Court of Appeals' opinion shall remain undisturbed. This Court granted Bradford's petition for discretionary review on 7 October 1993. *Moss v. J.C. Bradford and Co.*, 334 N.C. 688, 436 S.E.2d 381 (1993).

By its single assignment of error before this Court, Bradford argues that the trial court erred by failing to rule that, as a matter of law, Bradford did not breach its agreement with the plaintiffs.

Paragraph 5 of the parties' agreement provides, in pertinent part, as follows:

> Customer agrees to maintain at all times such margins in and for Customer's account as Bradford, in its sole and absolute discretion, may from time to time require. Such margin requirements . . . may be changed by Bradford at any time without prior notice to Customer. . . . If *at any time* Customer's account does not contain the amount of margin and/or premium required by Bradford, Bradford may, *at any time, without notice* close out Customer's open positions in whole or in part and take any action described in paragraph 9 hereof.

(Emphasis added.) Paragraph 9 of the agreement provides, in pertinent part, as follows:

> Customer hereby authorizes Bradford *in its sole and absolute discretion* to close out Customer's account in whole or in part, sell any or all of Customer's property held by Bradford, buy or sell any securities, commodities, commodity futures, or options contracts, or other property in Customer's account, or cancel any outstanding orders to close out any account of Customer or to close out any commitment made by Bradford on behalf of Customer should any of the following events occur: . . . (v) the property deposited in Customer's account shall be determined by Bradford, in its sole and absolute discretion, and regardless of current market quotations, to be inadequate to secure the account; (vi) Customer's account shall incur a deficit balance; . . . (viii) at any time Bradford shall reasonably in good faith feel insecure with respect to the sufficiency of the property deposited by Customer; (ix) for any other reason whatsoever that Bradford in good faith shall determine it necessary to take the aforementioned action for its protection and/or the protection of its other customers. Such sale, purchase or cancellation may be made at Bradford's discretion on the contract market or at public auction or at private sale, without advertising the same and *without notice, prior tender, demand or call upon Customer.*

(Emphasis added.)

The foregoing language notwithstanding, the jury determined, and the Court of Appeals agreed, that before liquidating the plaintiffs' accounts, Bradford was under a contractual duty to issue a margin call and provide the plaintiffs a reasonable time within which to meet

that margin call. Bradford contends, however, that paragraphs 5 and 9 unambiguously gave it the right to liquidate the plaintiffs' accounts whenever it deemed itself at risk and without issuing a margin call or providing the plaintiffs with notice of its intent to liquidate their positions. We neither reach nor decide this question. Instead, we conclude that Bradford did not wrongfully liquidate the plaintiffs' accounts, but for different reasons.

Commodities futures trading takes place in the context of extensive federal regulation. *See generally Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 356-67, 72 L. Ed. 2d 182, 187-94 (1982). Congress first legislated in the area of futures trading in 1921 with its enactment of the Future Trading Act. *Id.* at 360, 72 L. Ed. 2d at 190. The following year, however, the Supreme Court of the United States held the Future Trading Act unconstitutional as an improper exercise of Congress' taxing power. *See Hill v. Wallace*, 259 U.S. 44, 66 L. Ed. 822 (1922). Congress immediately responded with the Grain Futures Act, which contained the non-offending regulatory provisions of the Future Trading Act. *Curran*, 456 U.S. at 361, 72 L. Ed. 2d at 190. Congress substantially amended the Grain Futures Act in 1936, renaming it the Commodity Exchange Act. *Id.* at 362, 72 L. Ed. 2d at 191. Congress has since amended the Act on a number of occasions. *Id.* at 364-67, 72 L. Ed. 2d at 192-94.

The 1974 amendments to the Act were significant in that they created the Commodity Futures Trading Commission (hereinafter "CFTC"). *Id.* at 365, 72 L. Ed. 2d at 193; *see also* 7 U.S.C. § 4a (1988). Pursuant to the 1974 amendments, the CFTC has "exclusive jurisdiction over commodity futures trading."

Curran, 456 U.S. at 386, 72 L. Ed. 2d at 206; 7 U.S.C. § 2a(ii) (1988). While the various commodities exchanges remain free to promulgate their own rules, Congress has authorized the CFTC to disapprove exchange rules that are inconsistent with the Commodity Exchange Act and to supplement or alter exchange rules as the CFTC deems necessary. *Curran*, 456 U.S. at 364-66, 72 L. Ed. 2d at 192-93; *see also* 7 U.S.C. §§ 7a(12), 12a(7) (1988). The single exception is with regard to the setting of margin levels, which traditionally has been left entirely within the province of the individual commodities exchanges. *See* 7 U.S.C. §§ 7a(12), 12a(7). The setting of margin levels was "accorded a special status in the regulatory scheme of the Commodity Exchange Act so that futures commission [merchants would be] able to assure their own financial integrity, which, in turn, contributes

to the financial integrity of the entire marketplace." *Capital Options Investments v. Goldberg Bros.*, 958 F.2d 186, 190 (7th Cir. 1992). Congress amended the Act in 1992, however, to provide for review by the Federal Reserve Board of any exchange rule establishing or altering an initial or maintenance margin for stock index futures contracts. *See* 7 U.S.C.A. § 2a(vi) (Supp. 1994). Pursuant to its authority under the 1992 amendments, the Federal Reserve Board delegated this power of review to the CFTC. *See* 58 Fed. Reg. 26979 (1993). In so doing, however, the Federal Reserve Board continued to recognize the importance of appropriate levels of margin to the financial integrity of the market. *Id.*

To implement the authority granted it by the Commodity Exchange Act, the CFTC has promulgated an extensive set of regulations. *See* 17 C.F.R. §§ 1.1 to 190.10 (1993). These range from provisions governing a principal's liability for the conduct of those acting on his or her behalf, *see* 17 C.F.R. § 1.2 (1993), to provisions regarding the bankruptcy of a commodities merchant. *See* 17 C.F.R. § 190.10 (1993). Of particular interest in the present case is 17 C.F.R. § 1.55, which mandates that a futures merchant provide each of its customers with a "Risk Disclosure Statement," the content of which is specifically set forth in the regulation. Each of the plaintiffs in the case at bar received and signed a copy of this disclosure statement, which states in pertinent part:

RISK DISCLOSURE STATEMENT

This statement is furnished to you because Rule 1.55 of the Commodities Futures Trading Commission requires it.

The risk of loss in trading commodity futures contracts can be substantial. You should therefore carefully consider whether such trading is suitable for you in light of your financial condition. In considering whether to trade, you should be aware of the following:

1. You may sustain a total loss of the initial margin funds and any additional funds that you deposit with your broker to establish or maintain a position in the commodity futures market. If the market moves against your position, you may be called upon by your broker to deposit a substantial amount of additional margin funds, on short notice, in order to maintain your position. If you do not provide the required funds within the prescribed time,

> your position may be liquidated at a loss, and you will be liable for any resulting deficit in your account.
>
> . . . .
>
> 5. The high degree of leverage that is often obtainable in futures trading because of the small margin requirements can work against you as well as for you. The use of leverage can lead to large losses as well as gains.
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> This brief statement cannot, of course, disclose all the risks and other significant aspects of the commodity markets. You should therefore carefully study futures trading before you trade.

The rules of the various exchanges, promulgated as they are with express Congressional authorization and, in most cases, having been approved by the CFTC, possess the force of law. *See Taylor v. Motor Co.*, 227 N.C. 365, 367, 42 S.E.2d 460, 461 (1947) ("[I]t is well settled that an Act of the Congress in exercise of the powers conferred by the Federal Constitution is supreme . . . [a]nd proper regulations authorized under the Act have the binding effect of law."). They are therefore binding on all who trade on such exchanges, both merchants and their customers. *See Case & Co., Inc. v. Board of Trade of City of Chicago*, 523 F.2d 355, 358 (7th Cir. 1975) (rules adopted by an exchange "govern trading in commodities futures on the exchange and are incorporated into every contract"); *Daniel v. Board of Trade of City of Chicago*, 164 F.2d 815, 818-19 (7th Cir. 1947) (traders on an exchange are bound by the rules and regulations of the exchange and all transactions on the exchange are subject to those rules and regulations). Indeed, "Congress primarily has relied upon the exchanges to regulate the contract markets." *Curran*, 456 U.S. at 382, 72 L. Ed. 2d at 203. The CME therefore has promulgated its own rules governing, *inter alia*, the trading of stock index futures contracts. Most important to the present case is CME Rule 827, which provides, in pertinent part, as follows:

> D. The [merchant] may call for additional margins at his discretion, but whenever a customer's margins are depleted below the minimum amount required, the [merchant] must call for such additional margins as will bring the account up to initial margin requirements, and if within a reasonable time the customer fails to comply with such demand (the [merchant] may deem one hour to be a reasonable time), the [merchant] may close out the cus-

tomer's trades or sufficient contracts thereof to restore the customer's account to required margin status.

E. If the [merchant] is unable to effect personal contact with a customer, a written demand left at the customer's place of business or a telegram sent to the customer at his address furnished by him to the [merchant] shall be deemed sufficient.

F. [Merchants] shall be responsible to the Exchange for all margin requirements.

G. Violation of this rule constitute[s] a major offense.

H. In the event of the failure of a [merchant] to maintain customer margins as required under this rule, the President [of the Exchange] may order such [merchant] to immediately close out all or such part of the positions on his books so as to correct the delinquency.

Rules of this sort governing margin calls and account liquidation are for the protection of the merchant and, ultimately, for the protection of the commodities exchange itself. *See Geldermann & Co., Inc. v. Lane Processing, Inc.*, 527 F.2d 571, 576-77 (8th Cir. 1975). In *Geldermann*, the United States Court of Appeals for the Eighth Circuit rejected the challenge of a commodities exchange customer to liquidation provisions contained in a "commodities signature card" and in Rule 209 of the Chicago Board of Trade. The commodities signature card, which the customer had executed when it began its futures trading, provided that the merchant could liquidate the customer's accounts "without prior demand or notice" if the customer "fail[ed] to maintain with [the merchant] at all times such margin as [the merchant] may deem adequate for [the merchant's] protection." *Id.* at 574. Chicago Board of Trade Rule 209, which is quite similar to CME Rule 827, provided that a merchant could require the customer to deposit additional sums of money "to the extent of any adverse fluctuations in the market price." *Id.* at 575. The rule further provided that "[s]uch deposits must be made with the . . . merchant within a reasonable time after demand, and, in the absence of unusual circumstances, one hour shall be deemed a reasonable time." *Id.* If the customer failed to deposit the funds within the guidelines prescribed by the merchant, the merchant was entitled under the rule to liquidate the customer's accounts. *Id.* Finally, Rule 209, like CME Rule 827(E), provided that if the merchant "is unable to effect personal contact with the customer, a written demand left at the office of the customer,

during business hours, shall be deemed sufficient." *Id.* The customer challenged both the commodities signature card and Rule 209 on the ground that they were unconscionable and therefore unenforceable.

The Eighth Circuit disagreed, noting initially that the customer "was a sophisticated investor" who "voluntarily assumed the risks inherent in futures trading." *Id.* at 576. The court then went on to conclude that the liquidation provision in the signature card, which permitted liquidation without prior demand or notice, "was eminently reasonable in light of the commercial background of futures trading." *Id.* The court explained this commercial background as follows:

> It is clear that the liquidation provision promoted the interest and protection of the commissions merchants, their customers and the investing public as a whole. Investors or speculators who have failed to deposit sufficient maintenance margins may have insufficient financial resources to withstand substantial losses on the market and, if so, continued trading on that account is a financial risk for the commission merchant, and ultimately for the commodities exchange if the loss suffered by the commission merchant exceeds its capital account. *Imposing requirements of demand and notification, particularly where it would be extremely difficult or time-consuming to contact an investor, may violate the manifest purpose of the liquidation provision.*

Id. at 577 (emphasis added). The court also determined that Rule 209 withstood attack on unconscionability grounds since it "complements the liquidation provision in the signature card by affording commission merchants an opportunity to quickly determine whether an investor is going to maintain his margin." *Id.* at 578.

In light of the fact that rules governing margin calls and account liquidation are for the protection of the merchant and the commodities exchange itself, we interpret the federal regulatory scheme in the area of futures trading, including CME Rule 827, to permit the liquidation of a customer's account without prior demand or notice. It is through the setting of margin levels, the issuance of margin calls and account liquidation that commodities futures merchants "are able to assure their own financial integrity, which, in turn, contributes to the financial integrity of the entire marketplace." *Goldberg Bros.*, 958 F.2d at 190. The CFTC, which possesses "exclusive jurisdiction over commodity futures trading," has taken steps to apprise potential investors of the importance of margins and the very real possibility of account liquidation via its Risk Disclosure Statement. The CFTC Risk

Disclosure Statement specifically warns prospective customers that if they fail to restore their accounts to the initial margin level within the guidelines prescribed by their merchant, their "position may be liquidated at a loss, and [they] will be liable for any resulting deficit in [their] account." Finally, the CME, on which Congress relies to regulate the stock index futures market, has promulgated Rule 827, which requires a merchant to ensure that its customers maintain their accounts at the initial margin level and allows the merchant to liquidate a customer's account if necessary to restore the account to the initial margin level. To achieve the protective purposes of this federal regulatory scheme, it is imperative that futures merchants be able to act quickly and decisively to liquidate a customer's account when, as in the present case, a precipitously declining market demands such action. We conclude therefore that the federal scheme, including Rule 827, contemplates and permits *but does not require* a demand, i.e., margin call, or notice prior to liquidating a customer's account.

The plaintiffs contend, however, that Rule 827 requires that the merchant provide the customer with notice of the merchant's intent to liquidate and allow the customer an opportunity to meet yet another margin call before liquidating the customer's accounts. We disagree. As previously explained, CME Rule 827 is intended to protect the merchants trading on the CME and the CME itself. The essential thrust of Rule 827 therefore is that if the merchant chooses not to liquidate an under-margined customer, the merchant *at least* must issue a margin call. Thus, while the merchant may either liquidate the under-margined customer's accounts without notice to the customer or provide the customer an opportunity to restore his account to the initial margin, the exchange rules prohibit a merchant from continuing to "carry" an under-margined customer to the detriment of the merchant, the CME and, ultimately, the national economy.

In the present case, Bradford, in the midst of a market free-fall, was faced with a group of under-margined customers who had yet to meet a previous margin call and for whom another margin call was imminent. For its own protection and for the protection of the CME, Bradford chose to liquidate the accounts of those customers rather than issue another margin call. Bradford's conduct in this regard was entirely consistent with governing federal law and therefore proper. Further, Bradford attempted to provide the plaintiffs with notice of its intent to liquidate their accounts. Thus, although it was not legally obligated to do so, Bradford attempted to provide the plaintiffs with the notice to which they erroneously insist they were entitled.

In short, we conclude that the pervasive federal regulatory paradigm in the area of futures trading, including CME Rule 827, is designed to afford maximum protection to the commodities merchants and the commodities exchanges themselves and therefore permits the liquidation of a customer's under-margined account *without prior demand or notice.* We recognize that a number of courts who have previously considered similar issues have based their holdings in favor of the merchant on contract language nearly identical to that found in the customer agreement between the parties in the case at bar. *See, e.g., Goldberg Bros.*, 958 F.2d 186 (7th Cir. 1992); *Modern Settings, Inc. v. Prudential-Bache*, 936 F.2d 640 (2d Cir. 1991); *Prudential-Bache Securities, Inc. v. Stricklin*, 890 F.2d 704 (4th Cir. 1989); *Misabec Mercantile, Inc. v. Donaldson*, 853 F.2d 834 (11th Cir. 1988). Bradford also would have us decide in its favor based on the language of the customer agreement. We find it unnecessary to reach the terms of the contract, however, since any terms contrary to the federal regulatory scheme in the area of futures trading would be unenforceable. *Gore v. Ball, Inc.*, 279 N.C. 192, 203, 182 S.E.2d 389, 395 (1971) (contractual provisions contrary to public policy will not be enforced). Since the federal regulatory scheme is designed to afford merchants and commodities exchanges with maximum protection, any terms of the customer agreement which exposed Bradford (and thereby the CME) to a risk greater than that allowed by federal law would be unenforceable. The federal regulatory scheme therefore controls and entitled Bradford to liquidate the plaintiffs' accounts without notice.[3]

For the foregoing reasons, we hold that Bradford was entitled to judgment as a matter of law. The trial court therefore erred in refusing to grant Bradford's motions for a directed verdict and for a judgment notwithstanding the verdict. The Court of Appeals erred in affirming the trial court. Accordingly, we reverse the Court of Appeals and remand this case to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for the entry of a judgment in favor of the defendants.

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3. We also recognize that the United States District Court for the Southern District of New York has stated its belief that under 7 U.S.C. § 6b, the anti-fraud provision of the Commodities Exchange Act, a merchant may not liquidate a customer's account without first issuing a margin call. *See Cauble v. Mabon Nugent & Co.*, 594 F. Supp. 985, 990 (1984). The court noted, however, that this margin call requirement could be waived by contract. *Id.* We do not find this case persuasive and therefore decline to follow it in the present case.

REVERSED AND REMANDED.

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

WILLIAM BRIAN HALES AND DONNA HALES v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION

No. 418PA93

(Filed 29 July 1994)

1. Judgments § 233, 223 (NCI4th)— automobile liability policy—whether policy in effect—previous action—guardian ad litem and minor—res judicata and collateral estoppel—virtual representation

Plaintiffs were not barred by the doctrines of *res judicata* or collateral estoppel, and the doctrine of virtual representation was not adopted, where plaintiff Brian Hales was injured while riding in a car driven by his brother on which his father had obtained insurance; his father filed a declaratory judgment action to determine insurance coverage; summary judgment was granted for the insurance company; Brian Hales and his mother instituted a tort action against his father and brother; a default judgment was entered; Brian and his mother brought a declaratory judgment action seeking a declaration that an insurance policy was in force; the insurance company was declared insolvent; this action was brought against the Insurance Guaranty Association; and the trial court granted the Association's motion for summary judgment on the grounds that plaintiff's claims had been adjudicated in the declaratory judgment action brought by the father. A minor is not bound by a proceeding in which he or she was not a party and in which he or she was not represented by a general guardian, a guardian ad litem, or a next friend, and Brian's mother was not a party to the action and was not in privity with his father because his interest was that of a potential tortfeasor in establishing that a policy was in effect, while her interest was to recover losses resulting from medical expenses whether that recovery came from the tortfeasor or the insurance carrier. Although the Association argued for the adoption of the doctrine of virtual represen-

tation, the N.C. Supreme Court declined to adopt that doctrine because courts have been unable to apply the doctrine with precision and because the traditional doctrines of *res judicata*, collateral estoppel, and privity, while imperfect, have provided the courts of this state with a fair and workable approach.

Am Jur 2d, Judgments §§ 518 et seq., 567 et seq.

2. Insurance § 635 (NCI4th)— automobile liability insurance—notice of cancellation—not effective

An automobile liability insurance policy was in effect at the time an accident occurred where the insurance company failed to satisfy the requirements of N.C.G.S. § 20-310(f), as it appeared at the time of the accident, in that uncontroverted evidence before the trial court tended to show that the policyholder received a premium notice which merely stated that the policy was "up for renewal on April 5, 1985" and requested that he pay the premium amount of $313.00 "before the renewal date to avoid a lapse in coverage"; the notice indicated that the policy would remain in effect upon renewal until 5 October 1985 and that "[a]ll premiums are due and payable upon effective date of policy"; there was no forecast of evidence tending to show that the Commissioner of Insurance had previously approved the form of the notice; and the notice did not state the date on which any cancellation or refusal to renew would become effective, a date which "must be expressly and carefully specified with certainty" in order to comply with the requirements of N.C.G.S. § 20-310(f). Although the insurance company still could have complied with the statute by satisfying the requirements of N.C.G.S. § 20-310(g), the premium notice in the present case was insufficient to accomplish this task in that it neither expressly informed the insured that his policy was about to expire nor apprised him of the date of expiration and failed to satisfy the requirement that the insurer manifest its willingness to renew. If the General Assembly had intended to allow for such a manifestation by an agent or broker of the insurer, it easily could have and would have done so.

Am Jur 2d, Automobile Insurance §§ 38, 39.

3. Insurance § 43 (NCI4th)— Insurance Guaranty Association—covered claim—summary judgment

Entry of summary judgment for plaintiffs would be inappropriate where there were a number of genuine issues of material

fact remaining with regard to whether plaintiffs possessed a "covered claim" within the statutory meanings. N.C.G.S. § 58-48-20(4); N.C.G.S. § 58-48-35(a)(1).

Am Jur 2d, Insurance § 874.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 111 N.C. App. 892, 433 S.E.2d 468 (1993), affirming an order entered by Greene, J., on 20 April 1992, in the Superior Court, Wake County. Heard in the Supreme Court on 9 May 1994.

Mast, Morris, Schulz & Mast, by Bradley N. Schulz and George B. Mast, for the plaintiff-appellants.

Moore & Van Allen, by Joseph W. Eason, Christopher J. Blake and Martin H. Brinkley, for the defendant-appellee.

MITCHELL, Justice.

The primary issue before us in this case is whether the plaintiffs' claims are barred by the doctrines of *res judicata* or collateral estoppel. We hold that they are not; therefore, we reverse the decision of the Court of Appeals.

The pleadings and forecast of evidence before the trial court tended to show the following. William I. Hales, the father of the plaintiff W. Brian Hales, procured automobile liability insurance through Cotton Insurance and Realty Co. (hereinafter "Cotton") in 1968. Due to an arrangement between Cotton and Interstate Casualty Insurance Company (hereinafter "Interstate"), the exact nature of which is unclear, Cotton subsequently designated Interstate as the company that would provide automobile liability insurance to William Hales. This occurred in December of 1984.

In January of the following year, William Hales amended his policy by adding a 1977 Plymouth and a 1979 Buick and deleting a 1974 Dodge Dart. As a result of this amendment, William Hales received an invoice from Cotton seeking an additional premium in the amount of $155.00. When William did not pay this additional amount, he received a "Notice of Cancellation or Refusal to Renew" from Interstate, explaining that it intended to terminate his policy on 2 March 1985. William paid the $155.00 premium to Cotton on 1 March 1985 and subsequently received a notice from Interstate informing him that his policy had been "reinstated with no lapse in coverage."

On 4 March 1985, Cotton sent William Hales a premium notice which stated, in pertinent part, as follows:

> Your auto policy is up for renewal on April 5, 1985. Please have your payment in our office before the renewal date to avoid a lapse in coverage. Thank you.

The notice also indicated that the amount of the payment to be made was $313.00. William Hales never paid the $313.00 and received no further correspondence from Interstate or Cotton.

On 29 May 1985, Brian Hales was injured in an automobile accident while a passenger in the 1979 Buick. Brian's brother, Robert Hales, was driving.

William Hales subsequently filed a declaratory judgment action against Interstate on 21 November 1985 seeking a declaration that, *inter alia*, the Interstate policy was in effect on the date of the accident. Neither Brian nor his mother, Donna Hales, were parties to this action. The trial court granted Interstate's motion for summary judgment on the ground that the policy was not in effect on the date of Brian's accident.

On 12 February 1987, Brian Hales (through a guardian ad litem) and his mother, Donna Hales, instituted a tort action against William and Robert Hales seeking damages and medical expenses. Interstate was notified of the action but declined to defend William and Robert Hales. The trial court entered a default judgment (1) concluding that Robert Hales had been negligent and that his negligence had proximately caused Brian's injuries, (2) imputing Robert's negligence to William Hales under the family purpose doctrine and (3) awarding Brian $75,000 in damages for his personal injuries and Brian's mother $17,758 for Brian's medical expenses.

On 25 February 1988, Brian Hales (through a guardian ad litem) and his mother brought a declaratory judgment action against Interstate and Cotton seeking a declaration that, *inter alia*, the Interstate policy issued to William Hales was in effect on the date of Brian's accident. While this action was pending, Interstate was declared insolvent. Pursuant to the provisions of the Insurance Guaranty Association Act, N.C.G.S. §§ 58-48-1 to 58-48-130, the North Carolina Insurance Guaranty Association (hereinafter "Association") assumed "all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." N.C.G.S. § 58-48-35(a)(2) (1991 & Supp. 1993); *see also* N.C.G.S. § 58-48-5 (1991).

Brian Hales and his mother (hereinafter "plaintiffs") therefore instituted the present declaratory judgment action against the Association on 21 November 1991 seeking a declaration that, *inter alia*, (1) Interstate's policy was in effect on the date of the accident and (2) the Association is obligated to pay the limits of the liability coverage under the policy pursuant to the Insurance Guaranty Association Act. Both parties moved for summary judgment. The trial court denied the plaintiffs' motion and granted the Association's motion on the ground that the plaintiffs' claims had been adjudicated in the 1985 declaratory judgment action between William Hales and Interstate.

The Court of Appeals affirmed, agreeing with the trial court that the doctrine of *res judicata* bars the plaintiffs' claims against the Association. *Hales v. N.C. Insurance Guaranty Assn.*, 111 N.C. App. 892, 896, 433 S.E.2d 468, 471 (1993). We allowed the plaintiffs' petition for discretionary review on 3 December 1993. *Hales v. N.C. Insurance Guaranty Assn.*, 335 N.C. 237, 439 S.E.2d 146 (1993).

[1] By their first assignment of error, the plaintiffs contend that their cause of action against the Association is not barred by the doctrine of *res judicata*. The plaintiffs therefore insist that the Court of Appeals erred in affirming the trial court's grant of the Association's motion for summary judgment. We agree.

Under the doctrine of *res judicata* (or "claim preclusion"), "a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Under the companion doctrine of collateral estoppel (or "issue preclusion"), "parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination [between the parties or their privies] and were necessary to the prior determination." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). Thus, while *res judicata* precludes a subsequent action between the same parties or their privies based on the same *claim*, collateral estoppel precludes the subsequent adjudication of a previously determined *issue*, even if the subsequent action is premised upon a different claim. *Hall*, 318 N.C. at 427, 349 S.E.2d at 556; *King*, 284 N.C. at 356, 200 S.E.2d at 805.

As this Court has recognized, the meaning of "privity" for purposes of *res judicata* and collateral estoppel is somewhat elusive. *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983). Indeed,

"[t]here is no definition of the word 'privity' which can be applied in all cases." *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962). The prevailing definition that has emerged from our cases is that "privity" for purposes of *res judicata* and collateral estoppel "denotes a mutual or successive relationship to the same rights of property." *Settle*, 309 N.C. at 620, 308 S.E.2d at 290; *see also Bank v. Casualty Co.*, 268 N.C. 234, 239, 150 S.E.2d 396, 401 (1966); *Masters*, 256 N.C. at 525, 124 S.E.2d at 577; *Hayes v. Ricard*, 251 N.C. 485, 492, 112 S.E.2d 123, 128 (1960); *Light Co. v. Insurance Co.*, 238 N.C. 679, 689, 79 S.E.2d 167, 174 (1953), *reh'g denied*, 240 N.C. 196, 81 S.E.2d 404 (1954); *Rabil v. Farris*, 213 N.C. 414, 416, 196 S.E. 321, 322 (1938). The Association argues that the plaintiffs and William Hales have such a "mutual or successive relationship to the same rights of property" and therefore the plaintiffs are bound by the result of William Hales' 1985 declaratory judgment action against Interstate. We do not agree.

We long have recognized that a minor is not bound by a proceeding in which he or she was not a party and in which he or she was not represented by a general guardian, a guardian ad litem or a next friend. *Bank v. Casualty Co.*, 268 N.C. 234, 241, 150 S.E.2d 396, 402-03. In such a situation, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel operates to bar a subsequent action brought by the minor.

In *Bank v. Casualty Co.*, a minor, through her present guardian, brought an action against her former guardian and the surety on the bond of her former guardian, alleging that the former guardian had mismanaged and misappropriated funds. In a prior action by the surety against the former guardian, however, the trial court had concluded that the former guardian was innocent of any wrongdoing and that the surety and the former guardian therefore were " 'forever discharged and acquitted from any liability' by virtue of the guardianship and bond." *Id.* at 236, 150 S.E.2d at 399. The surety and the former guardian maintained, and the trial court agreed, that the minor and her present guardian were bound by this prior judgment.

This Court reversed, emphasizing that neither the present guardian nor the minor had been parties to the prior action. *Id.* at 241, 150 S.E.2d at 402-03. While the present guardian had been named as a defendant in the prior action, the trial court had sustained the present guardian's demurrer and had dismissed it from the proceeding. Similarly, while the minor had participated in the prior action as a witness,

she had not been a party to the prior action and had not been represented by a guardian. This Court held that since the present guardian "was not a party to the proceeding instituted by [the surety] at the time of the entry of the judgment [in that prior action] . . . that judgment is not binding upon the [present guardian] and the doctrine of *res judicata* has no application." *Id.* at 241, 150 S.E.2d at 402. This Court further held that "a minor, called as a witness in a proceeding to which she was not a party and in which she was not represented by a general guardian, a guardian *ad litem*, or a next friend, should not be precluded by a judgment entered therein." *Id.* Therefore, we concluded that the present guardian, "on behalf of its ward, [was] entitled to its day in court and to an opportunity to establish its right, if any, to recover of [the former guardian] and the surety on [the] bond." *Id.* at 241, 150 S.E.2d at 402-03.

We likewise conclude in the present case that the plaintiff Brian Hales is entitled to an opportunity to establish his right to recover from the Association. Brian Hales, a minor in 1985, was not a party to the declaratory judgment action instituted by his father and was not represented in that action by a general guardian, a guardian ad litem or a next friend. Therefore, he is not bound by the result in that action and is not precluded from bringing this action by the doctrine of *res judicata* or the doctrine of collateral estoppel.

We also conclude that the plaintiff Donna Hales is entitled to an opportunity to establish her right to recover from the Association. Donna Hales, like the guardian in *Bank v. Casualty Co.*, was not a party to the declaratory judgment action instituted by William Hales at the time of the entry of the judgment in that action. Further, Donna Hales was not in privity with William Hales. At the time of his 1985 declaratory judgment action, William Hales was a potential tortfeasor by operation of the family purpose doctrine. His interest was to establish that the Interstate policy was in effect on the date of the accident which in turn would obligate Interstate to defend him in any subsequent tort action and to pay the liability limits of the policy should the injured parties prevail. The interest of Donna Hales, however, is simply to recover for her losses resulting from Brian's medical expenses. She is unconcerned with whether this recovery ultimately will come from the tortfeasor or the tortfeasor's insurance carrier. She thus "had a personal, but *not* a legal, interest in the outcome" of the 1985 declaratory judgment action. *Masters*, 256 N.C. at 526, 124 S.E.2d at 578 (emphasis added). Therefore, Donna Hales and William Hales did not have a "mutual or successive relationship to the same rights of

property." Accordingly, Donna Hales was not in privity with William Hales at the time of the 1985 declaratory judgment action and is not precluded from bringing the present action by the doctrine of *res judicata* or the doctrine of collateral estoppel.

The Association, however, would have us abandon these traditional principles and preclude the plaintiffs' action through use of the doctrine of "virtual representation." Under this doctrine, "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908, 46 L. Ed. 2d 137 (1975); *see also generally* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 203-32 (1992) [hereinafter Bone] (analyzing the historical development of the virtual representation doctrine). We decline to adopt this doctrine.

The doctrine of virtual representation apparently originated in the eighteenth century as a means by which courts of equity could "bind persons holding remainder and reversionary interests in real property to a decree adjudicating property rights as long as the owner of the first vested estate of inheritance . . . was made a party to the suit." Bone, 67 N.Y.U. L. Rev. at 206. The nineteenth century saw an expansion of the doctrine beyond its real property origins. *Id.* at 209-11. Taxpayers, for example, were held to be bound by prior judgments entered in "public rights suits" challenging the legitimacy of government action. *Id.* at 210 (citing *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 132, 13 N.E. 161, 163-64 (1887) (holding that a challenge by taxpayers and property owners to the issuance of municipal bonds was barred by a judgment entered in a prior action)).

The doctrine of virtual representation fell into disfavor in the early part of this century, however, due primarily to the desire of the courts to afford nonparties their own "day in court." *Id.* at 213. Indeed, "[b]y the end of the 1930s, references to 'virtual representation' all but disappeared from the res judicata and class action literature." *Id.* at 212.

The "modern revival" of the virtual representation doctrine seems to have been triggered by the opinion of the United States Court of Appeals for the Fifth Circuit in *Aerojet-General Corporation v. Askew*, 511 F.2d 710 (5th Cir. 1975). *See* Bone, 67 N.Y.U. L. Rev. at 218-221. In holding that the defendants were bound by a judgment entered in a prior action to which they were not a party, the court set forth

what has become the paradigmatic statement of the virtual representation doctrine: "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Askew*, 511 F.2d at 719; *see also* Bone, 67 N.Y.U. L. Rev. at 219.

The "promise of broader preclusion" offered by *Askew* "has never been realized," however. Bone, 67 N.Y.U. L. Rev. at 220. Indeed, just two years later, the United States Court of Appeals for the Fifth Circuit retreated somewhat from its opinion in *Askew*, explaining that the doctrine of virtual representation "offers little analytical assistance . . . because of its wide and inconsistent application." *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84, 97 (5th Cir.), *cert. denied*, 434 U.S. 832, 54 L. Ed. 2d 93 (1977); *see also* Bone, 67 N.Y.U. L. Rev. at 223. The Court of Appeals for the Fifth Circuit eventually restricted its use of the doctrine by requiring "the existence of an express or implied legal relationship in which parties to the first suit are *accountable* to non-parties who file a subsequent suit raising identical issues." *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978) (emphasis added); *see also* Bone, 67 N.Y.U. L. Rev. at 223-31. Other courts have experienced similar difficulties when attempting to apply the virtual representation doctrine. *See, e.g., Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1125 (7th Cir. 1987) (noting that "no uniform pattern has emerged from the cases [applying the doctrine of virtual representation]"); *General Foods v. Mass. Dept. of Public Health*, 648 F.2d 784, 790 (1st Cir. 1981) ("doubt[ing the] soundness" of the doctrine of virtual representation).

The revival of the virtual representation doctrine thus has resulted in "a collection of seemingly ad hoc decisions with no clear organizational framework." Bone, 67 N.Y.U. L. Rev. at 220; *see also* Marjorie A. Silver, *Fairness and Finality: Third-Party Challenges to Employment Discrimination Consent Decrees After the 1991 Civil Rights Act*, 62 Fordham L. Rev. 321, 356 (1993) ("The cases [applying the doctrine of virtual representation] are sporadic, and the doctrine often idiosyncratic."). Accordingly, it seems clear that courts have been unable to apply the doctrine with sufficient precision to be said to be "close enough" even for government work. It is for this reason, in part, that we choose not to adopt it in the present case.

In addition, we decline to adopt the doctrine of virtual representation because it would amount to no less than an abandonment of our traditional concepts of *res judicata*, collateral estoppel and priv-

ity. Though perhaps imperfect, these doctrines have provided the courts of this state with a fair and workable approach to analyzing the effects of prior adjudication for many years and we find no compelling reason to abandon them.

For the foregoing reasons, we have concluded that the plaintiffs are not barred by our traditional doctrines of *res judicata* or collateral estoppel. Further, we have declined to adopt the doctrine of virtual representation and therefore need not consider whether its application would preclude the plaintiffs from bringing this action.

[2] By another assignment of error, the plaintiffs contend that the Court of Appeals erred in affirming the trial court's grant of the Association's motion for summary judgment because the plaintiffs are entitled to judgment as a matter of law.[1] Specifically, the plaintiffs argue that they are entitled to recover from the Association because (1) the Interstate policy was in effect on the date of Brian Hales' accident and (2) there are no other genuine issues of material fact with regard to their right to recover from the Association. While we agree that the policy was in effect on the date of the accident, we believe that genuine issues of material fact remain with regard to whether the plaintiffs have a "covered claim" within the meaning of the Insurance Guaranty Association Act.

The question of whether the Interstate policy was in effect on 29 May 1985, the date of Brian Hales' accident, is governed by the provisions of N.C.G.S. § 20-310 as they appeared at the time of the accident.[2] At that time N.C.G.S. § 20-310(f) provided, in pertinent part, as follows:

> (f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew.

Subsection (f) further provided that this notice must: (1) have received the prior approval of the Commissioner of Insurance, (2) state the date on which the cancellation or refusal to renew would become effective, (3) state the specific reason or reasons for the can-

1. The Court of Appeals did not consider this issue since it determined that the plaintiffs' claims were barred by the doctrine of *res judicata*.

2. Since the date of Brian Hales' accident, the General Assembly of North Carolina has amended N.C.G.S. § 20-310 on five occasions.

cellation or refusal to renew, (4) advise the insured of his right to request a review by the Commissioner of Insurance of the insurer's actions in cancelling or refusing to renew and (5) advise the insured "that operation of a motor vehicle without complying with the provisions of this Article is a misdemeanor and specify[] the penalties for such violation." N.C.G.S. § 20-310(f) (1983) (amended 1985, 1987, 1991, 1993 and 1994). N.C.G.S. § 20-310(g) provided at that time, however, that

> (g) Nothing in this section shall apply:
>
> (1) If the insurer has manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention by any other means;
>
> (2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be canceled or that he does not wish the policy to be renewed[.]

In the present case, Interstate failed to satisfy the requirements of N.C.G.S. § 20-310(f). Uncontroverted evidence before the trial court tended to show that the policyholder, William Hales, received a premium notice which merely stated that the Interstate policy was "up for renewal on April 5, 1985" and requested that he pay the premium amount of $313.00 "before the renewal date to avoid a lapse in coverage." In addition, the notice indicated that upon renewal, the policy would remain in effect until 5 October 1985 and that "[a]ll premiums are due and payable upon effective date of policy." There was no forecast of evidence tending to show that the Commissioner of Insurance had previously approved the form of the notice. Further, the notice did not state the date on which any cancellation or refusal to renew would become effective, a date which "must be expressly and carefully specified with certainty" in order to comply with the requirements of N.C.G.S. § 20-310(f). *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 253, 382 S.E.2d 745, 748 (1989). Finally, the notice failed to apprise William Hales of his right to request a review by the Commissioner of Insurance or of the possible penalties for failing to maintain liability insurance on his automobiles. The premium notice therefore failed to satisfy the requirements of N.C.G.S. § 20-310(f).

Interstate still could have complied with the statute, however, by satisfying the requirements of N.C.G.S. § 20-310(g). While we have indicated in the past that a premium notice alone could satisfy the

requirements of N.C.G.S. § 20-310(g), *see Smith v. Nationwide Mut. Ins. Co.*, 315 N.C. 262, 269, 337 S.E.2d 569, 573 (1985), the premium notice in the present case was insufficient to accomplish this task. In *Smith*, we emphasized that the premium notice in question

> specifically tells [the insured] that his policy is going to expire and states in two places the date on which the policy will expire. It also states, in a prominent location, "This is renewal notice for your policy which expires on the above date," and is subtitled, "Semi-annual renewal for policy term beginning 6-22-79." On the back side of the form, the expiration date appears again, as well as an itemized list of the coverage type, policy limits, and premium, at the bottom of which the total "RENEWAL PREM" amount appears.

Id. at 269, 337 S.E.2d at 574. As such, the premium notice in *Smith* was "more than 'simply a statement of an account that will be due on the date indicated.' " *Id.* (quoting *Insurance Co. v. Davis*, 7 N.C. App. 152, 160, 171 S.E.2d 601, 605 (1970)). The same cannot be said of the premium notice in the present case.

Unlike the notice in *Smith*, the premium notice in the present case neither expressly informed William Hales that his policy was about to expire nor apprised him of the date of expiration. The notice in the case at bar was "simply a statement of an account that will be due on the date indicated" and therefore failed to constitute a manifestation of Interstate's willingness to renew within the meaning of N.C.G.S. § 20-310(g). *Id.*

Even had the premium notice in question constituted a manifestation of Interstate's willingness to renew, it nevertheless would have failed to satisfy the statute since N.C.G.S. § 20-310(g)(1) requires that the *insurer* have manifested its willingness to renew. The premium notice in the present case was sent not by Interstate, the insurer, but by Cotton.

The Association contends, however, that Cotton was an "insurance broker" for Interstate and therefore "had authority to act on Interstate's behalf with respect to the renewal of the Interstate policy." To adopt the Association's position in this regard would be to contravene the plain language of the statute. At all pertinent times, N.C.G.S. § 20-310(g)(2) provided that the other requirements of the statute did not apply if the insured had notified either "the insurer *or its agent*" that the insured did "not wish the policy to be renewed."

N.C.G.S. § 20-310(g)(1), however, provided that the requirements of the statute would not apply if "the *insurer* [had] manifested *its* willingness to renew." If the General Assembly had intended to allow for such a manifestation by an agent or broker of the insurer, it easily could have and would have done so. This is apparent from the fact that the General Assembly expressly included an agent of the insured within the language of subsection (g)(2). *Cf. In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 230, 436 S.E.2d 828, 831 (1993) (having expressly prohibited contingent fees in a number of other settings where it deemed them to be inappropriate, the General Assembly would have expressly prohibited them in N.C.G.S. § 105-299 had it intended such a prohibition), *reh'g denied*, 335 N.C. 566, 441 S.E.2d 118, *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (1994). In addition, the statutory definition of "insurer" contained in N.C.G.S. § 20-310(a)(3) does not include agents or brokers of the insured. *See In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) (where the statute itself contains a definition of a word used in the statute, the statutory definition controls even if contrary to the ordinary meaning of the word).

The Association argues, however, that the phrase "by any other means" appearing in the 1985 version of N.C.G.S. § 20-310(g)(1) contemplated a manifestation of the insurer's willingness to renew by persons other than the insurer. We disagree. Instead, we interpret this phrase to refer to other *methods* of manifestation by the *insurer* itself. This interpretation is supported by the present version of the statute. Subsequent to the date of Brian Hales' accident, the General Assembly amended N.C.G.S. § 20-310(g)(1) to read: "by any other means, including the mailing by first-class mail of a premium notice or expiration notice." N.C.G.S. § 20-310(g)(1) (1993). This indicates that through its use of the phrase "by any other means," the General Assembly contemplated other *methods* of notice by the *insurer*, not notice by persons or entities other than the insurer. *See Cooke v. Outland*, 265 N.C. 601, 609, 144 S.E.2d 835, 840 (1965) (this Court deemed an amendment to the former N.C.G.S. § 55-38 to be pertinent in an action instituted prior to the amendment's effective date for the purpose of showing that prior to the amendment, the General Assembly considered the statute to be applicable to banking corporations).

For the foregoing reasons, we conclude that Interstate failed to satisfy the requirements of N.C.G.S. § 20-310. As we explained in *Pearson*, "[i]n order to cancel a policy the carrier must comply with the procedural requirements of the statute or the attempt at cancella-

tion fails and the policy will continue in effect despite the insured's failure to pay in full the required premium." *Pearson*, 325 N.C. at 254, 382 S.E.2d at 748. Therefore, we conclude as a matter of law that the Interstate automobile liability insurance policy issued to William Hales was in effect on 29 May 1985, the date of Brian Hales' accident.

[3] We further conclude, however, that the plaintiffs are not entitled to summary judgment in their favor because genuine issues of material fact remain with regard to whether the plaintiffs are entitled to recover from the Association. The Association is "a nonprofit, unincorporated legal entity" composed of all insurers that (1) are "licensed and authorized to transact insurance in this State" and (2) "write[] any kind of insurance to which [the Insurance Guaranty Association Act] applies." N.C.G.S. §§ 58-48-25, -20(6) (1991 & Supp. 1993). The purpose of the Association is, in part, "to provide a mechanism for the payment of covered claims under certain insurance policies . . . and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." N.C.G.S. § 58-48-5 (1991).

Under the Act, the Association is "obligated [only] to the extent of . . . covered claims." N.C.G.S. § 58-48-35(a)(1) (Supp. 1993). The Act defines a "covered claim" as

> an unpaid claim . . . which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State.

N.C.G.S. § 58-48-20(4) (Supp. 1993). A "covered claim" does not include, however, "any amount awarded as punitive or exemplary damages; sought as a return of premium under any retrospective rating plan; or due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation or contribution recoveries or otherwise." *Id.*

The Association is obligated to pay "only the amount of each covered claim that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000)." N.C.G.S. § 58-48(a)(1). Further, the Association

> has no obligation to pay a claimant's covered claim, except a claimant's worker's compensation claim, if:

a. The insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars ($300,000) and applicable to the claimant's loss; or

b. The insured's coverage is written subject to a self-insured retention equal to or in excess of three hundred thousand dollars ($300,000).

If the primary coverage or self-insured retention is less than three hundred thousand dollars ($300,000), the Association's obligation to the claimant is reduced by the coverage and the retention.

Id. Finally, the Act provides that "[i]n no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises." *Id.*

Summary judgment is appropriate only where there is no genuine issue as to any material fact. *Mozingo v. Pitt County Memorial Hospital*, 331 N.C. 182, 187, 415 S.E.2d 341, 344 (1992); *see also* N.C.G.S. § 1A-1, Rule 56 (1990). In the present case, a number of genuine issues of material fact remain with regard to whether the plaintiffs possess a "covered claim" within the meaning of the foregoing provisions of the Act and to what extent, if any, the Association is obligated under the Act to pay that covered claim. An entry of summary judgment in favor of the plaintiffs therefore would be inappropriate.

For the foregoing reasons we hold that the Court of Appeals erred in affirming the trial court's grant of summary judgment in favor of the Association. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for its further remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JON (JAKE) PHELPS v. LISA B. PHELPS

No. 144PA93

(Filed 29 July 1994)

1. **Divorce and Separation § 350 (NCI4th)— child custody—father's age—not fundamental basis of court's decision**

The trial judge's brief references to the ages of the parties in an oral statement and in her written order did not indicate that plaintiff father's age was a "fundamental" basis of her decision awarding custody of a child to defendant mother in light of all the other reasons given for that decision.

Am Jur 2d, Divorce and Separation §§ 974 et seq.

2. **Constitutional Law § 89 (NCI4th)— equal protection—invidious discrimination—necessity for classification**

The equal protection clause of the Fourteenth Amendment deals with invidiously discriminatory classifications, and there is no equal protection claim without some type of "classification" of an individual.

Am Jur 2d, Constitutional Law §§ 735 et seq.

3. **Constitutional Law § 92 (NCI4th); Divorce and Separation § 350 (NCI4th)— child custody—court's comments about father's age—no equal protection violation**

The statute the trial court follows in determining child custody, N.C.G.S. § 50-13.2(a), does not classify an older parent either on its face or in its application, and the trial court's passing comments about plaintiff father's age when determining the child's best interest in accordance with the statute did not constitute an unlawful classification in violation of plaintiff's equal protection rights.

Am Jur 2d, Constitutional Law §§ 784-801.

4. **Constitutional Law § 92 (NCI4th); Divorce and Separation § 350 (NCI4th)— child custody—consideration of parent's age—no equal protection violation**

Assuming *arguendo* that a parent's right to the custody of a child was fundamental, the trial court's consideration of a parent's age in determining custody between two natural parents did not violate equal protection since the consideration of all aspects

of both parents' lives, including the effect of their ages upon the potential for continuity and stability in the life of the child, was necessary to promote the governmental interest of granting custody based on the best interest of the child.

Am Jur 2d, Constitutional Law §§ 784-801.

5. Divorce and Separation § 337 (NCI4th)— child custody—court's comment about father's age—no presumption in favor of mother

The trial judge's comments about the father's age in her oral statement explaining her decision to grant custody of a child to defendant mother and her mention of the ages of both parents in her written order did not create a presumption in favor of the younger mother in violation of N.C.G.S. § 50-13.2(a) where it is clear that the age factor was not given more weight than other factors in the trial judge's determination of the best interest of the child.

Am Jur 2d, Divorce and Separation §§ 974 et seq.

6. Appeal and Error § 44 (NCI4th)— issue not addressed by parties—consideration by Court of Appeals

Although an issue concerning the trial judge's comments on her duty to consider the testimony of a five-year-old child as related by adult witnesses was not addressed by either party on appeal to the Court of Appeals, the Court of Appeals could consider the effect of the comments as a matter of appellate grace pursuant to N.C.G.S. § 7A-32(c) and Appellate Rule 2.

Am Jur 2d, Appeal and Error § 5.

7. Divorce and Separation § 352 (NCI4th)— child custody—hearsay statements—court's hesitancy to admit—limited weight

The trial judge in a child custody case did not err by indicating that she found it "dangerous" to allow into evidence statements of parents relating what a child has said and by giving such statements limited weight where the judge recognized that such hearsay statements may be admitted under Rule 803, admitted such testimony in light of this rule, and acknowledged the admission of such evidence in her written findings of fact. The weight and credibility of such testimony was within the discretion of the trial court.

Am Jur 2d, Divorce and Separation § 975.

Child's wishes as factor in awarding custody. 4 ALR3d 1396.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a unanimous panel of the Court of Appeals, 109 N.C. App. 242, 426 S.E.2d 294 (1993), remanding for a new trial a child custody and support order of Hunt (now Love), J., filed 30 April 1991 in District Court, Orange County, awarding sole custody of the child, Joshua Phelps, to the defendant-mother and granting substantial visitation rights to the plaintiff-father. Heard in the Supreme Court 14 March 1994.

James T. Bryan III for plaintiff-appellee.

Glenn, Mills & Fisher, P.A., by William S. Mills, for defendant-appellant.

MEYER, Justice.

Jake Phelps (plaintiff) married Lisa Phelps (defendant) on 9 September 1984, and on 26 May 1986, a son, Joshua Bryan Blumenthal Phelps, was born of the marriage. Plaintiff and defendant separated on 9 September 1988 and, after the separation, agreed upon an informal custody arrangement until the filing of this action by plaintiff on 5 September 1989. Defendant responded to plaintiff's complaint with a request for sole custody of the child. Although plaintiff had originally requested that a joint custody arrangement be ordered by the court, during the hearing he specifically requested that he be granted sole custody of the child.

The case was heard in April of 1991. The evidence indicated that both parties, while loving, caring, and fit parents, had some problems. There was evidence that plaintiff had a drinking problem and that his lifestyle, which involved staying up late and constant entertaining, might not be an appropriate one in which to raise a child. There was evidence that defendant had committed acts of infidelity. Judge Hunt addressed these problems, as well as others, in the oral statement she made to the parties in the courtroom and in her written order. Her legal conclusion that sole custody of Joshua should be awarded to

defendant, with extensive visitation rights given to plaintiff, was based in part upon the following findings of fact:

> 6. That both parties are college educated and both parties are employed. Jake Phelps works at Duke University as director of the student union, making a monthly gross income of $3,441.00 and that Lisa Phelps works as a research associate with Duke University with gross income of $1,375.00 per month.
>
> 7. Each of the parties [is] in apparent good health. Jake Phelps being 55 years old, and Lisa Phelps being 33 years old.
>
> 8. Each of the parents loves Joshua and shows this affection appropriately; that each parent is a fit and proper person to have custody of this child.
>
> 9. The Court has considered carefully the question of joint custody, in spite of the fact that neither party seeks joint custody. Because of serious disagreements between the parties concerning the child raising issues, the Court finds as a fact that the placement of Joshua Phelps in joint custody of his parents is not appropriate in this case and is not in his best interest. It is not in Joshua's best interest that he be switched back and forth between the parties' respective residences each week.
>
> 10. The plaintiff has a stable home, a good job, is well respected in the community where he lives and in the community where he works. He has in the past had a substantially inhibiting alcohol problem and pursuant to his recognition of that situation he now is abstaining from the use of alcohol completely.
>
> 11. Certain actions of Lisa Phelps, while married to the plaintiff, have caused the plaintiff such a deep hurt and resentment and anxiety and profound rage, that he is unable to overcome his grief and anger to cooperate in a reasonable fashion with the mother of his son to promote the best interest of his son.
>
> 12. The lifestyle of the plaintiff in this action[] reflects his station in life, his employment and his maturity. This lifestyle, while it may be appropriate to the plaintiff in this action, . . . is a difficult lifestyle for a young child. Adjusting to the late hours, to the constant flow of guests, and the adult entertainment that is a solid part of plaintiff's home is not appropriate for the young child.

13. The defendant has a small apartment that does have a separate bedroom for Joshua. The defendant did commit certain acts of infidelity that have created a chasm between the parties that cannot be breached at this time. Nevertheless, the defendant has made every effort to cooperate with the father of her child to reduce the arguments and the violent verbal confrontations between the parties.

14. The defendant has made extraordinary efforts to involve her child with other children in her neighborhood and to take her child on regular visits to educational and recreational activities. There is some evidence that the actions of certain friends of the defendant may be distressing to the child and this stress has been communicated to the father of the child.

15. There is some evidence that the defendant has distressed her son with hints or misunderstandings that she would leave this area and live far away from Joshua's father. All of this is denied by the defendant, who stated to the Court that she liked where she lived, she liked her job and she wanted to stay in this area and has no plans to move from here.

16. There is a conflict between the parties concerning the religious training of Joshua Phelps. Both parties agree that Joshua comes from a mixed marriage of Christian and Jew and both parties agree that that common heritage should be preserved and encouraged in the education of this young child. The disagreement between the parties is reflected in that the defendant mother wants Joshua raised as a Jew with considerable education and understanding of his Christian heritage. The plaintiff father prefers that the child be raised as a child in a Judaeo-Christian [sic] religious training.

17. The parties have serious differences concerning the education of young Joshua. The plaintiff father wants Joshua to attend the Carolina Friends School in Chapel Hill. This school is a Quaker oriented and supported, multi-ethnic private school. It is a school that is fairly unstructured and looks to the individual child's needs rather than a program oriented system. The defendant mother is very interested in raising Joshua in the Durham County Public Schools because she feels that the system is more structured, that it is more racially balanced and that it will be able to deal with the special needs of her child more effectively should that need occur.

Additional facts will be addressed as necessary to the understanding of a particular issue.

[1] Defendant first argues that the Court of Appeals erred in holding that a trial court is prohibited from considering the respective age of the parents in determining the custody of a child. The Court of Appeals stated in its opinion that it appeared "that age difference was one of the fundamental bases for the trial court's custody award" and that there is "no acceptable basis in law or reason for awarding custody simply to the youngest parent or party in a custody action." *Phelps v. Phelps*, 109 N.C. App. 242, 247, 426 S.E.2d 294, 297 (1993). We conclude that the Court of Appeals erred in determining that the trial court considered plaintiff's age as a "fundamental" basis for its decision and that the evidence does not support the Court of Appeals' decision that the trial court awarded custody to the defendant because she was the youngest parent.

At the conclusion of the custody hearing, Judge Hunt spent approximately eleven transcript pages explaining to the parties her decision to grant sole custody to defendant and factors that she had considered in reaching that decision. In the middle of this announcement, she made the following statement:

> One of the reasons, Mr. Phelps, I had to look at, there is just no way—as my eye doctor told me the other day, you know, time is working on your eye, lady. He didn't say age. He said time. But I think you have to take that into consideration. This is a young child, and you are not a young man, and I think it is important that this child be raised in one home. And that that home has to be the one that is apparently going to last the longest.

Other than the brief mention of defendant's and plaintiff's respective ages in the eleven-page written order, the above oral statement is the only mention of age that Judge Hunt made during the lengthy oral and written explanations of her decision. We do not believe that, in light of all the other reasons given for her decision, the above brief references to the ages of the parties indicates that a "fundamental" basis of Judge Hunt's decision was plaintiff's age.

[2] Nor do we conclude that Judge Hunt in fact "classified" plaintiff according to his age in violation of his equal protection rights. We note that while the Court of Appeals cited no authority for its decision that Judge Hunt's comment about age was impermissible, both parties have addressed this as a constitutional equal protection issue.

However, "[t]he equal protection guarantee . . . governs all governmental actions which *classify* individuals for different benefits or burdens under the law." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 14.1, at 568 (4th ed. 1991) (emphasis added). "The equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination." *State v. Tatum*, 291 N.C. 73, 83, 229 S.E.2d 562, 568 (1976). Without some type of "classification" of an individual, there is no equal protection claim. *See Zablocki v. Redhail*, 434 U.S. 374, 391, 54 L. Ed. 2d 618, 634 (1978) (Stewart, J., concurring) ("The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.").

There are three ways to establish that an unconstitutional "classification," in violation of an individual's equal protection rights, has occurred. First, a statute may classify people for different treatment on its face. *See Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L. Ed. 664, 666 (1880). Second, a law or statute may classify people through its application, such as when governmental officials administer the law with different degrees of severity to different persons who are described by some suspect trait. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373, 30 L. Ed. 220, 227 (1886); *Maines v. City of Greensboro*, 300 N.C. 126, 130, 265 S.E.2d 155, 158 (1980). Finally, an equal protection claim may potentially stand if the law in reality constitutes a device purposefully designed to impose different burdens on different classes of persons. *See Shaw v. Reno*, — U.S. —, —, 125 L. Ed. 2d 511, 528 (1993); *Washington v. Davis*, 426 U.S. 229, 241-42, 48 L. Ed. 2d 597, 608-09 (1976).

[3] The statute the trial court follows in determining custody does not classify parents in any way. The statute provides:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

N.C.G.S. § 50-13.2(a) (1987).

There is no classification of an older parent in the statute here, either on its face or in its application, nor is there any indication that the statute was created for the purpose of imposing different burdens on different classes of persons. The statute specifically states that there shall be no presumptions made as to which parent "will better promote the interest and welfare of the child." *Id.* As noted above, the trial judge in this case simply mentioned defendant's age as a factor in her decision along with the consideration of educational choices, religious choices, drinking problems of the plaintiff, etc. There is nothing to indicate that the ultimate decision of the judge turned on the age of plaintiff.

Further evidence that the statute does not classify older people in its application is the fact that judges have granted custody to grandparents over parents on numerous occasions. *Clark v. Clark*, 294 N.C. 554, 243 S.E.2d 129 (1978); *Phillips v. Chaplin*, 65 N.C. App. 506, 309 S.E.2d 716 (1983); *Campbell v. Campbell*, 63 N.C. App. 113, 304 S.E.2d 262, *disc. rev. denied*, 309 N.C. 460, 307 S.E.2d 362 (1983); *In re Custody of Edwards*, 25 N.C. App. 608, 214 S.E.2d 215 (1975); *In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971); *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971). We conclude that a passing comment about a party's age, when determining a child's best interest in accordance with the statute, does not constitute an unconstitutional classification in violation of a party's equal protection rights.

[4] Assuming *arguendo*, however, that the trial judge did create a classification, implicating plaintiff's rights, when she mentioned plaintiff's age, we will consider if such classification violated plaintiff's equal protection rights.

> In determining whether a challenged statute violates the Equal Protection Clause of the federal constitution by treating similarly situated persons differently, courts generally employ a two-tiered analysis. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E.2d 142 (1980). Under this analysis, a statute is subjected to the highest level of review, or "strict scrutiny," "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983), citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312[, 49 L. Ed. 2d 520, 524] (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1,

16[, 36 L. Ed. 2d 16, 33] (1973). For a statute to survive this level of constitutional review, the government must demonstrate that the classification created by the statute is "necessary to promote a compelling government interest." [*White v. Pate*, 308 N.C. at 766, 304 S.E.2d at 204]; *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980).

In re Assessment of Taxes Against Village Publishing Corp., 312 N.C. 211, 221, 322 S.E.2d 155, 162 (1984), *appeal dismissed by Village Publishing Corp. v. N.C. Dep't of Revenue*, 474 U.S. 1001, 86 L. Ed. 2d 710 (1985).

The classification alleged to have been made here was based on age, which is not a "suspect" class for equal protection purposes. *See Gregory v. Ashcroft*, 501 U.S. 452, 470, 115 L. Ed. 2d 410, 430 (1991) ("This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause."); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14, 49 L. Ed. 2d 520, 525. However, the right to custody of one's child may be deemed a "fundamental right." *See Stankosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982) ("fundamental liberty interest of natural parents in the care, custody, and management of their child"). Assuming *arguendo* that plaintiff's right to the custody of his child was fundamental, we must determine if the consideration of a parent's age in determining custody between two natural parents is necessary to promote a compelling governmental interest.

The United States Supreme Court has held that "[t]he State . . . has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore v. Sidoti*, 466 U.S. 429, 433, 80 L. Ed. 2d 421, 425-26 (1984). We conclude that granting custody of a child based upon the best interest of a child is a governmental interest of the highest level. Next, we determine if consideration of a person's age, along with many other factors, is necessary to promote the governmental interest.

Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child. The factors may include the consideration of constitutionally protected choices or activities of parents. For example, a parent has a constitutional right to enroll a child in the school of the parent's choosing, *Pierce v.*

Society of Sisters, 268 U.S. 510, 534-35, 69 L. Ed. 2d 1070, 1078 (1925), yet choices of parents regarding education may be considered in determining what is in the best interest of the child. A parent also has a fundamental constitutional right to religious freedom under the First Amendment, yet judges may consider the spiritual welfare of a child, as evidenced by the attendance of church or participation in religious activities, in reaching their decision on custody. *See Dean v. Dean*, 32 N.C. App. 482, 483-84, 232 S.E.2d 470, 471-72 (1972); *Custody of King*, 11 N.C. App. 418, 419, 181 S.E.2d 221, 221 (1971). We conclude that a trial court should also be allowed to consider a parent's age and its potential effect on the welfare of the child as a factor in its determination of what is in the best interest of the child.

It should be noted that the United States Supreme Court has on one notable occasion addressed the issue of what may not be the basis for determining what is in the best interest of the child. *Palmore v. Sidoti*, 466 U.S. 429, 80 L. Ed. 2d 421. In *Palmore*, the United States Supreme Court overturned a trial court's decision to grant custody to the father because the decision was based solely on the fact that the child's white mother had remarried a black man. In its decision, the Supreme Court noted that the "court [below] was entirely candid and made no effort to place its holding on any ground other than race." *Id.* at 432, 80 L. Ed. 2d at 425. There was no evidence in the opinion that the consideration of what was in the best interest of the child went beyond the fact that it would be better for the child to live in a single-race family than a mixed-race family. The Supreme Court held that basing a custody decision on this one consideration was unacceptable.

The case below differs from *Palmore* in two significant ways. First, in the case at hand, the trial court set forth many different reasons why sole custody of the child should be with the mother, including the fact that the father had a drinking problem, was unable to cooperate in a reasonable fashion with the mother, and participated in a lifestyle not appropriate for a young child. Second, *Palmore* also differs from our case because the singular consideration of the trial court that was at issue in *Palmore* focused on race. "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Id.* (footnote omitted). "The paradigm of its [Equal Protection Clause] violation is, of course, classification by race." *Zablocki v. Redhail*, 434 U.S. 374, 391, 54 L. Ed. 2d 618, 634 (Stewart, J., concurring). Race is unquestionably a "suspect class." Thus, the consideration of race by any court will be

held to a higher scrutiny than the consideration of age, which is not a "suspect class."

It is simple logic that all else being equal a fifty-five-year-old person has a shorter remaining life span than a thirty-three-year-old person. The consideration of continuity and stability in the life of a child will logically lead a judge to consider the age of a parent. We conclude that consideration of all aspects of both parents' lives, including the potential for continuity and stability, is necessary to promote the governmental interest of granting custody based on the best interests of the child.

[5] Holding that the trial court committed no error under the United States Constitution, we consider if the trial court violated the law of North Carolina. The Court of Appeals and plaintiff have attempted to characterize the court's statement about age as a presumption against older parents. N.C.G.S. § 50-13.2(a) states that "[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child." We conclude that there was no presumption applied by the trial court in this case. In eleven pages of her oral statement explaining her custody decision, the judge mentioned the plaintiff's age only on that one occasion referred to previously. The only mention of age in the written order is when the respective age of both parents is set out in the findings of fact. Based on a review of the oral announcement of custody and the written order, it is clear that while age may have been a factor considered by the judge in determining the custody decision, it was not a presumption applied by the court in favor of the mother. There is no evidence that this factor was given any more weight than consideration of the plaintiff's drinking problem or the anger and hurt he feels toward his wife. These two latter factors were mentioned not only in open court, but were also specifically addressed in the written order.

N.C.G.S. § 50-13.2(a) and our case law require that when two parents have both been deemed fit, the court must make the decision of custody based on what is in the best interest of the child. *See Hinkle v. Hinkle*, 266 N.C. 189, 196, 146 S.E.2d 73, 78 (1965). " 'The welfare or best interest of the child, in the light of all the circumstances, is the paramount consideration which guides the court in awarding the custody of the minor child. It is "the polar star by which the discretion of the court is guided." ' " *Id.* at 197, 146 S.E.2d at 79 (quoting Robert E. Lee, 3 *North Carolina Family Law* § 244, at 21 (3d ed. 1963). The trial

judge is "entrusted with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). It is undeniable that the age of a parent may somehow affect the welfare of a child. *See Clark v. Clark*, 294 N.C. 554, 574, 243 S.E.2d 129, 140-41 ("With judgmatical objectivity, . . . the judges have weighed a consideration which plaintiff [grandmother] obviously has not permitted herself to contemplate: Her life expectancy is less than defendant's [mother's], and it is not in the children's interest that the court ignore the possibility of plaintiff's disablement or death prior to the majority of one or more of them."). The comments made by the trial judge in this case did not create a presumption that a younger parent will be awarded custody but simply noted that age can be a factor in considering what is in a child's best interest. This observation was consistent with the statutory duty entrusted to trial judges in custody cases.

Defendant next argues that the Court of Appeals erred when it concluded that the trial judge improperly commented on her duty to consider the testimony of the five-year-old child as related by an adult witness, indicating she would give such testimony no weight.

During the trial, plaintiff attempted to enter into evidence, through the testimony of adult witnesses, hearsay statements the child had made. The trial judge, in overruling defendant's objection to such testimony, stated:

> Well, it's always been a huge problem especially with small children in any kind of custody case and when they get a little bit older, you can talk to them. But you can't talk to five year olds and I don't think it's proper to put them on the stand and cross examine them. And that's where the problem is that we would have to rely on what he has to say in a hotly contested custody case that he [father] says the child said about his mother. And, you know, that goes to the weight of the evidence, that's clear. . . .
>
> . . . .
>
> I have for some time believed [Rule] 803 probably would lead me—allow some of the testimony of children in, and I think, on some of the sex abuse cases that we're seeing makes it very clear that the Supreme Court is leaning too in that direction.
>
> I'm going to allow him to say, realizing that I probably am opening a keg of worms, and I will strike it immediately if it does

> not rise to what I believe is implicit in Rule 803, especially those first three. It is a dangerous thing and I want Ms. Phelps to understand that and Mr. Phelps too, it is a dangerous thing for Judges to listen to what children—what you're quoting children as saying.

[6] First, defendant argues that, as this issue was not addressed by either party on appeal to the Court of Appeals, it was not properly before the Court of Appeals and should not have been ruled upon. We conclude that this argument is without merit. The North Carolina Rules of Appellate Procedure state:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

> In addition, N.C.G.S. § 7A-32(c) states:
>
> The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, . . . in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice . . . . The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

N.C.G.S. § 7A-32(c) (1989).

This Court has held that "the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to App. R. 2, could consider on its own initiative [a] question . . . [not brought forward in briefs of parties] and give relief *as a matter of appellate grace.*" *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 288, 266 S.E.2d 812, 814 (1980) (footnote omitted). We conclude that the Court of Appeals could consider the effect of the trial court's comments "*as a matter of appellate grace.*"

[7] Finding that the Court of Appeals could consider the comments made by the trial court, we now address the propriety of such com-

ments. Contrary to the Court of Appeals' belief, we do not determine that the trial judge's comments indicate that she would give no weight to the statements allegedly made by the child to others. The trial judge's comments indicated that she did not feel that a five-year-old should be put on the witness stand and subjected to cross-examination. The trial judge went on to conclude that although a judge could allow hearsay testimony about statements the child had made, she found such practice "dangerous," indicating that she would consider such statements very carefully.

The trial judge's written order indicates that she did, in fact, consider the testimony relating the statements of the child to some extent. Finding of fact #15 states that the defendant has distressed her son with hints or misunderstandings that she would leave the area and live far away from Joshua's father. This finding is supported in part by testimony of the plaintiff, relating what his son had said to him on one occasion.

We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial. A trial judge "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "[I]ssues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980).

We conclude that the trial judge in this case did not err by indicating that she found it "dangerous" to allow into evidence statements of parents relating what a child had said. The trial court recognized that, under Rule 803, such hearsay statements may be admitted and, in light of this rule, allowed such testimony in over the objection of defendant. Furthermore, the trial judge acknowledged the admission of such evidence in her written findings of fact. Although the trial court seems to have indicated a reluctance to give such testimony a great deal of weight, we conclude that the weight or credibil-

ity to be given such testimony was ultimately within the discretion of the trial court. We conclude that the statements of the trial court did not constitute error.

Finally, defendant notes that there were numerous assignments of error brought forward by plaintiff that were not addressed by the Court of Appeals. Defendant requests that we address these assignments of error in order to finalize this custody decision. We conclude that these assignments of error are not correctly before this Court for review because "[r]eview by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the *decision* of the Court of Appeals." N.C. R. App. P. 16(a) (emphasis added). Nevertheless, we have thoroughly reviewed the entire transcript, records, and briefs and have evaluated the additional assignments of error not specifically addressed by the Court of Appeals. We conclude that there is no merit to any of the additional assignments of error.

In conclusion, we hold that plaintiff's equal protection rights were not violated by the trial court's two brief references to the plaintiff's age and that it was not erroneous for the trial judge to indicate her hesitancy to allow into evidence hearsay statements of a five-year-old child or to give such statements limited weight. Upon a thorough review of the record, it is clear that the findings of fact made by the trial judge are supported by competent evidence and that the decision of the trial judge that sole custody of Joshua Phelps should be granted to his mother with liberal visitation rights granted to the father was supported by these findings of fact.

We reverse the decision of the Court of Appeals and remand the case to that court for further remand to the District Court, Orange County, for reinstatement of the custody order of Judge Hunt filed 30 April 1991.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. HAROLD VERNARD QUICK

No. 18A92

(Filed 29 July 1994)

1. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—failure to submit—prejudicial error

The trial court erred by failing to instruct the jury in a capital sentencing hearing on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where evidence presented by the State in its case-in-chief and on cross-examination of defendant revealed that defendant had used drugs illegally and had been convicted of larceny, receiving stolen goods and forgery, since the jury should have been allowed to consider whether this history was insignificant. The trial court's failure to submit this mitigating circumstance was not harmless beyond a reasonable doubt because it cannot positively be said that the jury would not have found the existence of this circumstance and that, had this circumstance been balanced against the aggravating circumstances, the jury would still have returned a sentence of death. The trial court's submission of a nonstatutory mitigating circumstance that "[t]he defendant has no prior convictions of crimes involving violence" did not cure its failure to submit the statutory mitigating circumstance because the jury was not required to give mitigating value to the nonstatutory circumstance if the jury found its existence but would be required to give the statutory circumstance mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599.

2. Evidence and Witnesses §§ 1077, 1087 (NCI4th)— accusation of murder—silence by defendant—SBI agent's testimony—cross-examination of defendant—violation of constitutional right to silence

The trial court in a capital resentencing hearing erred by permitting the State to elicit testimony from an SBI agent that, during interrogation after defendant had been advised of his *Miranda* rights and had been informed that he was under arrest, defendant had remained silent when faced with the agent's accusation that he murdered the victim, since this testimony amounted to an impermissible reference to defendant's exercise of his

right to silence. The trial court also erred by permitting the State to cross-examine defendant about his silence in the face of the SBI agent's accusation of murder since this questioning allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence.

Am Jur 2d, Evidence §§ 802 et seq.; Homicide § 339.

Justice MEYER dissenting.

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Washington, J., at the 24 August 1987 Criminal Session of Superior Court, Richmond County, upon a jury verdict finding defendant guilty of first-degree murder and a jury recommendation that defendant be sentenced to death. Heard in the Supreme Court 13 September 1993.

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

Thomas K. Maher for defendant-appellant.

EXUM, Chief Justice.

This appeal presents questions regarding the mitigating circumstance that defendant has no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1988), and whether the State improperly offered evidence of defendant's silence during a pretrial interrogation. Concluding there was reversible error in failing to submit the mitigating circumstance and at least error in offering evidence of defendant's silence, we vacate the sentence of death and remand for a new sentencing hearing.

This is defendant's second appeal of a death sentence. At his first trial he was convicted of robbery with a dangerous weapon and first-degree murder on the basis of premeditation and deliberation and under the felony-murder rule. Upon the jury's recommendation, the trial court imposed a sentence of death for the murder and arrested judgment on the robbery conviction. On his first appeal we found no prejudicial error in the guilt phase of defendant's trial, but concluded defendant was entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Quick*, 329 N.C. 1, 405 S.E.2d 179 (1991).

At the new sentencing hearing conducted at the December 1991 Criminal Session of Superior Court, Richmond County, the jury again returned a recommendation of, and the trial court imposed, a sentence of death. Defendant has brought forth thirteen assignments of error. Because we find reversible error in the trial court's failure to instruct on the statutory mitigating circumstance that defendant has no significant history of prior criminal activity we address this assignment. Because the issue is likely to arise at the next sentencing proceeding, we also address defendant's assignment of error relating to the admission of his silence during a pretrial interrogation.

Except as necessary for an understanding of the issues we will not repeat the evidence inasmuch as it is adequately summarized in our prior opinion on the first appeal.

I.

[1] By his tenth assignment of error, defendant contends the trial court erred in failing to submit statutory mitigating circumstance (f)(1).

> The General Assembly has mandated that:
>
> In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the list provided in subsections (e) and (f) which may be supported by the evidence . . . .

N.C.G.S. § 15A-2000(b) (1988). The law regarding submission of mitigating circumstance (f)(1) states that:

> The trial court is required to determine whether the evidence will support a rational jury finding that a defendant has no significant history of prior criminal activity. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

State v. Mahaley, 332 N.C. 583, 597, 423 S.E.2d 58, 66 (1992). Regardless of whether defendant requests submission of this mitigating circumstance or objects to its submission to the jury, mitigating circumstance (f)(1) must be submitted to the jury where the trial court

determines the mitigating circumstance is supported by the evidence. *State v. Jones*, 336 N.C. 229, 247, 443 S.E.2d 48, 56 (1994); *State v. Robinson*, 336 N.C. 78, 118, 443 S.E.2d 306, 325-26 (1994); *State v. Gibbs*, 335 N.C. 1, 55, 436 S.E.2d 321, 352 (1993), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (1994); *State v. McHone*, 334 N.C. 627, 641-42, 435 S.E.2d 296, 304 (1993), *cert. denied*, —— U.S. ——, 128 L. Ed. 2d 220 (1994); *State v. Mahaley*, 332 N.C. 583, 586, 423 S.E.2d 58, 60 (1992); *State v. Bacon*, 326 N.C. 404, 418, 390 S.E.2d 327, 335 (1990); *State v. Artis*, 325 N.C. 278, 311, 384 S.E.2d 470, 489 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991); *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 328 N.C. 550, 402 S.E.2d 573 (1991); *State v. Fullwood*, 323 N.C. 371, 394, 373 S.E.2d 518, 531 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602, *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991); *State v. Wilson*, 322 N.C. 117, 142, 367 S.E.2d 589, 603 (1988); *State v. Lloyd*, 321 N.C. 301, 310, 364 S.E.2d 316, 322 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601, *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, 824-25 (1985), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *see also State v. Stokes*, 308 N.C. 634, 652, 304 S.E.2d 184, 195-96 (1983); *State v. Hutchins*, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981).

Evidence in the present case, though not offered by defendant, tended to show that defendant had some history of prior criminal activity. Evidence presented by the State in its case-in-chief and on cross-examination of defendant revealed that he had used drugs illegally and had been convicted of larceny, receiving stolen goods and forgery.

In *Mahaley* and *Wilson*, we held the trial court erred by failing to submit mitigating circumstance (f)(1) when the evidence revealed defendant had engaged in prior criminal activity similar to and certainly no less than defendant's criminal activity in the case now before us. In *Mahaley*, the evidence showed illegal drug activity and larceny of money and credit cards to support a drug habit. *Mahaley*, 332 N.C. at 598, 423 S.E.2d at 67. In *Wilson*, defendant had a prior conviction for the second-degree kidnapping of his wife and had engaged in other prior criminal activity including the storage of illegal drugs and complicity in a theft. *Wilson*, 322 N.C. at 143, 767 S.E.2d at 604.

Mahaley and *Wilson* also held the error to be reversible, requiring a new sentencing proceeding. In *Wilson*, we held that the "rights guaranteed by N.C.G.S. § 15A-2000 are anchored in the eighth amendment prohibition against cruel and unusual punishment in that the statute 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Wilson*, 322 N.C. at 144, 367 S.E.2d at 605 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961 (1976)). Because failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity, when it is supported by the evidence, is a violation of both our statute and the Eighth Amendment, the standard for determining prejudice is N.C.G.S. § 15A-1443(b), which provides that violation of defendant's federal constitutional rights is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). *Mahaley*, 332 N.C. at 598, 423 S.E.2d at 67.

In *Wilson*, we stated that the Court had "no way of knowing whether the failure to submit this statutory mitigating circumstance to the jury may have tipped the scales in favor of the jury determination that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty." *Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. *See also Brown*, 315 N.C. at 62, 337 S.E.2d at 822 ("common sense, fundamental fairness and judicial economy require that any reasonable doubt regarding the submission of a statutory or requested mitigating [circumstance] be resolved in favor of the defendant").

Here the record demonstrates that the jury knew about defendant's history of prior criminal activity, but was not allowed to consider whether this history was insignificant. "We cannot state that had this mitigating circumstance been submitted to the jury, the jury would not have found its existence. *See State v. Brown*, 315 N.C. 40, 337 S.E.2d 808." *Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. Further, we cannot conclude positively "that had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death." *Mahaley*, 332 N.C. at 599, 423 S.E.2d at 67-68. We therefore hold that failure to submit this mitigating circumstance was not harmless beyond a reasonable doubt.

The State contends defendant received the benefit of the evidence about his prior criminal activity by the submission of a nonstatutory mitigating circumstance that "[t]he defendant has no prior convictions of crimes involving violence." In *Mahaley*, we held that the trial court's submission of two nonstatutory mitigating circumstances which paralleled statutory mitigating circumstance (f)(1) did not satisfy the State's burden of showing harmlessness beyond a reasonable doubt.

> The fact that the trial court substituted the nonstatutory mitigating circumstances that "the defendant has no history of violence or physical injury to others" and "the defendant has no record of criminal convictions" does not satisfy the State's burden. The trial court's submission of these two nonstatutory circumstances was inadequate because the trial court gave the jury the discretion, if it found either circumstance to exist, to determine "whether you deem this to have mitigating value." As a result of this instruction, the jury was not required to give any weight to such nonstatutory mitigating circumstances. By contrast, if a jury determines that a statutory mitigating circumstance exists, it must give that circumstance mitigating value. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988) [*vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990)].

Mahaley, 332 N.C. at 598, 423 S.E.2d at 67. As in *Mahaley*, the jury in the present case was instructed that it was within its discretion to determine whether the nonstatutory mitigating circumstance existed and, if so, whether it deemed it to have mitigating value. Because the jury was not required to give mitigating value to the nonstatutory mitigating circumstance if the jury found the circumstance's existence, its submission did not cure the trial court's failure to submit statutory mitigating circumstance (f)(1).

Mahaley and *Wilson* are dispositive of this issue favorably to defendant. We therefore conclude the trial court's failure to submit mitigating circumstance (f)(1) is reversible error.

II.

[2] By another assignment of error defendant contends the trial court erred by allowing the State to present testimony regarding defendant's failure to respond to questions following his arrest. Because we are granting a new sentencing hearing on other grounds, we need not address this matter in terms of reversible error. However, due to the

likelihood of this issue arising upon resentencing, we address defendant's argument at this time.

Evidence presented at resentencing tended to show that on 6 April 1987 defendant was taken to the Richmond County Courthouse where he was questioned by five law enforcement officers, including Agent Snead of the State Bureau of Investigation. Defendant was informed he was not under arrest and was free to leave at any time. He was then read a form setting forth his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The form stated that, "You have the right to remain silent. Anything you say can be used against you in court." The form also stated that "If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time, until you talk to a lawyer."

Defendant waived his rights and then explained his whereabouts during the time at which the murder was believed to have occurred. He denied ever visiting the residence of the victim and further denied any involvement with the death of the victim.

During the interview, Agent Snead received a telephone call from Agent Johnnie Leonard with the Latent Evidence Section of the State Bureau of Investigation. Agent Leonard informed Agent Snead that defendant's fingerprints had been found on an ashtray in the victim's home. Agent Snead hung up the phone and said to defendant, "You're under arrest for first degree murder."

Over defendant's objection, Agent Snead testified to the following at resentencing:

Q: Did you say anything else to Mr. Quick?

A: I did.

Q: What did you say?

A: I asked him if he was ready to tell the truth, and he did not respond. I looked him dead in the eye, and I said, "You're a cold-bloodied [sic] son-of-a-bitch, how does it feel to kill a seventy-eight year old helpless man."

Mr. Nichols: OBJECTION AND MOTION TO STRIKE.

Court: OVER-RULED.

Q: What was his response to that statement?

> A: He had no reaction. He acted like I was talking about the weather.

No limiting instructions were given by the court with regard to this evidence.

We believe it was error for the trial court to allow admission of this testimony as it amounted to an impermissible reference to defendant's exercise of his right to silence. In *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), we stated:

> The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91 (1976), that when a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), which includes the right to remain silent, there is an implicit promise that the silence will not be used against that person.

Id. at 236, 382 S.E.2d at 754. Here upon being advised of his rights, defendant was advised that he could remain silent or cease answering questions at any time. During resentencing, however, the State was allowed to elicit testimony which revealed defendant had remained silent when faced with the accusation that he murdered the victim. This testimony should have been excluded as the State's purpose for presenting it was clearly to demonstrate to the jury that defendant did not deny the accusation. This is evidenced by the prosecutor's closing argument:

> Has this defendant ever once shed a tear, showed any compassion. He sits there as Agent Snead said, and we're talking about a vicious, cold-bloodied [sic] murder, like we're talking about the murder. That man (indicating) is utterly without compassion, members of the jury. You have never seen any evidence of it. That is a cold-bloodied [sic] killer sitting over there (indicating).
>
> Members of the jury, his own testimony, the State contends would support that. You saw him sitting on the stand. Now, how could he not react at all when Agent Snead, investigating, gets up in his face and calls him a cold-bloodied [sic] SOB, right in his face, "How does it feel to kill a helpless seventy-eight year old man—how does it feel to kill him?"
>
> And, that man (indicating) doesn't react at all. Didn't say a word.
>
> Use your own common sense and reason. If he didn't do it, wouldn't he be saying, "You've got the wrong man. Get away from me. Have you lost your mind?"

Once a defendant has been advised of his right to remain silent, "it is a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States to then impeach the defendant on cross-examination by questioning him about the silence." *Id.* Yet in the instant case defendant was asked the following during cross-examination:

Q: And When Mr. Snead—Mr. Snead did call you a cold-bloodied [sic] son-of-a-bitch, didn't he?

Mr. Nichols: OBJECTION.

Court: OVER-RULED.

Q: Didn't he?

A: Yeah.

Q: You didn't get mad at him, did you?

A: Well, I—I wondered what he was doing calling me a cold-bloodied [sic] son-of-a-bitch.

Q: And, he sat right there and accused you, directly in your face, of killing that man, didn't he?

A: He accused me of killing him.

Q: Right in your face, didn't he?

A: What [sic] I supposed to say.

Q: And, you didn't say a single word back to him, did you?

A: Yeah [sic], I told him I hadn't killed nobody [sic].

Q: So, when he said you didn't say a word back to him, he wasn't telling the truth, isn't that right?

A: I—I—I responded back to him.

This questioning by the State wrongfully referred to the defendant's silence in the face of Agent Snead's accusation of murder, and it allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence. The testimony therefore should have been excluded.

For the foregoing reasons, we vacate the sentence of death and remand this case to Superior Court, Richmond County, for a new capital sentencing proceeding.

DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

Justice MEYER dissenting.

I do not agree that the failure to give the instruction on the "no significant criminal history" mitigating circumstance, N.C.G.S. § 15A-2000(f)(1) (1988), in the case at bar constitutes reversible error. The evidence before the court precluded the submission of that circumstance.

I believe that the facts reflected in the record on appeal indicate a significant history of criminal activity. The record reflects that defendant used drugs illegally and admitted from the witness stand that he had been convicted of larceny, receiving stolen goods, and forgery within the last ten years. Not only is defendant's criminal activity recent, it is "significant" because much of it involves criminal activity similar to the crime with which he is charged in this case. Accordingly, I believe the trial court properly declined to submit the (f)(1) mitigating circumstance in this case.

In addition, without regard to the outcome of this particular case, I wish to comment on a problem highlighted by the case.

Heretofore, we have required, as we have in this case, the trial judge to review all the evidence in the record concerning defendant's prior criminal activity, regardless of when, for what purpose, and by whom it was submitted, and then to determine, *ex mero motu*, whether such evidence warrants submission of mitigating circumstance N.C.G.S. § 15A-2000(f)(1); this must be done without regard to defendant's position on the issue. *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988).

After our considerable experience with this particular mitigating circumstance, I now conclude that this requirement places our trial judges in the untenable position of having their decision on this question frequently assigned as error whether they submit the circumstance or fail to submit it on evidence that, from case to case, appears similar. *See, e.g., State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992) (error in trial court's failure to submit mitigating circumstance when evidence showed defendant had engaged in illegal drug activity and larceny of money and credit cards to support a drug habit); *State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991) (submission of mitigating circumstance (f)(1) proper where record showed defendant had been

convicted of four misdemeanors, including receiving stolen goods, larceny, worthless check, and assault with deadly weapon, and had engaged in criminal activity, including possession of marijuana, theft, sale of marijuana to victim which led to fatal altercation, and possession of sawed-off shotgun); *State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990) (proper to submit mitigating circumstance (f)(1) despite defendant's prior conviction for voluntary manslaughter), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (error not to submit mitigating circumstance (f)(1) even though defendant had prior conviction for second-degree kidnapping of wife); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985) (proper to submit mitigating circumstance (f)(1) over defendant's objection even though evidence revealed defendant's criminal history included six counts of felonious breaking and entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault), *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); *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983) (proper not to submit mitigating circumstance where history included several larcenies, several breaking and enterings, possessing and using marijuana all within a five-year period), *appeal after remand*, 319 N.C. 1, 352 S.E.2d 653 (1987) (court submitted mitigating circumstance (f)(1) at resentencing hearing). In the instant case, the majority likewise concludes that the trial court committed error in failing to submit this circumstance when the evidence showed that defendant had used drugs illegally and had been convicted of larceny, receiving stolen goods, and forgery.

I have come to believe that it is time for the legislature to revisit this issue. It is well established that in a capital sentencing proceeding, the defendant has the burden of proof on all mitigating circumstances, the standard of proof being by a preponderance of the evidence, *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); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979).

In any case, the party bearing the burden of proof on an issue has both the burden of producing evidence in support of the party's position on that issue and the burden of persuading the trier of fact that because of such evidence, the issue should be answered in the party's favor. Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 30 (4th ed. 1993). In a criminal case on an issue on which the defendant has the burden of proof, the defendant's burden of produc-

tion may be satisfied by the defendant's own evidence or by evidence offered by the State. *State v. Oliver*, 334 N.C. 513, 434 S.E.2d 202 (1993); *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992); *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991); *State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989); *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988); *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1988).

In light of the evidentiary principles governing the defendant's burden of proof as to mitigating circumstances, I believe that the following principles should govern the submission of mitigating circumstance (f)(1).

First, defendant should retain the burden of producing evidence in support of mitigating circumstance (f)(1). Second, defendant may meet this burden of production by offering evidence himself or by relying on evidence offered by the State. Third, if defendant, in order to meet his burden of production, relies on evidence offered by the State, *he should be required to expressly so advise the trial court.* If defendant offers evidence of his prior criminal activity in support of mitigating circumstance (f)(1), or expressly relies on evidence offered by the State, he should be deemed to have proffered evidence in support of mitigating circumstance (f)(1).

If defendant proffers evidence in support of mitigating circumstance (f)(1), the trial court must submit the circumstance for the jury's consideration. If defendant fails to proffer evidence in support of this circumstance in the manner prescribed above, then he should be deemed to have waived any right he might have had to have this circumstance submitted at trial and should not be permitted to assign as error on appeal the failure of the trial court to submit it.

I recognize that requiring the trial judge to submit mitigating circumstance (f)(1) when defendant proffers evidence in support of it is somewhat unusual in that it removes from the trial judge the obligation to make the determination in the first instance of whether the evidence supports submission of the circumstance. I believe, however, that such an approach is warranted because this particular mitigating circumstance has the unusual attribute of being self-policing. A defendant will know that if he proffers evidence in support of this circumstance, the State may offer evidence in rebuttal. A defendant will not want this circumstance to be submitted and will not want to proffer evidence in support of it unless he thinks a reasonable jury would find the circumstance in his favor based on the true state of defendant's prior criminal activity. To have this circumstance sub-

mitted when defendant's prior criminal activity is such that a reasonable jury will likely reject the circumstance will work to defendant's detriment.

Further, whether someone's "prior criminal activity" is "significant" is a completely subjective inquiry. What is "significant criminal activity" to some will be "insignificant criminal activity" to others. Like "beauty," what is "significant criminal activity" lies in the eye of the beholder.

For these reasons, I conclude that it is proper and would be the better practice to leave submission of this circumstance to the discretion of the defendant.

I now conclude, contrary to our previous holdings, that evidence offered by the State for other purposes, such as other crimes evidence under North Carolina Evidence Rule 404(b) or evidence of criminal convictions to prove an aggravating circumstance under N.C.G.S. § 15A-2000(e), should not provide the basis for an instruction on or support the submission of mitigating circumstance (f)(1). For it to become such evidence, it should be proffered by defendant for the purpose of supporting submission of mitigating circumstance (f)(1).

STATE OF NORTH CAROLINA v. TIMOTHY CURTIS BARLOWE

No. 420A92

(Filed 29 July 1994)

1. Burglary and Unlawful Breakings § 164 (NCI4th)— first-degree burglary—intent to commit murder—conflicting evidence—necessity for instruction on misdemeanor breaking or entering

In a prosecution for first-degree burglary wherein the State presented evidence that defendant intended to murder the victim, his mother-in-law, at the time he broke and entered her home while looking for his wife and son, defendant presented sufficient evidence that the killing of the victim was accidental and that he did not possess the requisite intent to murder at the time he entered her home so that the trial court erred by refusing to instruct the jury on misdemeanor breaking or entering where

defendant's evidence tended to show that he loved the victim, who was like a second mother to him; he did not intend to injure anyone when he went to the victim's residence; his rifle occasionally discharged accidentally; he had activated the safety; the gun accidentally discharged when his father-in-law grabbed for the barrel; and he told a witness moments after the shooting that his father-in-law jerked the gun and it went off. This error was not cured by the guilty verdict of first-degree burglary since it cannot be known whether the jury would have convicted defendant of misdemeanor breaking or entering had it been properly instructed.

Am Jur 2d, Trial §§ 1427-1435.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

2. **Assault and Battery § 116 (NCI4th)— assault with deadly weapon with intent to kill—instruction on misdemeanor assault not required**

In a prosecution of defendant for assault of his wife with a deadly weapon with intent to kill, defendant's testimony that he was unaware that his wife was in the car at the time he shot into the vehicle did not require the trial court to instruct on the lesser included offense of misdemeanor assault with a deadly weapon where defendant's intent to kill was shown by uncontradicted evidence that defendant and his wife had argued; defendant was angry, was breaking dishes, and said that he would get his gun; defendant heard his wife tell his son to get into the car; the vehicle was moving when defendant fired at it with his rifle, hitting the front windshield slightly to the right of center on the passenger side; and defendant, with another rifle in his hand, then searched for his wife. Assuming that defendant's testimony was sufficient to permit submission of the lesser offense, defendant was not prejudiced by the trial court's failure to submit the lesser offense where defendant's testimony was rejected by the jury when it found defendant guilty of discharging a firearm into an occupied vehicle.

Am Jur 2d, Trial §§ 1427 et seq.

3. **Homicide § 727 (NCI4th)— felony murder—two underlying felonies—arrest of judgment on one felony**

Where the jury found defendant guilty of felony murder based on the underlying felonies of first-degree burglary and discharg-

ing a firearm into occupied property, and there was error in submission of first-degree burglary requiring a new trial on that charge, the judgment imposed on the discharging a firearm into occupied property conviction must be arrested. To the extent that dicta in *State v. Pakulski*, 326 N.C. 434, 437, suggests that convictions for more than one underlying felony merge with the murder conviction, thereby mandating that judgment on the multiple underlying felonies be arrested, that dicta is expressly disavowed.

Am Jur 2d, Homicide §§ 549 et seq.

4. Homicide § 658 (NCI4th)— voluntary intoxication— instruction not required by evidence

The trial court did not err by refusing to instruct the jury on voluntary intoxication in a felony murder prosecution based on the underlying felony of first-degree burglary with the intent to commit murder where the evidence tended to show that defendant consumed alcoholic beverages during the day and evening of the crimes and that defendant was somewhat intoxicated, but nothing in the record indicated that defendant's mind and reason were so completely overwhelmed by alcohol that he was rendered incapable of forming the requisite intent to kill, and defendant testified that he knew what he was doing on the day of the crimes.

Am Jur 2d, Homicide § 517.

5. Evidence and Witnesses § 1652 (NCI4th)— photographs— defendant's destruction of property—hostility toward wife—admission for illustrative purposes

Five photographs depicting defendant's extensive destruction of the contents of the home he shared with his wife were properly admitted to illustrate the testimony of three witnesses that on the night of a murder and other crimes defendant acted overtly hostile and with inexplicable violence toward his wife, notwithstanding defendant admitted destroying most of the property shown in the photographs, where the photographs were not used excessively or repetitively during the trial, and the probative value of the photographs was not outweighed by the potential prejudice to defendant.

Am Jur 2d, Evidence §§ 960 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Guice, J., at the 11 May 1992 Criminal Session of Superior Court, Caldwell County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments entered for first-degree burglary, assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, and discharging a firearm into an occupied vehicle was allowed 23 March 1993. Heard in the Supreme Court 14 October 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Herbert H. Pearce and Lucy R. McCarl for defendant-appellant.

PARKER, Justice.

Defendant was indicted on 22 January 1991 for the murder of Mavel Jenkins Hawkins, assault with a deadly weapon with intent to kill Catherine Barlowe, and discharging a firearm into an occupied vehicle. He was further indicted on 17 February 1992 for first-degree burglary, discharging a firearm into occupied property, and injury to personal property. Defendant pled guilty to injury to personal property and was convicted by a Caldwell County jury on 20 May 1992 of first-degree burglary, assault with a deadly weapon with intent to kill, discharging a firearm into occupied property, discharging a firearm into an occupied vehicle, and first-degree murder based on felony murder with the underlying felonies being burglary and discharging a firearm into occupied property. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial judge imposed a sentence of life imprisonment for the first-degree murder conviction. Judge Guice also imposed a consecutive sentence of life imprisonment for the first-degree burglary conviction and three consecutive sentences of ten years' imprisonment for the assault and the two discharging a firearm convictions.

According to testimony introduced by the State, defendant had been drinking on the afternoon of 21 December 1990 with his cousin, Wayne Maltba, and two of defendant's employees, Michael Frye and Rodney Whisnant. When he returned home around 4:00 p.m., his wife, Catherine Hawkins Barlowe, confronted him about his drinking; and they argued for approximately thirty minutes. During the argument, defendant indicated he believed his wife intended to leave him. The argument ended when Catherine answered the telephone and defend-

ant went back out to the shed to continue drinking with Maltba, Frye, Whisnant, and Chris Hawkins, Catherine's nephew. Later, when defendant returned to the house for dinner, Maltba, who lived with the Barlowes, asked defendant and Catherine to come into the bedroom. He then told defendant he did not like to see the couple fighting and hoped they would work out their differences. Defendant became angry over Maltba's interference in his marriage and knocked a picture off the top of the dresser, striking Maltba. Maltba left on his motorcycle and drove to a trailer behind the home of Adair and Mavel Hawkins, Catherine Barlowe's parents. Defendant told Frye, Whisnant, and Hawkins to leave, and they followed Maltba to the trailer.

After defendant sat back down at the dinner table, his son, Matthew, asked for a new Nintendo game. When Matthew persisted after defendant told him "No," defendant again lost his temper and slapped him. Catherine took Matthew into the living room where they heard defendant breaking dishes in the dining room and threatening to get his gun. Catherine told Matthew to run to the car while she went into the bedroom to get her keys. She and Matthew got into the car and were attempting to drive out of the yard when defendant stepped out on the porch and began firing shots from his .30-.30 rifle. A bullet shattered the windshield and the passenger window. Several shards of glass hit Matthew causing him to believe he had been shot. Catherine and Matthew drove to a neighbor's home and hid in the bathtub.

Adair Hawkins testified that he and his wife lived three quarters of a mile from his daughter, Catherine, and defendant. On 21 December 1990 at approximately 8:00 p.m., Mr. Hawkins heard a motorcycle and then a car drive up his driveway and park. A few minutes later he heard a loud noise at the front door. His wife, Mavel, opened the front door and defendant, holding a rifle, demanded to see Catherine. As Mr. Hawkins stepped in front of his wife and opened the storm door, defendant shoved his gun inside the house and again demanded to see Catherine. Defendant pointed his gun at them during this entire exchange. He became quite angry when he learned that Catherine was not there and that the couple had not seen her all day. Still standing on the porch, defendant raised the gun to his shoulder and intentionally shot Mavel in the face. As she fell backwards, Mr. Hawkins heard a second shot ripping through the wall. As he knelt beside his wife, Mr. Hawkins realized she was dead. He stood up and said, "Lord, Tim, you killed my wife." Defendant replied, "You killed her, you killed

her." Wayne Maltba came into the house from the yard and telephoned for assistance.

Mr. Hawkins walked outside and found defendant standing on the grass in front of the steps. As he approached him, defendant struck him in the face with the barrel of the rifle. Mr. Hawkins fell to the ground and defendant pointed the rifle in his face. Mr. Hawkins begged defendant not to shoot him; when defendant could not get the gun to fire, he walked away. Maltba followed defendant into the house and wrestled the gun away from him.

Michael Frye, Rodney Whisnant, and Chris Hawkins each testified and corroborated the other witnesses. In addition, the three men testified that after staying at the trailer for about ten to twenty minutes, they decided to leave. As Maltba drove off on his motorcycle, defendant entered the Hawkins' driveway, hit Maltba with his van, and knocked him off the motorcycle. Defendant pointed his .22 rifle at Maltba and asked where Catherine was. The three men watched defendant walk towards the Hawkins' residence and then heard gunshots a few moments later.

Maltba's testimony was also corroborative, except on one point. After hearing the gunshot and running towards the house, Maltba testified he met defendant in the yard. Defendant again asked where Catherine was and then stated, "I shot Mavel, Adair grabbed the gun and it went off and hit Mavel."

Before resting, the State produced numerous expert witnesses who testified concerning the physical evidence. This evidence will be discussed in greater detail as necessary for a thorough understanding of each issue.

Defendant testified in his own defense and essentially corroborated the testimony of other witnesses regarding events leading up to the murder. He admitted drinking wine and vodka during the afternoon of 21 December 1990. He admitted that the alcohol may have had a minor influence on his actions that day but maintained that his behavior was fairly normal. Defendant admitted shooting at his wife's car but stated he did not realize his wife and son were in the car at the time. Before following Catherine and Matthew, defendant fired shots at two televisions, overturned numerous pieces of furniture and kitchen appliances, and destroyed other items inside his home. Defendant then traded his .30-.30 rifle for his .22 magnum rifle. When he arrived at the Hawkins' home, he knocked on the front door. Mavel

Hawkins opened the front door. Suddenly, his father-in-law confronted him and grabbed the rifle. The two men struggled, Mr. Hawkins lost his footing and fell backwards pushing the gun against the door casing. This contact caused the rifle to fire killing Mavel Hawkins. Defendant's father, mother, and sister verified that, on the night of the shooting, defendant told each of them this version of the shooting. Defendant further recalled telling Maltba that the rifle jerked when Mr. Hawkins grabbed it, but he did not recollect the rifle firing a second time. Defendant testified he struck Mr. Hawkins with his fist when he accused him of murdering his wife. Finally, defendant stated he loved Mavel Hawkins and did not intend to kill her.

[1] We first address defendant's contention that sufficient evidence existed tending to show defendant did not have the requisite intent to commit a felony when he entered the Hawkins' residence and that the trial court erred in refusing to instruct the jury on misdemeanor breaking or entering. This Court has held that

> [a] defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions, and error in failing to submit the lesser included offense is not cured by a verdict of guilty of the charged crime because it cannot be known whether the jury would have convicted on the lesser crime if it had been correctly submitted. However, this principle applies only when there is evidence of the crime of lesser degree.

State v. Pearce, 296 N.C. 281, 292, 250 S.E.2d 640, 648 (1979).

First-degree burglary is defined in North Carolina as the breaking and entering at night of the occupied dwelling house or sleeping apartment of another with the intent to commit a felony therein. *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974), and N.C.G.S. § 14-51 (1993). Defendant was indicted and convicted of first-degree burglary with the intent to commit murder as the underlying felony. To support a conviction the State needed to prove that the intent to commit murder existed at the time of the breaking and entering, in this case, when the barrel of defendant's rifle protruded approximately two inches into the Hawkins' home through the front door. *State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985). If defendant did not possess the intent to commit a felony in the dwelling house at the time of a breaking and entering, he may properly be convicted only of misdemeanor breaking or entering. *Id.* The determining factor then is whether there was, as defendant contends, sufficient evidence

from which a reasonable juror could infer that defendant did not possess the requisite intent to commit murder.

The State presented evidence suggesting defendant intended to murder Mavel Hawkins at the moment he stuck his gun through the front door of her home. However, other conflicting evidence was also presented which suggested that the killing of Mavel Hawkins was accidental, not intentional. Defendant testified that (i) he loved Mavel Hawkins who was like a second mother to him; (ii) he did not intend to injure anyone when he went to the Hawkins' residence searching for his wife and son; (iii) his rifle occasionally discharged accidentally; (iv) he had activated the safety; and (v) the gun accidentally discharged on 21 December 1990 when Adair Hawkins grabbed for the barrel. The State's witness, Maltba, testified that defendant said to him moments after the shooting that "Adair jerked the gun and it went off." To determine whether this evidence is sufficient for submission of the lesser offense to the jury, we must view the evidence in the light most favorable to defendant. Applying this standard, we cannot say as a matter of law that the evidence does not permit a reasonable inference that defendant did not possess the requisite intent. The credibility of the evidence and whether in fact defendant did or did not possess the requisite intent is for the jury to decide.

We hold, therefore, that the trial court erred in not instructing the jury on the lesser-included offense of misdemeanor breaking or entering. The error is not cured by the guilty verdict of first-degree burglary since it cannot be known whether the jury would have convicted defendant of misdemeanor breaking or entering had it been properly instructed. *Pearce*, 296 N.C. at 292, 250 S.E.2d at 648.

For the reasons stated, defendant is entitled to a new trial on the first-degree burglary charge. This ruling does not affect defendant's first-degree murder conviction based on felony murder since the jury also found defendant guilty of felony murder with the predicate felony being discharging a firearm into occupied property. Defendant has not brought forward and argued in his brief the sole assignment of error related to his conviction for discharging a firearm into occupied property. Accordingly, this assignment of error is deemed abandoned and this conviction is not subject to review. N.C. R. App. P. 28(a).

[2] Defendant next contends the trial court erred in refusing to instruct the jury on the lesser-included offense of misdemeanor assault with a deadly weapon of his wife Catherine Barlowe. Defend-

ant was charged with assault with a deadly weapon with intent to kill and argues that conflicting evidence of defendant's intent was sufficient to submit the lesser-included misdemeanor assault which does not require intent to kill. *See* N.C.G.S. § 14-33(b)(1) (1993). The basis of his contention is defendant's own testimony that he was unaware that his wife and son were in the vehicle at the time he shot at the car.

The State bears the burden of proving intent and the assault with a deadly weapon does not establish a presumption of an intent to kill. *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). Intent must normally be proved by circumstantial evidence, and "[a]n intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *Id.* Considered in light of these factors, the uncontradicted evidence supports a finding of defendant's intent to kill his wife, Catherine Barlowe. Defendant and his wife had argued; he was angry and was breaking dishes. Defendant said, "I'll get my gun." Defendant heard Catherine tell his son to get into the car, and the vehicle was moving when defendant fired at it with his .30-.30 rifle, hitting the front windshield slightly to the right of center on the passenger side. Defendant, with another rifle in hand, then searched for his wife and asked everyone he saw, "Where's Cathy?"

Even assuming arguendo defendant's testimony, that he was unaware his wife was in the car, was sufficient to permit submission of the lesser offense, the jury rejected this testimony when it found defendant guilty of discharging a firearm into an occupied vehicle. Hence, error, if any, by the trial court's failure to submit misdemeanor assault with a deadly weapon could not have been prejudicial to defendant under N.C.G.S. § 15A-1443(a). This assignment of error is overruled.

Defendant next contends the trial court, in its instruction on felony murder, improperly instructed the jury concerning the elements of burglary when murder was the underlying felony to support the charge of first-degree burglary. Defendant did not object at trial and asks this Court to apply plain error analysis. Inasmuch as this assignment of error relates to defendant's conviction for first-degree burglary and pertains to an instruction which likely will not reoccur during retrial on the first-degree burglary charge, we decline to address it.

[3] Defendant next contends the trial court erred by imposing separate sentences for each of the underlying felonies that supported

defendant's conviction for first-degree murder under the felony-murder rule. The jury found defendant not guilty of premeditated and deliberate murder but guilty of felony murder based on first-degree burglary and discharging a firearm into an occupied property as the underlying felony. The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, life imprisonment for the first-degree burglary conviction, and ten years' imprisonment for the discharging a firearm into occupied property conviction. We agree with defendant that these multiple sentences constitute error and arrest judgment on the conviction for discharging a firearm into occupied property.

A murder is a felony murder when it is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17 (1993). Application of the felony-murder rule requires that there be an interrelationship between the felony and the homicide. *State v. Strickland*, 307 N.C. 274, 291-94, 298 S.E.2d 645, 651-58 (1983). Our cases also firmly establish the principle that "a defendant may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution." *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). The underlying felony supporting a conviction for felony murder merges into the murder conviction. *State v. Silhan*, 302 N.C. 223, 262, 275 S.E.2d 450, 477 (1981). The underlying felony provides no basis for an additional sentence, and any judgment imposed thereon must be arrested. *Id.*

In the present case, the jury answered two separate, specific inquiries concerning felony murder, namely, (i) guilty of first-degree murder under the first-degree felony-murder rule with the underlying felony of burglary and (ii) guilty of first-degree murder under the first-degree felony-murder rule with the underlying felony of discharging a firearm into occupied property. In this respect, this case is distinguishable from *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), where the trial court submitted the felony-murder issue in the disjunctive, and this Court could not determine whether the jury had found the defendant guilty of felony murder on the basis of felonious breaking or entering or robbery with a firearm. Since under the facts in *Pakulski* submission of felonious breaking or entering as an underlying felony for felony murder was error, this Court granted defendant a new trial on the first-degree murder charge. In so ruling, the Court stated:

> The State contends that error in submitting the breaking or entering felony is harmless because the jury could have based its verdict solely on the robbery felony. The State's argument, while superficially appealing, overlooks that the verdict form does not reflect the theory upon which the jury based its finding of guilty of felony murder. Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant. *E.g.*, *State v. Belton*, 318 N.C. 141, 162, 347 S.E.2d 755, 768 (1986).

Pakulski, 319 N.C. at 574, 356 S.E.2d at 326.

Only one underlying felony is necessary to support a felony-murder conviction, and in this case the record is clear the jury found that two separate felonies supported the first-degree murder conviction. Had there been no error in submission of the first-degree burglary charge, the trial court would have been required to arrest judgment on one of the underlying felony convictions but could have elected either the discharging a firearm into occupied property or the first-degree burglary conviction. To the extent *dicta* in the second opinion in *State v. Pakulski*, 326 N.C. 434, 437, 390 S.E.2d 129, 130 (1990), suggests the conviction for more than one underlying felony, if found, merges with the murder conviction thereby mandating that judgment on the multiple underlying felonies be arrested, that *dicta* is expressly disavowed. In this case, since there was error in submission of the first-degree burglary, requiring a new trial on that charge, we hold judgment on the discharging a firearm into occupied property conviction must be arrested.

[4] Defendant next assigns error to the trial court's refusal to instruct the jury on voluntary intoxication. Defendant contends that his voluntary intoxication would have negated the specific intent to commit burglary, one of the underlying felonies found by the jury in convicting defendant of felony murder. Voluntary intoxication is an affirmative defense negating the element of specific intent in a particular crime whenever the defendant satisfies the jury that he was so intoxicated at the time of the commission of the crime that he did not know what he was doing. *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965).

For defendant to be entitled to an instruction on voluntary intoxication, "the evidence must be that defendant's intoxication rendered him 'utterly incapable' of forming a deliberate and premeditated intent to kill." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)). Evidence of mere intoxication is insufficient. *State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992).

Wayne Maltba testified that on the afternoon of 21 December 1990 defendant drank approximately one fourth of a bottle of wine during lunch and two thirds of a bottle of vodka during the late afternoon and early evening. However, Maltba refused to state an opinion as to whether defendant was intoxicated. Catherine Barlowe testified she realized defendant had been drinking when he first returned home around 4:00 p.m. "but he didn't really appear to be totally intoxicated at that particular time. He was talking sensibly." Following their argument, defendant spent thirty to forty-five minutes in the shed drinking more vodka with Maltba, Frye, and Whisnant. When he returned, Catherine noted that defendant "was more intoxicated, he was reacting more like he had been drinking too much." Michael Frye testified that defendant "appeared to me like he was sort of drunk" while the men were in the shed but he acknowledged he could understand everything defendant said. Defendant estimated he drank two coffee cups full of vodka but, on cross-examination, denied he was intoxicated and claimed to have been acting normally on 21 December 1990.

Viewed in the light most favorable to defendant, this evidence tends to show that defendant consumed alcoholic beverages during the day and evening of 21 December 1990. Although the evidence suggests defendant was somewhat intoxicated, nothing in the record indicates that defendant's mind and reason were so completely overwhelmed by the alcohol that he was rendered incapable of forming the requisite intent to kill. The trial court found that "defendant's own testimony reveals that he said that he knew what he was doing, he knew where he was going, [and] that he was capable of thinking about the things that he was doing." We hold that the trial court did not err in refusing to instruct the jury on voluntary intoxication.

[5] Finally, defendant assigns error to the admission into evidence of five photographs depicting the extensive destruction of the contents of the Barlowe home. Defendant contends the photographs were irrelevant since he admitted destroying most of the property shown in

the photographs. Defendant testified that he shot at both televisions and turned over numerous pieces of furniture and kitchen appliances, including the refrigerator, before he followed Catherine and Matthew. Furthermore, three witnesses for the State had testified at length concerning the condition of the Barlowe home and their testimony needed no further illustration. As a result, defendant argues the photographs were, at best, minimally probative of defendant's intent to commit murder and were prejudicial and cumulative. We disagree.

Catherine Barlowe, Detective Marley, and John Bumgarner each testified for the State at trial and described the condition of the Barlowe home on 21 and 22 December 1990. The State offered the five photographs with the intent to further illustrate the hostility and ill will defendant felt towards his wife on the evening of the murder. The trial court, over objection, allowed the photographs to be admitted into evidence and later instructed the jury on the illustrative purpose of photographic evidence.

Rule 403 of the North Carolina Rules of Evidence provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-4, Rule 403 (1992). In the context of crime scene and autopsy photographs, this Court has held that "[w]hether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation.

Id.

The five photographs of the Barlowe home were not used excessively or repetitively during the trial. The introduction of the photographs was not aimed solely at arousing the passions of the jury. The photographs were admitted solely to illustrate the testimony of

Barlowe, Marley, and Bumgarner that on the night of 21 December 1990 defendant acted overtly hostile and with inexplicable violence towards his wife. The probative value of these photographs is not outweighed by any potential prejudice to defendant. This assignment of error is also without merit.

For the foregoing reasons, we find no error in defendant's trial for first-degree murder. However, we do find prejudicial error in the trial court's failure to instruct the jury on misdemeanor breaking or entering and, thus, we reverse the conviction for first-degree burglary and remand this case to the Superior Court, Caldwell County, for a new trial thereon. We further find that the trial court's failure to merge the underlying felonies into the first-degree murder conviction was error pursuant to the felony-murder rule. We, therefore, arrest judgment on the trial court's imposition of a ten-year sentence for discharging a firearm into occupied property.

NO. 90CRS11354—DISCHARGING FIREARM INTO OCCUPIED VEHICLE: NO ERROR.

NO. 90CRS11355—ASSAULT WITH DEADLY WEAPON WITH INTENT TO KILL CATHERINE H. BARLOWE: NO ERROR.

NO. 90CRS11358—FIRST-DEGREE MURDER OF MAVEL HAWKINS: NO ERROR.

NO. 92CRS1416—FIRST-DEGREE BURGLARY: NEW TRIAL.

NO. 92CRS1417—DISCHARGING FIREARM INTO OCCUPIED PROPERTY: JUDGMENT ARRESTED.

STATE OF NORTH CAROLINA v. DANIEL PETERSON

No. 491A93

(Filed 29 July 1994)

1. Evidence and Witnesses § 1009 (NCI4th)— unavailable witness—statements to officer—guarantees of trustworthiness—admissibility under residual hearsay exception

The trial court did not err by finding that hearsay statements made to an officer by an unavailable witness who refused to tes-

tify possessed sufficient guarantees of trustworthiness to be constitutionally admissible in a murder trial under Rule 804(b)(5) where the evidence tended to show that the witness described events about which only she could have known; the witness had no motivation other than to speak the truth; the only information supplied by the officer to the witness was the number of the trailer where the events occurred; the witness made statements against her penal interest wherein she referred to her use of illegal drugs and participation in prostitution; the witness was incarcerated for much of the time between the interview and the trial and never attempted to recant her statement during a two-year period; and the statement to the officer was recorded. N.C.G.S. § 8C-1, Rule 804(a)(2).

Am Jur 2d, Evidence §§ 701 et seq.

Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.

2. Evidence and Witnesses § 1694 (NCI4th)— photographs of victim's body and crime scene—repetition of testimony near jury

The trial court did not err in allowing the admission of photographs depicting a murder victim's body and items found at the crime scene and in allowing the State's witnesses to testify about the photographs from the witness stand and then to repeat their testimony near the jury where the photographs were not overly gruesome or gory; the photographs of the victim's body merely showed its position in the ditch where it was found and a single bullet wound in her head; the photographs of the trailer where the crime occurred showed the condition of the crime scene at the time law officers examined it; the number of photographs was not excessive; and the State's witnesses showed the photographs a second time in front of the jury merely to better illustrate their testimony at closer range.

Am Jur 2d, Homicide §§ 417 et seq.

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

3. Evidence and Witnesses §§ 2793, 2983 (NCI4th)— cross-examination about conviction—actual amount of time to be served—possibility of parole—speculation—no plain error

Any error by the trial court in a murder trial in permitting the State, without objection by defendant, to cross-examine two witnesses already sentenced for the victim's murder regarding the actual amount of time they would serve in prison did not constitute plain error since the jury's knowledge that the two witnesses might not serve their entire sentences for their involvement in the murder is not likely to have affected its verdict in light of the strong evidence of defendant's guilt, including testimony by an eyewitness that she saw defendant holding a gun to the victim's head just before she heard one gunshot.

Am Jur 2d, Witnesses §§ 426 et seq., 569 et seq.

4. Homicide § 232 (NCI4th)— first-degree murder—sufficiency of evidence

The trial court properly denied defendant's motion for a directed verdict at the close of the evidence in a first-degree murder trial where the State's evidence tended to show that defendant, the victim and two others were in a trailer on the night of 6 August; an eyewitness saw defendant holding a gun to the victim's head just before she heard one gunshot; the victim died from a gunshot wound to the head that occurred while the muzzle of the gun was in contact with the victim's scalp; blood found in the trailer was consistent with the victim's blood, and small, rounded luminal reactions at the trailer were consistent with the tips of crutches defendant was using; officers were dispatched to the scene at 1:17 p.m. on 7 August and discovered the victim's body later that afternoon; and defense witnesses testified that another person accidentally shot the victim around 10:00 or 10:30 a.m. on 7 August, and they went to move the body later on the night of 7 August and cleaned the trailer the next day.

Am Jur 2d, Homicide §§ 425 et seq.

5. Trial § 526 (NCI4th)— first-degree murder verdict—refusal to set aside—no abuse of discretion

The trial court did not err in the denial of defendant's motion to set aside the verdict of guilty of first-degree murder as being against the greater weight of the evidence where the jury's verdict

was consistent with substantial evidence regarding each element of first-degree murder and defendant being the perpetrator of that offense.

Am Jur 2d, Trial § 1953.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Thompson, J., at the 5 August 1993 Criminal Session of Superior Court, Cumberland County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 April 1994.

Michael F. Easley, Attorney General, by William P. Hart, Special Deputy Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

WHICHARD, Justice.

Defendant was tried noncapitally on an indictment charging him with the first-degree murder of Charletta Covington. The jury returned a verdict finding defendant guilty on the theory of premeditation and deliberation, and he was sentenced to life imprisonment. Defendant assigns error to the admission of hearsay testimony, use of photographic evidence, questioning of witnesses about past convictions, and failure to grant motions for a directed verdict and to set aside the verdict as being against the greater weight of the evidence. We conclude that defendant received a fair trial free of prejudicial error.

The State's evidence tended to show that defendant came from New York City to North Carolina with Damon Chamberlain, Jeff Page, and Jerome Kelly, to sell cocaine in the Fayetteville area. One place from which they sold cocaine was a trailer located at lot #10, Thomas' Mobile Home Park.

Teresa Blackwell, a prostitute, testified that she went to the trailer on the night of 6 August 1991 to have sex in exchange for cocaine. Defendant, Chamberlain, and the victim, Charletta Covington, were in the trailer. While Blackwell was in the trailer, she observed defendant, who recently had been shot in the leg, using crutches. When Blackwell left the trailer just before midnight, defendant, Chamberlain, and Charletta Covington remained there. Blackwell saw the victim alive and well shortly before midnight. Blackwell also testified that defendant and his friends previously had accused Charletta Covington of stealing a package of drugs from them.

Michelle Hopper, another prostitute, stated that on the night of 6 August 1991 she saw Chamberlain chasing Charletta Covington out the front door and around the trailer. According to Hopper, Chamberlain grabbed the victim's hair and threw her to the ground. Defendant then came out of the back door of the trailer. Hopper heard him say "Charletta, you stole my f——— package. I'm going to be the one to end it." Chamberlain then jerked Covington up and threw her towards defendant. Defendant had a gun and motioned towards the back door of the trailer. As they moved towards the back door, Chamberlain was holding the victim by the hair and defendant had a gun to the back of her head. Immediately after that, Hopper heard one gunshot.

On 7 August 1991 at 1:17 p.m., Deputy John Smith of the Cumberland County Sheriff's Department was dispatched to Thomas' Mobile Home Park regarding a possible deceased person in a ditch. Deputy Smith found the body of Charletta Covington in a ditch in the woods near the trailer at lot #10. He also found a trash bag in the ditch with the body.

Dr. Deborah Radisch, an expert in forensic pathology, testified that on 8 August 1991 she performed an autopsy on the victim. She further stated that the cause of death was a single gunshot wound to the head. Based on the scalp tearing around the wound and the existence of powder residue within the wound track, Dr. Radisch determined that the muzzle of the gun was in contact with the victim's scalp when it was fired. Dr. Radisch removed small fragments of lead and jacketing material from inside the wound track.

Deputies from the Homicide Section of the Cumberland County Sheriff's Department conducted a search of the trailer. They found garbage bags on the kitchen counter which were of the same texture and color as the one found in the ditch with the body. The deputies located cleaning materials in the kitchen and cleanser in the living room. They discovered a visible amount of blood in the living room, human tissue on the stereo, and a bullet hole with a projectile embedded in it in the window frame behind the sofa. On the kitchen table, they found .38 caliber hollow-point ammunition, which was consistent with the projectile in the window frame and with the bullet fragment removed from the victim's body. Sergeant Donald Smith testified that the deputies later recovered an Amtrak train ticket for New York City in Damon Chamberlain's name which indicated a departure time of 1:49 p.m. on 7 August 1991.

Lucy Milks, a forensic serologist and a Special Agent with the SBI, conducted chemical tests in the trailer using luminal and phenolphthalein. She obtained reactions indicating the presence of blood in the living room, kitchen, hallway, bedroom, and bathroom. Samples of blood from the trailer were consistent with the victim's blood. Milks observed swirling patterns which indicated cleaning or mopping blood. Milks also noticed several small, rounded reactions one-inch in diameter. She testified that these reactions were consistent with the tips of crutches defendant was using in August 1991. Milks testified that the luminal reactions indicated that the crutch tips had picked up blood and transferred it to the floor.

Defendant presented three witnesses. Damon Chamberlain testified that he was from New York and was serving a twenty-year sentence in North Carolina after a plea bargain in which he pled guilty to the second-degree murder of Charletta Covington. He testified that Charletta Covington was not in the trailer on the night of 6 August 1991. Chamberlain testified that on the morning of 7 August 1991, he was in the trailer with Pam Jordan, Jerome Kelly, and the victim. Chamberlain testified that he saw a .41 caliber magnum revolver near the couch; to prevent someone from stealing it, he picked it up and saw that it was cocked and had bullets in it. When he tried to put the trigger back, the gun accidently discharged and the bullet went past Kelly and hit Charletta Covington, who was sitting on the couch six to seven feet away, in the head.

Chamberlain testified that they panicked, ran out, and went to Hardee's. He stated that after leaving Hardee's they went to another trailer on Patton Street to get defendant and then to a nearby hotel. Chamberlain testified that later in the evening of 7 August 1991, he and Kelly went back to the trailer to move the body to the ditch in the woods. The next day, he and Kelly purchased cleaning materials and went to the trailer with defendant to clean it. Defendant was in the trailer but did not help them. Chamberlain testified that they then left for New York City.

Jerome Kelly testified that he was from New York and was serving a three-year sentence pursuant to a plea bargain in which he pled guilty to accessory-after-the-fact to the murder of Charletta Covington. He testified that Charletta Covington was not in the trailer on the night of 6 August 1991. He stated that around 10:00 or 10:30 a.m. on 7 August 1991, he was in the trailer with Chamberlain, Pam Jordan, and the victim. He saw Chamberlain with the gun and heard it discharge

and saw the victim with her head back on the couch. Kelly testified that later on the night of 7 August 1991, around 11:00 p.m., he went with Chamberlain back to the trailer to move the body. They went back to the trailer on 8 August 1991 in the middle of the day to clean it. He did not remember whether defendant was with them. Kelly testified that after cleaning the trailer, they took the train to New York.

Defendant testified that he came to North Carolina to sell drugs. He further testified that he was not in the trailer on the night of 6 August 1991. He saw the victim in the early morning hours of 7 August 1991 while he was in the trailer on Patton Street. The victim was looking for Chamberlain. Around noon on 7 August 1991, Chamberlain and Kelly came to him and told him Chamberlain had killed Charletta Covington. Defendant testified that he was not present when Kelly and Chamberlain moved the body, but that he was there when they were cleaning. Defendant admitted, however, that when he gave a statement to New York City Police he stated that he had never been back to the trailer.

The State presented rebuttal evidence through the testimony of Sergeant Smith. Smith testified that a .41 magnum revolver cannot be loaded or unloaded with the hammer in the cocked position because the gun's chamber cannot be opened. He further testified that the Sheriff's Department had not found any .41 magnum ammunition or weapon at the trailer. Smith stated that the deputies had not found blood stains or any evidence of blood on or near the couch at the trailer.

[1] In his first assignment of error, defendant contends the trial court erred in admitting under Rule 804(b)(5) the hearsay testimony of Michelle Hopper, which was in the form of an out-of-court statement given to an officer. Defendant argues that the circumstances surrounding this hearsay evidence do not have sufficient guarantees of trustworthiness to warrant introduction under Rule 804(b)(5), and therefore admission of the statement violated his state and federal rights to confrontation of witnesses, based on the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. We disagree.

The residual hearsay exception for instances in which the declarant is unavailable, Rule 804(b)(5), provides:

> (b) Hearsay exceptions.-The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . .

(5) Other Exceptions.-A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered that any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C.G.S. § 8C-1, Rule 804(b)(5) (1992).

In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), this Court articulated the guidelines for admission of hearsay testimony under Rule 804(b)(5). The trial court must first find that the declarant is unavailable. *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. A declarant is unavailable if he "[p]ersists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so." N.C.G.S. § 8C-1, Rule 804(a)(2) (1992). Here, the trial court found that Hopper knew that she was under subpoena to testify, knew that she would be held in contempt of court if she did not, and still refused to testify. Based on these findings, it concluded that Hopper was unavailable. It then proceeded with the six-step inquiry set forth in *Triplett* to determine the admissibility of Hopper's testimony. The court must determine:

(1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;

(2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);

(3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";

(4) That the proffered statement is offered as evidence of a material fact;

(5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and

(6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Ali, 329 N.C. 394, 408, 407 S.E.2d 183, 191-92 (1991) (citing *Triplett*, 316 N.C. at 9, 340 S.E.2d at 741). In conducting this analysis,

> [t]he trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness, because they embody the two-prong constitutional test for the admission of hearsay under the confrontation clause, i.e., necessity and trustworthiness. On the other four issues, the trial court must make conclusions of law and give its analysis. We will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied.

State v. Deanes, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989).

Defendant complains that the trial court's findings of fact regarding the trustworthiness of Hopper's statement are not supported by competent evidence, and that the admission of the hearsay evidence was erroneous as a matter of law. The United States Supreme Court has stated that because an evidentiary rule such as 804(b)(5) is a "residual" hearsay exception, rather than a "firmly rooted" one, it does not inherently possess indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 653-54 (1990). However, a statement which falls under the residual hearsay exception can meet Confrontation Clause standards if it is supported by particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement. *Id.* at 817, 820, 111 L. Ed. 2d at 653, 655-56.

In *Triplett* this Court articulated factors the trial court should consider to determine whether a hearsay statement possesses the required guarantees of trustworthiness. The trial court should examine, among other factors:

> (1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted

> the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination. . . . Also pertinent . . . are factors such as the nature and character of the statement and the relationship of the parties.

Triplett, 316 N.C. at 10-11, 340 S.E.2d at 742. Here, the trial court found that Hopper's statement was taken under circumstances that assured her personal knowledge of the events; the substance of the statement contained statements against Hopper's penal interest; Hopper had no motivation other than to speak the truth; and over a two-year period Hopper never recanted her statement.

These findings of fact are well supported by the evidence. Hopper testified to events about which only she could have known; Sergeant Smith testified that the only information he had supplied to Hopper was the number of the trailer. Hopper made statements in her testimony against her penal interest wherein she referred to her use of illegal drugs and participation in prostitution. This Court has stated that the extent to which a statement resembles a declaration against penal interest is one factor to consider in determining the trustworthiness of that statement. *State v. Nichols*, 321 N.C. 616, 625, 365 S.E.2d 561, 567 (1988). Additionally, Hopper was incarcerated for much of the time between the interview and the trial and never attempted to recant her statement during that two-year period. Finally, Hopper's statement was made to a law enforcement officer and was recorded. This evidence supports the trial court's findings of fact and conclusion of law that the hearsay testimony of Hopper possessed sufficient guarantees of trustworthiness to be constitutionally admissible under Rule 804(b)(5). Defendant's assignment of error therefore is overruled.

[2] Defendant next contends the trial court committed plain error in allowing the admission of, and testimony regarding, the State's photographic exhibits depicting the victim's body and items found at the scene of the crime. He argues that these exhibits were unduly inflammatory, and complains that the trial court improperly allowed the cumulative introduction of an excessive number of photographs. He also argues that it improperly permitted the State's witnesses to testify about the photographs from the witness stand and then walk in front of the jury and repeat their testimony.

Photographs "showing the condition of the body when found, its location . . ., and the surrounding scene at the time . . . are not rendered incompetent by the portrayal of the gruesome events which the

witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982). Repetitive photographs may be introduced, even if they are revolting, as long as they are used for illustrative purposes and are not aimed solely at prejudicing or arousing the passions of the jury. *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Photographs may be excluded, however, if their probative value is outweighed by their prejudicial impact. *Id.* at 284, 372 S.E.2d at 526. Whether particular photographic evidence is more probative than prejudicial is a matter for the trial court's sound discretion. *Id.* at 285, 372 S.E.2d at 527. Factors a court may consider include what the photographs depict, the level of detail, the manner of presentation, and the scope of accompanying testimony. *Id.* at 285, 372 S.E.2d at 527.

The photographs about which defendant complains were not overly gruesome or gory. The photographs of Charletta Covington's body merely showed her position in the ditch and a single bullet wound in her head. The photographs of the trailer showed the condition of the crime scene at the time law enforcement officers examined it. The number of photographs was not excessive. The State's witnesses showed the photographs a second time in front of the jury merely to better illustrate their testimony at a closer range.

If defendant had objected to the admission of, and testimony surrounding, the photographs in question, the trial court would have properly overruled the objections. The admission of the photographs was not error, and thus clearly not plain error. This assignment is overruled.

[3] Defendant contends the trial court committed plain error in permitting the State to cross-examine two witnesses already sentenced for Charletta Covington's murder concerning their arrests, punishment and possibility of parole. This contention, too, is without merit.

For the purpose of attacking their credibility, witnesses may be cross-examined regarding convictions for crimes for which the punishment is confinement of more than sixty days. N.C.G.S. § 8C-1, Rule 609(a) (1992). The scope of inquiry is restricted to the name of the crime, the time and place of conviction, and the punishment imposed. *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993); *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977). Questions regarding the possibility of parole are outside the scope of permissible inquiry. Additionally, the issue of when a prisoner will be granted parole is speculative and beyond the knowledge of the witness. *State*

v. Rutherford, 70 N.C. App. 674, 681, 320 S.E.2d 916, 921 (1984), *disc. rev. denied*, 313 N.C. 335, 327 S.E.2d 897 (1985). Here, the trial court permitted the State to question Chamberlain and Kelly regarding the actual amount of time they would serve in the prison system.

Because defendant did not object, however, this Court must apply a plain-error analysis. Under the plain-error standard, the appellate court should not grant a new trial unless it is convinced that absent the alleged error, the jury probably would have reached a different verdict. *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983). The plain error rule is

> always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial,' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 740-41, 303 S.E.2d at 806-07 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

The inquiry by the State into the actual amount of time Chamberlain and Kelly would spend in jail did not deny defendant a fair trial. The State's evidence effectively showed that on the night of 6 August 1991 defendant, Chamberlain, Blackwell and the victim were in the trailer. An eyewitness saw defendant holding a gun to the victim's head just before she heard one gunshot. Dr. Radisch testified that the gunshot wound occurred while the muzzle of the gun was in contact with the victim's scalp. Agent Milks testified that blood found at the trailer was consistent with the victim's blood. She also testified that small, rounded luminal reactions at the trailer were consistent with the tips of defendant's crutches. Law enforcement officers were dispatched to the scene at 1:17 p.m. on 7 August 1991 and discovered the victim's body later that afternoon. Defense witnesses, however, testified that Damon Chamberlain accidently shot Charletta Covington around 10:00 or 10:30 a.m. on 7 August 1991, they went to

move the body later on the night of 7 August 1991, and cleaned the trailer the next day.

Viewing the evidence as a whole, the jury's knowledge that Chamberlain and Kelly might not serve their entire sentences for their involvement in the murder is not likely to have affected its verdict. Defendant thus has not met the plain-error standard. This assignment of error is without merit.

[4] Defendant asserts as his final assignment of error that the trial court erred in denying both of his motions for a directed verdict and his motion to set aside the verdict as being against the greater weight of the evidence. We disagree.

At the close of the State's evidence, defendant made a motion for a directed verdict of not guilty, which the trial court denied. Following this denial, defendant introduced evidence and therefore waived any argument on appeal regarding that motion. N.C. R. App. P. 10(b)(3); *see State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985).

At the close of all the evidence, defendant again moved for a directed verdict of not guilty. The trial court also denied this motion. In general, the credibility of witnesses and the sufficiency of evidence are questions for the jury to evaluate in light of the court's instructions. *State v. Smith*, 268 N.C. 659, 662, 151 S.E.2d 596, 598 (1966). The trial court should deny a motion for a directed verdict if there is substantial evidence of each element of the offense charged and of the defendant being the perpetrator of the crime. *State v. McDonald*, 312 N.C. 264, 275, 321 S.E.2d 849, 855 (1984). Substantial evidence is the amount of relevant evidence a reasonable person might accept as sufficient to support a conclusion. *State v. Myers*, 309 N.C. 78, 83, 305 S.E.2d 506, 509 (1983). In making its determination, the trial court must consider the evidence in the light most favorable to the State, giving the State every reasonable inference and resolving any discrepancies in its favor. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation. N.C.G.S. § 14-17 (1993); *see State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1984). The evidence, as reviewed hereinabove and in the light most favorable to the State, including the properly admitted hearsay testimony of Michelle Hopper, was substantial as to each element of the offense of first-

degree murder and the defendant being the perpetrator. Therefore, the trial court properly denied defendant's motion for a directed verdict at the close of all the evidence.

[5] After the jury returned the guilty verdict, defendant made a motion to set aside the verdict as being against the greater weight of the evidence. The trial court denied this motion. The denial of a motion to set aside the verdict as being against the weight of the evidence is within the discretion of the trial court and is reviewable on appeal under an abuse of discretion standard. *State v. Wilson,* 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). Abuse of discretion occurs "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis,* 323 N.C. at 285, 372 S.E.2d at 527. Here, the jury's verdict was consistent with substantial evidence regarding each element of first-degree murder and defendant being the perpetrator of the offense. The trial court thus did not abuse its discretion in refusing to set aside the verdict. Accordingly, this assignment of error is overruled.

NO ERROR.

WILLIAM B. PETERSEN AND WIFE, PATRICIA T. PETERSEN v. PAMELA A. ROGERS AND WILLIAM J. ROWE

No. 427PA93

(Filed 29 July 1994)

1. Parent and Child § 24 (NCI4th); Constitutional Law § 119 (NCI4th)— adoption—consent revoked—inquiry into religious beliefs—rights of natural parents

The trial court correctly ordered an adopted child returned to its biological parents where the trial court found that the biological mother had consistently and continuously attempted to set aside her consent; the male defendant is the biological father and had attempted to legitimate his son on several occasions; a Michigan home study reflects that defendants are fit and appropriate persons to have custody of their son; the son was not eligible for adoption and the rights of his parents have not been terminated;

and there was no finding that defendants had neglected their child's welfare in any way. Absent a finding that parents are unfit or have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail and inquiry into plaintiffs' religious beliefs, if error, was harmless.

Am Jur 2d, Parent and Child §§ 26, 28.

Religion as factor in child custody and visitation cases. 22 ALR4th 971.

2. Parent and Child § 28 (NCI4th)— adoption revoked—right to visitation

The trial court did not err when revoking an adoption and awarding custody of the child to the biological parents by including a conclusion that there should be no visitation with plaintiffs (the adoptive parents) except as may be consented to and approved by defendants. N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers; such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children. Language in *Ray v. Ray*, 103 N.C. App. 790, indicating that the statute changed the paramount right of parents was expressly disavowed.

Am Jur 2d, Parent and Child § 36.

Visitation rights of persons other than natural parents or grandparents. 1 ALR4th 1270.

Appeal as of right pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision of the Court of Appeals, 111 N.C. App. 712, 433 S.E.2d 770 (1993), reversing an order of custody entered by Hunt (Love), J., on 11 December 1991 in District Court, Orange County. Heard in the Supreme Court 12 April 1994.

Hassell & Baker, P.A., by Robert A. Hassell, for plaintiff-appellees.

Levine, Stewart & Davis, by Donna Ambler Davis, for defendant-appellants.

PARKER, Justice.

In *In re Adoption of P.E.P.*, 329 N.C. 692, 407 S.E.2d 505 (1991), this Court voided the adoption of the minor child whose custody is the subject of the instant case. We remanded for dismissal of the adoption proceeding, *id.* at 704, 407 S.E.2d at 512, subject to N.C.G.S. § 48-20(c).[1] Placement of the child was originally made by the biological mother, defendant Rogers, with plaintiffs Petersen. Hence, after remand and notice the Orange County Department of Social Services ("DSS") commenced a juvenile proceeding in September 1991 by filing a petition for custody of the child.

In September and October 1991 the trial court entered temporary orders granting custody of the child to DSS, placing him with plaintiffs, and appointing a guardian ad litem. Contemporaneously, plaintiffs filed an action seeking custody of the child. By consent of all parties the temporary orders were continued until trial on the merits of plaintiffs' action for custody. In the meantime plaintiffs also filed in the juvenile proceeding a motion in the cause requesting custody of the child. Later plaintiffs moved that their civil action and the juvenile proceeding be consolidated, and on 7 November 1991 the trial court granted the motion.

The matters were heard beginning 12 November 1991; and on 15 November the court orally ordered return of the child to his biological parents, defendants Rogers and Rowe. By written order entered 11 December 1991 the court denied plaintiffs' request for custody and visitation.

Plaintiffs appealed, and the Court of Appeals limited its discussion to the issue of "the permissible extent of inquiry into religious practices and beliefs of the parties in a child custody proceeding." *Petersen v. Rogers*, 111 N.C. App. 712, 713, 433 S.E.2d 770, 772 (1993). The court found that plaintiffs' right to freedom of religion, as guar-

1. The statute provides as follows:

> Upon dismissal of an adoption proceeding, the custody of the child shall revert to the county director of social services or licensed child-placing agency having custody immediately before the filing of the petition. If the placement of the child was made by its biological parents directly with the adoptive parents, the director of social services of the county in which the petition was filed shall be notified by the court of such dismissal and said director of social services shall be responsible for taking appropriate action for the protection of the child.

N.C.G.S. § 48-20(c) (1991).

anteed by the federal and state constitutions, was violated by the trial court's extensive inquiry into plaintiffs' religion and remanded "for proceedings free from unwarranted religious inquisition into the beliefs of the parties." *Id.* at 725, 433 S.E.2d at 778.

Defendants appealed to this Court, contending the judgment of the Court of Appeals involved a substantial question arising under the First Amendment of the United States Constitution and Article I, § 13, of the North Carolina Constitution in that it purported "to protect the rights of religious freedom of the Plaintiffs/Appellees, yet ignores that the religious beliefs and practices of the Plaintiffs/Appellees are extremely different from the beliefs of the biological parents, the Defendants/Appellants." Defendants' second contention was that the judgment involved a substantial question arising under the First and Fourteenth Amendments and Article I, §§ 1 and 19, of the North Carolina Constitution in that it deprived defendants of their right to custody and control of their child, including control over his associations. Defendants argued that this issue, raised in the trial tribunal and in their brief in the Court of Appeals, was erroneously ignored by that court. Plaintiffs moved pursuant to Rule 14(b)(2) to dismiss the appeal for lack of a substantial constitutional question, but this Court denied the motion. *Petersen v. Rogers*, 335 N.C. 239, 439 S.E.2d 150 (1993). This Court also granted defendants' petition for discretionary review, *id.*, which set forth the same contentions as the notice of appeal.

[1] For reasons which follow, we conclude that defendants' constitutionally-protected paramount right to custody, care, and control of their child, including control over his associations, outweighed plaintiffs' interests, including their right to freedom of religion. Therefore, inquiry into plaintiffs' religious beliefs, if error, was harmless. Consequently, we reverse the decision of the Court of Appeals.

Discussing protection of the family unit, the United States Supreme Court has said:

> The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "*It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply*

> *nor hinder.*" *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 558-59 (1972) (emphasis added). In *Stanley*, the Court found repugnant to the Due Process and Equal Protection Clauses a state's dependency proceeding in which putative fathers were presumed unfit to raise their children. The Court recognized that under Illinois law

> legal custody is not parenthood or adoption. A person appointed guardian in an action for custody and control is subject to removal at any time without such cause as must be shown in a neglect proceeding against a parent. He may not take the children out of the jurisdiction without the court's approval. He may be required to report to the court as to his disposition of the children's affairs. Obviously then, even if [the putative father] were a mere step away from "custody and control," to give an unwed father only "custody and control" would still be to leave him seriously prejudiced by reason of his status.

Id. at 648-49, 31 L. Ed. 2d at 557 (citations omitted). The Court concluded that the interest of the State in caring for children of a putative father is de minimis if the father "is shown to be a fit father." *Id.* at 657-58, 31 L. Ed. 2d at 562.

Recently the Court revisited the question of parental rights, stating as follows:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly,

> "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.

Reno v. Flores, — U.S. —, —, 123 L. Ed. 2d 1, 18 (1993) (citation omitted).

North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in *Stanley*. In cases involving conflict over custody this Court has repeatedly emphasized the strength and importance of the right. In *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965), a mother and putative father disputed who should have custody of their child. The trial court found (i) both parties and their spouses were fit and suitable persons to have care and custody of the child and (ii) it was in the child's best interest that custody be awarded to his putative father for the nine months of the school year and to his mother for the other three months, with visitation privileges for each parent during the other's custody interval. On appeal, speaking for a unanimous court, Justice Sharp said as follows:

> "It is well settled law in this State, and it seems to be universally so held, that the mother of an illegitimate child is its natural guardian, and, as such, has the legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child." *Browning v. Humphrey*, 241 N.C. 285, 287, 84 S.E.2d 917, 918; *accord, Wall v. Hardee*, 240 N.C. 465, 82 S.E.2d 370; *In re Cranford*, 231 N.C. 91, 56 S.E.2d 35; *In re McGraw*, 228 N.C. 46, 44 S.E.2d 349; *In re Foster*, 209 N.C. 489, 183 S.E. 744; *In re Shelton*, 203 N.C. 75, 164 S.E. 332; *In re Jones*, 153 N.C. 312, 69 S.E. 217; 10 Am. Jur. 2d, *Bastards* § 60 (1963); 3 Lee, *North Carolina Family Law* § 224 (3d ed. 1963).

Id. at 713-14, 142 S.E.2d at 595. Justice Sharp also stated that having found the mother fit, the trial court could not award custody to the putative father. Further, "[t]he mother being of good character and able to provide for her child, *the finding of the judge that it is in the best interest of the child that he remain in the home of respondents for nine months during the year is not controlling.*" *Id.* at 715, 142 S.E.2d at 596 (emphasis added). The Court's examination of the para-

mount custody right of the mother of an illegitimate child illustrates the strength of the right of natural parents as against others: Although a trial court "might find it to be in the best interest of a legitimate child of poor but honest, industrious parents" that his custody be given to a more affluent person, such a finding "could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time" with the more affluent person. *Id.* Instead, "parents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances. So it is with the paramount right of an illegitimate's mother." *Id.* at 715-16, 142 S.E.2d at 596.

In a case decided before *Jolly*, the Court discussed the common-law basis for parents' paramount right to custody: "Because the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not an absolute right. The welfare of the child is the crucial test. *When a parent neglects the welfare and interest of his child, he waives his usual right to custody.*" *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961) (emphasis added).

Similarly, the Court of Appeals, after *Stanley*, recognized that parents' paramount right to custody includes the right to control their children's associations: "So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate." *Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716, *disc. rev. denied*, 293 N.C. 360, 238 S.E.2d 149 (1977); *accord Moore v. Moore*, 89 N.C. App. 351, 365 S.E.2d 662 (1988).

Citing *Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986), plaintiffs argue that "North Carolina recognizes the right of a minor child to be placed in the custody of the person or entity which will meet that child's best interests." Further, plaintiffs argue that as to parents' custodial rights, our law recognizes no more than a "higher evidentiary standard" which must apply in custody disputes between parents and those who are not natural parents; but "the welfare of the child is paramount to all common law preferential rights of the parents." In light of *Flores*, *Stanley*, and the principles enunciated in *Jolly* and *Hughes*, we explicitly reject these arguments. We hold that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount

right of parents to custody, care, and control of their children must prevail. Language to the contrary in *Best v. Best*, 81 N.C. App. at 342, 344 S.E.2d at 367, is hereby expressly disavowed.

In the instant case, the trial court's findings included the following:

> 11. [Defendant] Pamela Rogers has since November, 1988 consistently and continuously attempted to set aside her consent to give up her child for adoption.
>
> 12. [Defendant] William Rowe is a resident of Michigan who has never been a resident nor a visitor to North Carolina, except to answer these court proceedings which attempted to set aside his parental rights. William Rowe has attempted to legitimate his son on several occasions and has never denied the paternity of his child. [Defendant] Pamela Rogers, the mother of this child, has affirmed that William Rowe is the father of this child. William Rowe, nevertheless, subjected himself to a blood test and the blood grouping reflected that the probability that William Rowe is the father of [the child] is 99.92% more likely than an unrelated male in the United States. *William Rowe is the biological father of [this child].*
>
> . . . .
>
> 23. The Michigan home study reflects that [defendants] Rogers and Rowe are fit and appropriate persons to have custody of their son [name omitted].
>
> . . . .
>
> 25. [Name omitted] is a child who is not eligible for adoption; the rights of his parents have not been terminated; and his parents have not consented to any such adoption.

(Emphasis added.)

There was no finding that defendants had neglected their child's welfare in any way. Based on the record, defendants' paramount right to custody of their minor child had to prevail; and the trial court could not award custody to anyone other than defendants. Since as a matter of law the trial court could not award custody to plaintiffs, inquiry into their fitness for purposes of custody was irrelevant. Therefore, error, if any, in the extent of inquiry into this issue was harmless.

[2] Defendants also contend plaintiffs have no right to visitation or to file an action requesting visitation under N.C.G.S. § 50-13.1. We agree.

The statute provides as follows:

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C.G.S. § 50-13.1(a) (Supp. 1993).

The Court of Appeals considered the application of this statute in *Ray v. Ray*, 103 N.C. App. 790, 407 S.E.2d 592 (1991). In *Ray*, plaintiff, the paternal step-grandmother of a minor child, sought visitation and named as defendants the child's biological parents, who were married but living apart. The trial court granted defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6). The trial court's order included the following reasoning:

> The Court has considered the argument of counsel for plaintiff that allowing an amendment to the pleadings to claim a specific "right" to visitation under 50-13.1 would remedy any defect in her pleadings; and specifically rejects plaintiff's argument that the legislature intended to overturn the general case law which asserts that, with specific statutory exceptions, the parents with lawful custody of a child have the prerogative of determining with whom their children shall associate (*Moore v. Moore*, 89 N.C. App. 351).
>
> The legislature has carved out specific exceptions for both "biological grandparents" and "adoptive grandparents," and has made no other exceptions for non-biological, non-adoptive "step-grandparents," particularly where the relationship by affinity has terminated by divorce or, as in this case, by death of the biological relative on whom the affinity depends.
>
> Nor is the Court persuaded, as counsel for plaintiff argues, that G.S. 50-13.1 was ever intended by the legislature to confer upon strangers the right to bring custody or visitation actions against the parents of children unrelated to [those strangers].

> Such an interpretation would nullify any need for G.S. 50-13.2(b1) and 50-13.2A, neither of which [has] been repealed.

Id. at 792, 407 S.E.2d at 593.

The Court of Appeals agreed with defendants' argument that North Carolina law grants to parents who have lawful custody of their children the prerogative of determining with whom their children associate. However, the court held that by changing N.C.G.S. § 50-13.1(a) so that it included the right to bring an action for visitation, the legislature changed the law of *Acker v. Barnes* and *Moore v. Moore*. The court stated, "We note that this subject may involve constitutional issues relating to the substantive due process interests in the care and custody of one's children. As neither party has brought the issue before this Court, we do not address it." *Id.* at 793, 407 S.E.2d at 593-94. Concurring separately, Judge Eagles emphasized "that the amended version of G.S. 50-13.1 undermines the traditional prerogative of parents to determine with whom their minor children associate. In my view, the Legislature did not intend this result when it amended the statute." *Id.* at 794, 407 S.E.2d at 594.

We agree with the reasoning of the trial court in *Ray* that N.C.G.S. § 50-13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers. Such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children. For these reasons, we expressly disavow language in *Ray* indicating that the statute changed the paramount right of parents.

In the instant case, the trial court's order awarding custody included a conclusion that there should be no visitation with plaintiffs "except as may be consented to and approved by [defendants]." Since this conclusion manifestly accords with law protecting parents' constitutionally paramount right to custody, care, and control of their children, the trial court did not err in reaching it.

Accordingly, the Court of Appeals' decision is reversed and this case remanded to that court for further remand to the District Court, Orange County, for reinstatement of the trial court's order.

REVERSED.

STATE OF NORTH CAROLINA v. ALGERIO STEFFON CARSON

No. 431A93

(Filed 29 July 1994)

1. Homicide § 280 (NCI4th)— first-degree felony murder—firing into occupied vehicle—sufficiency of evidence

The State presented sufficient evidence for the jury to conclude that defendant personally fired the shot that inflicted the fatal wound upon the victim so as to support defendant's conviction of first-degree felony murder based upon the predicate felony of firing into an occupied vehicle, notwithstanding the caliber of the fatal bullet could not be determined and the fatal bullet could not be identified as being among those recovered, where the evidence tended to show that both .25-caliber and .38-caliber bullets were recovered from the truck in which the victim was killed; the jury could find that defendant fired .25-caliber bullets at the truck as it exited the upper level parking lot of an apartment complex and fired .38-caliber bullets into the truck on the lower level parking lot; defendant admitted firing a .38-caliber revolver into the truck at the time the fatal wound was inflicted on the lower level; and defendant was the only person firing into the truck at the time the victim was killed.

Am Jur 2d, Homicide § 442.

2. Assault and Battery § 31; Homicide § 478 (NCI4th)— aggravated assault—instruction on transferred intent—no unconstitutional presumption

The trial court's instruction on the doctrine of transferred intent as it related to a charge of assault with a deadly weapon with intent to kill inflicting serious injury did not permit the jury to apply an unconstitutional presumption against defendant.

Am Jur 2d, Assault and Battery § 18; Homicide § 502.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Downs, J., at the 30 November 1992 Criminal Session of Superior Court, Buncombe County, upon jury verdicts of guilty of first-degree felony murder and discharging a firearm into an occupied vehicle. Defendant's motion to bypass the Court of Appeals as to an additional verdict of

guilty of assault with a deadly weapon with intent to kill was allowed by the Supreme Court on 20 October 1993. Heard in the Supreme Court 11 May 1994.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

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

MEYER, Justice.

On 6 July 1992, a Buncombe County grand jury indicted defendant Algerio Steffon Carson for the murder of Walter Samuel Rice and for assault with a deadly weapon with intent to kill inflicting serious injury upon Lois Elaine Wallin. On 3 August 1992, the grand jury also indicted defendant for discharging a firearm into occupied property, a vehicle occupied by Rice and Wallin. Defendant was tried capitally at the 30 November 1992 Criminal Session of Superior Court, Buncombe County. The jury found defendant guilty of first-degree murder under the felony murder rule, guilty of assault with a deadly weapon with intent to kill, and guilty of discharging a firearm into an occupied vehicle. On 11 December 1992, Judge Downs entered judgments sentencing defendant to consecutive terms of life imprisonment for the first-degree murder conviction and five years' imprisonment for the assault conviction. The conviction for discharging a firearm into an occupied vehicle was merged with the first-degree murder conviction; thus, there was no additional sentence imposed for, and defendant does not appeal from, that conviction.

Defendant brings forward two assignments of error. First, he contends the trial judge erred when he denied defendant's motion to dismiss for insufficiency of the evidence because the State failed to prove that defendant personally inflicted the murder victim's fatal wound. Second, he argues that the trial court's jury instruction on the doctrine of transferred intent permitted application of an unconstitutional conclusive presumption in the jury's consideration of the assault charge. We conclude that defendant's assignments of error are without merit.

The evidence taken in the light most favorable to the State showed the following. On 20 December 1991, Terri Roberson; her sister, Lois Wallin; and Wallin's boyfriend, "Sammy" Rice, left Cowboy's Nightlife bar to purchase some cocaine. Roberson drove the threesome to Deaverview Apartments in her black Ford Ranger truck.

Deaverview apartment complex is divided into an upper and lower level. Each level has its own separate, noncontiguous entrance, and a footpath connects the upper and lower levels of the complex.

Roberson drove into the upper level of the complex in search of a drug dealer. Roberson and Rice got out of the truck; Wallin remained inside. Roberson told Sharee Lynch that she wanted to buy some cocaine, and Lynch directed her to a man standing nearby. Roberson testified that she had $220.00 in her back pocket. She removed $60.00 from her pocket and told the man to get two or three needles and syringes. The man left to get the syringes.

Roberson testified that the man returned with one syringe and wanted $5.00 for it. Roberson refused to pay the asking price because it was too high. The next thing Roberson knew, she had been hit and knocked to the ground in front of the truck. She discovered that her money was gone and heard gunshots in the lower part of the apartment complex.

Sharee Lynch stated to the police that defendant ran up from the lower level of the complex and shot at Roberson's truck just after the altercation on the upper level. Roberson and Rice jumped into the truck and Roberson drove out of the parking lot. According to Lynch, defendant was still shooting at the truck as Roberson drove out of the upper level parking lot. Lynch heard bullets hitting the side of the truck. She heard defendant shoot six times and then watched him reload the gun.

Roberson drove out of the upper level of the complex and into the parking lot of the lower level. Rice sat on the passenger side of the truck, and Wallin sat in the middle. Roberson parked in front of her brother's apartment. According to Roberson, she left Rice and Wallin waiting in the truck while she went into her brother's apartment to borrow his shotgun. She testified, "I'd been robbed, and I was going to kill somebody, or hurt them." Roberson admitted that she was drunk and "ranting and raving."

While inside her brother's apartment, Roberson heard four or five gunshots outside. Roberson ran outside and opened the driver's door to find her sister slumped over in the driver's seat, with Rice lying on top of her. Both Rice and Wallin had been hit by gunfire. Roberson heard Rice struggling to breathe, and he died soon thereafter.

Wallin testified that while Roberson was in her brother's apartment, two black men, one short and one tall, came down the hill to

the truck. She later identified the short man as defendant and the tall man as Theodis Burgin. She testified that Burgin leaned part of his body inside the passenger window and began hitting Rice in the chest. She and Rice tried to push Burgin out of the window. Wallin stated that Burgin stepped aside, and she saw defendant standing there with a gun. According to Wallin, defendant was the only man with a gun. She recalled that the gun "just went off, bam, bam, bam, bam," and she saw smoke. Rice pushed Wallin over in the seat. Wallin received grazing bullet wounds to her wrist and back. No bullets were recovered from her body.

In his statement to the Asheville Police Department, defendant confessed to firing three shots from a black .38-caliber revolver into the truck in the lower level of the complex:

> As far as a robbery, I don't know anything about it, except stories that I have heard about. We were having a party, and I was in the house, and I heard some guns—gunshots. Three people were shooting at the bottom of the hill and two people were standing—were shooting at the top of the hill. I came outside of the apartment I was in, which was Wanda Brown's. I shot two times in the air. I then went back inside and reloaded the two shells I shot.
>
> Someone came inside and said that there was a fight up on the hill. I went up there and I saw Sherri [sic] up there saying, "I need a hit."
>
> We went back down the hill. The truck which I think was a black—I think it was black with a red line and gray on the bottom was parked down across from where the party was. I saw a girl who was white and a dude who was also white inside the truck. They were just sitting inside the truck. A dude named Boo, also known as Theodis Burgin, started hitting the white man in the face a couple of times. We moved out of the way, and I was standing behind him, and I started shooting. I shot three times with a .38 which was black with brown handle. I heard the window bust and the guy said "Stop it," so I stopped shooting. Also think the woman said, "Stop it." There was a bunch of people shooting.

Dr. Richard Landau, the pathologist who performed the autopsy on Rice, testified that Rice received two gunshot wounds. Landau could not determine the order in which the two wounds occurred. Nor could he determine the caliber of the bullets or type of gun that was used to inflict the wounds.

Landau testified that the fatal wound was caused by a bullet that entered Rice's right back area and exited his left shoulder. The bullet followed a right-to-left and slightly upward path, passing through the victim's right lung, vertebral column, aorta, and major vessels in the left lung. Landau concluded that Rice bled to death as a result of this wound. He did not recover the bullet that caused the fatal wound.

The nonfatal wound was caused by a bullet that entered Rice's right upper abdomen at the rib cage but did not penetrate any vital organs. Black pigmentation around the wound led Landau to conclude that this wound was a contact wound, a close wound inflicted four to six inches from the body. Landau removed from Rice's body the bullet responsible for the nonfatal wound and gave it to the Asheville Police Department.

The entrance to the fatal wound measured about 1.0 centimeter, and the entrance to the nonfatal wound measured 1.5 centimeters.

An Asheville Police Department evidence technician recovered bullets from the vehicle in the following locations: one on the driver's floorboard, one from the bottom of the driver's door at the accessory pocket, one from the fabric at the top of the driver's door, three from among the broken glass at the bottom interior of the passenger door, one from the front left tire, and one from the tailgate.

The evidence technician observed broken glass on the seat and floorboard. She observed three bullet holes in the exterior of the passenger door, one below the door handle, and two close to the passenger-side mirror. None of the bullets found in the passenger side door penetrated the passenger compartment. The evidence technician concluded that the bullets found in the interior of the driver's door were fired from the interior of the truck or through the window.

Eugene Bishop, the State's expert in forensic firearms identification, identified the projectiles recovered from the nonfatal wound and from the floorboard as .38-caliber bullets. He determined that these two bullets and the bullet found in the accessory pocket of the driver's door had been fired from the .38-caliber revolver recovered during the investigation of Rice's murder.

Bishop identified two projectiles recovered from the passenger side door as .25-caliber bullets, which could not have been fired by the .38-caliber revolver recovered during the investigation. However, he did determine that the two bullets were fired from the same .25-caliber weapon. Fragments composing the third bullet found inside

the passenger side door had the same land and groove markings as the .25-caliber bullets, but Bishop could not determine their caliber.

Bishop was also unable to determine the caliber of the deformed bullets recovered from the top of the driver's door, front tire, and tailgate. He also noted that bullets lose weight as they penetrate objects.

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

[1] In his first assignment of error, defendant contends that the trial court erroneously denied defendant's motion to dismiss made at the close of all the evidence and after the return of the verdict of guilty of felony murder. Defendant argues that the State's evidence was insufficient as a matter of law to convict him of first-degree felony murder. Defendant acknowledges that the State presented sufficient evidence to support an inference that defendant fired the shot that inflicted the *nonfatal* wound upon Rice. However, he asserts that the State failed to produce substantial evidence that defendant personally fired the shot that inflicted the *fatal* wound upon Rice, a finding necessary to support the jury's verdict of guilt under the court's instructions to the jury. We disagree.

The law concerning challenges to the sufficiency of evidence in criminal trials is well settled. Upon a defendant's motion to dismiss based on insufficiency of the evidence, a trial judge shall " 'determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense.' " *State v. Mlo*, 335 N.C. 353, 368-69, 440 S.E.2d 98, 105 (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)), *cert. denied*, —— U.S. —— , 129 L. Ed. 2d 841, 1994 WL 194303 (1994). If both criteria are met, then a trial judge may properly deny a motion to dismiss. *Id.*

"Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). Evidence is not substantial if it arouses only a suspicion about the facts to be proved, even if the suspicion is strong. *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983).

Additionally, when considering a motion to dismiss based on insufficiency of evidence,

> "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and

> every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

Defendant asserts that the State's evidence was insufficient to show that defendant personally fired the fatal shot or that any of his acts "caused or directly contributed to the death" of Rice. *State v. Luther*, 285 N.C. 570, 573, 206 S.E.2d 238, 240 (1974); *State v. Horner*, 248 N.C. 342, 349, 103 S.E.2d 694, 699 (1958). The evidence presented at trial established that three .38-caliber bullets were recovered: one from the body of Rice, which caused the nonfatal wound; one from the floorboard; and one from the accessory pocket of the driver's door. The firearms expert testified that he did not test the .38-caliber bullets for the presence of blood. He testified when asked that he did not see any foreign material, such as "hair, human dermatitis [sic], or blood," on the bullet found in the floorboard. Defendant contends that there is no proof that any of the three .38-caliber bullets caused the fatal wound. We conclude that there was substantial evidence from which the jury could have reasonably inferred that defendant fired the bullet that killed Rice.

Defendant was convicted of first-degree felony murder based on the predicate felony of firing into an occupied vehicle. "A defendant may properly be found guilty of first-degree felony murder where he knowingly engages in the commission of a dangerous felony and where a killing takes place." *State v. Reese*, 319 N.C. 110, 145, 353 S.E.2d 352, 372 (1987).

Evidence taken in the light most favorable to the State showed that defendant fired at Roberson's truck on two separate occasions. First, according to the testimony of Lynch, defendant fired at the truck as it was exiting the upper level parking lot. Lynch testified that she heard bullets strike the truck. A rational trier of fact could have determined that this activity accounts for the .25-caliber bullets found in the frame of the door and the other fragments that did not penetrate the passenger compartment of the truck. Second, according to the testimony of Wallin and to defendant's own confession, defendant was firing into the truck when Rice's fatal wound was inflicted. Defendant admitted firing a .38-caliber revolver on this second occa-

sion. Thus, a rational trier of fact could have inferred that defendant fired at the truck with a .25-caliber weapon on the upper level and fired into the truck with a .38-caliber weapon on the lower level, reconciling the physical evidence of two different types of bullets found in the truck.

The State presented Wallin's testimony of the events that happened on the lower level indicating that defendant was the only person with a gun and that he fired into the truck several times. Defendant's own confession indicates that he was the only one firing into the truck when Rice was killed and that he was firing a .38-caliber weapon. Roberson stated that she heard four or five shots while she was inside her brother's apartment. The jury could have reasonably inferred that defendant shot the .38-caliber revolver more than three times because two witnesses indicated that at least four shots were fired. From this evidence, the jury could have inferred that one of those bullets caused the fatal wound but was never recovered or that the unidentified deformed bullet found at the top of the driver's door was a .38-caliber bullet and that it inflicted the fatal wound. The jury might also have inferred that the .38-caliber bullet found in the floorboard caused the fatal wound, though it was not tested for the presence of blood and the firearms expert saw no foreign matter on it. Thus, the jury could have easily inferred that defendant personally inflicted the fatal wound.

The State's forensic firearms identification expert testified that bullets lose weight as they penetrate objects. Defendant's confession indicates that he heard glass break as he was shooting. From this evidence, a rational trier of fact could have inferred that the fatal shot lost weight as it passed through glass and into Rice's body, therefore accounting for the difference in size between the fatal and nonfatal entrance wounds. A rational trier of fact could have also reasonably inferred that the nonfatal wound, which was determined to have been fired by defendant's .38-caliber revolver, could have been fired after the fatal wound and thus would not have gone through the glass.

We conclude that the jury could have reasonably concluded that the fatal wound was personally inflicted by defendant as he shot the .38-caliber revolver into the truck.

From this evidence, a rational trier of fact could have determined that during the commission of the felony of firing into the vehicle occupied by Rice and Wallin, defendant fatally shot Rice, proximately causing his death. Thus, this evidence, when viewed in the light

most favorable to the State, sufficiently supports the jury's finding of guilty of first-degree felony murder. Therefore, we affirm the trial court's denial of defendant's motion to dismiss for insufficiency of evidence.

[2] Defendant's second assignment of error is a preservation issue by which he contends the trial court erred in instructing the jury on the doctrine of transferred intent as related to the assault charge. Defendant invites this Court to revisit and set aside its holding in *State v. Locklear*, 331 N.C. 239, 415 S.E.2d 726 (1992) (no presumption of any kind arose where the trial court merely fulfilled its duty by explaining the well-established doctrine of transferred intent as it applied to the assault charged). As this issue has previously been determined contrary to defendant's contention and defendant offers no argument that persuades us to reverse our holding in *Locklear*, we decline to readdress that issue here and find no error.

In summary, we conclude that defendant received a fair trial, free from prejudicial error. Accordingly, we affirm the judgments for first-degree felony murder and for assault with a deadly weapon with intent to kill.

NO ERROR.

STATE OF NORTH CAROLINA v. GREGORY STEWART LYNCH

No. 48A93

(Filed 29 July 1994)

1. Evidence and Witnesses § 293 (NCI4th)— first-degree murder—testimony of prior breaking or entering charge—no probable cause finding—admissible

The trial court did not err in a first-degree murder prosecution by admitting testimony by the victim's twelve year old son that he had awakened at 5:00 a.m. on a morning prior to the day of the murder when he heard an intruder in the house, he had recognized defendant as the intruder, had climbed out a window and gone to the home of a neighbor, who called the police, and defendant had been charged with felonious breaking or entering, but a district court judge found no probable cause. Defendant has not been acquitted of the crime for which he was previously

charged, the State may proceed against him on that charge, and he is not entitled to the protection provided by *State v. Scott*, 331 N.C. 39.

Am Jur 2d, Evidence § 410.

Admissibility of evidence as to other offense as affected by defendant's acquittal of that offense. 25 ALR4th 934.

2. Evidence and Witnesses § 3003 (NCI4th)— first-degree murder—prior conviction ten years and one month old—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence that defendant had been convicted of aggravated robbery in Colorado on 14 June 1974 where defendant was released from prison and parole on 19 July 1982 and this trial began on 17 August 1992, approximately ten years and one month after defendant was released from prison. Although N.C.G.S. § 8C-1, Rule 609(b) provides that a witness cannot be questioned on cross-examination about a previous conviction if more than ten years has elapsed since the date of the conviction or the date of release from confinement unless the court determines in the interests of justice that the probative value of the conviction substantially outweighs its prejudicial effect, the court focused on the importance of the evidence in attacking the credibility of the defendant, balanced this importance against the danger of prejudice to the defendant, and extended the time for the admission of the evidence for only a short period.

Am Jur 2d, Witnesses § 577.

Right to impeach credibility of accused by showing prior conviction, as affected by remoteness in time of prior offense. 67 ALR3d 824.

Construction and application of Rule 609(b) of Federal Rules of Evidence, setting time limit on admissibility of evidence of conviction of crime to attack credibility of witness. 43 ALR Fed. 398.

3. Evidence and Witnesses § 2993 (NCI4th)— first-degree murder—impeachment of State's witness—prior p.j.c.—excluded

The trial court did not err in a first-degree murder prosecution by denying defendant the use of an assault conviction to

impeach a State's witness where defendant's attorney asked the witness if he had been convicted of assault, the witness answered that he had not been convicted but had been found not guilty, and defendant's attorney attempted to introduce a court record which did not show a verdict but said "PJ cont and costs remitted" and "[h]ave no contact with each other." Under N.C.G.S. § 15A-101(4a), prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment. The phrase "[h]ave no contact with each other" is ambiguous; there was nothing "more" on the record to keep the statute from applying.

Am Jur 2d, Witnesses § 570.

4. Evidence and Witnesses § 694 (NCI4th)— first-degree murder—cross-examination of deputy—nothing to show what answer would have been

There was no error in a first-degree murder prosecution where defendant twice attempted to ask a deputy on cross-examination whether the initial report in a domestic investigation is sometimes not true, objections were sustained, and defendant then asked if that was because people are nervous and upset and afraid, sometimes because they are not telling the truth, to which the deputy answered "It's possible." Although defendant argues that it is apparent what the answers to the first questions would have been, there is nothing in the record to show what the response would have been and it is by no means apparent that the witness would have answered as defendant desired. The answer to the third question was equivocal and defendant was not prejudiced by its exclusion.

Am Jur 2d, Appeal and Error § 604, Trial §§ 129, 130.

5. Evidence and Witnesses § 173 (NCI4th)— first-degree murder—testimony by victim's twelve-year-old son—fear when defendant entered house on prior occasion

The court did not err in a first-degree murder prosecution by admitting testimony from the victim's twelve-year-old son that his state of mind when the defendant entered the house on a prior occasion was "fear." Although the jury had probably concluded on its own that the witness was in fear when he fled the house, the testimony was relevant to prove matters other than the character of the defendant in that it was relevant to rebut defendant's

contention that he was in the house with the consent of the victim, the testimony served to corroborate testimony indicating that defendant had threatened the victim, and it demonstrated the state of the familial relationship in the period immediately preceding the murder.

Am Jur 2d, Evidence §§ 556 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Saunders, J., at the 17 August 1992 Criminal Session of Superior Court, Rutherford County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 12 April 1994.

This is the second time this case has been in this Court. In *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), we granted the defendant a new trial after he had received a death sentence upon his conviction of first degree murder.

At the second trial of this case, there was evidence in the form of testimony from several witnesses that the defendant stabbed his estranged wife to death in the parking lot of Spindale Mills on 21 June 1986. He was convicted of first degree murder. Pursuant to a recommendation by the jury, the defendant was sentenced to life in prison.

The defendant appealed.

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, for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the admission of testimony by the victim's twelve year old son that on 19 May 1986, at 5:00 a.m., he was in his mother's house when he heard someone in the house. He recognized the defendant as the intruder. He climbed out a window and went to the home of a neighbor who called the police. As a result of that incident, the defendant was charged with felonious breaking or entering, but a district court judge found no probable cause.

The defendant says it was prejudicial error to admit testimony of this incident. In our first opinion in this case, we said, "[w]hen a hus-

band is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will toward the victim." *Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). We held that the testimony by the victim's son was admissible as "some evidence of defendant's malice, intent and ill will toward his victim[.]" *Lynch*, 327 N.C. 210, 220, 393 S.E.2d 811, 816.

The defendant nevertheless, relying on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), contends this testimony should have been excluded. In *Scott*, we held that the State may not introduce in a criminal trial evidence of a prior offense for which a defendant has been acquitted. We based this holding on the proposition that the presumption of innocence continues with the defendant after his acquittal and so erodes the probative value of the evidence of the previous crime that it is more prejudicial than probative, making it inadmissible under N.C.G.S. § 8C-1, Rule 403.

Scott is distinguishable from this case. Its rationale is based on the defendant's acquittal of a prior crime. The defendant in this case has not been acquitted of the crime for which he was previously charged. No probable cause was found by a district court. N.C.G.S. § 15A-612 provides:

> **Disposition of charge on probable-cause hearing.**
>
> . . . .
>
> (b) No finding made by a judge under this section precludes the State from instituting a subsequent prosecution for the same offense.

The State may proceed against the defendant on the previous charge and he is not entitled to the protection provided by *Scott*. This assignment of error is overruled.

[2] The defendant next assigns error to the admission of evidence that he had been convicted of aggravated robbery in Colorado. The defendant was convicted of this charge on 14 June 1974. He was released from prison and parole on 19 July 1982. The trial of this case commenced on 17 August 1992, approximately ten years and one month after the defendant was released from prison. The defendant contends it was in violation of N.C.G.S. § 8C-1, Rule 609(b) to allow this testimony.

N.C.G.S. § 8C-1, Rule 609(b) provides that a witness cannot be questioned on cross-examination about a previous conviction if a period of more than ten years has elapsed since the date of the conviction or of the date of release from confinement imposed for the conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. We have said that Rule 609(b) "rests upon a rebuttable presumption that prior convictions more than ten years old tend to be more prejudicial to a defendant's defense than probative of his general character for truthfulness[.]" *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 164 (1991) (quoting *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)).

The State gave the defendant written notice pursuant to Rule 609 that it would question him on cross-examination in regard to the Colorado conviction. The defendant made a motion *in limine* to exclude questioning in regard to this conviction and the court conducted a hearing on this motion. At the conclusion of the hearing, the court found "that the ten-year period contemplated by 609(b) began to run on or about July 17, 1982 and had not expired on the date of the indictment, July 21, 1986, and therefore its use is not barred by 609(b)."

The court then assumed that the ten year period of Rule 609(b) ran until the date of the trial and found facts based on this assumption. It found that it had been represented to the court that one defense would be diminished capacity. Another defense would be voluntary intoxication with both these defenses used to negate premeditation and deliberation. The court found further in regard to these defenses that the defendant's statements to mental health experts and the jury would be difficult to rebut because they would originate with the defendant. It was important to the State to be able to impeach the defendant's credibility. Robbery is a crime of dishonesty because it involves taking someone's property. Evidence of a conviction for robbery is a factor in determining credibility. The court allowed the admission of the testimony based on these findings.

The State does not contend that the running of the ten year period of Rule 609(b) was tolled from the date the defendant was indicted in this case. We must determine whether the court made sufficient findings to support the admission into evidence of the Colorado convictions.

The defendant contends that the court failed to make adequate findings of fact and to engage in the delicate balancing process required by Rule 609(b). He says the evidence of the robbery had little probative value for impeachment but was extremely prejudicial to him.

In determining whether the evidence was admissible, the court focused, as directed by Rule 609(b), on the importance of the evidence in attacking the credibility of the defendant and balanced this importance against the danger of prejudice to the defendant in admitting this evidence. We hold that on the facts of this case, the court did not commit error. The evidence would have been admissible only one month earlier if it had been offered at that time. The court extended the time for the admission of this evidence for only a short period. The defendant had testified he had killed his wife, but he did not mean to do it. The prejudicial effect of evidence of a crime of violence such as armed robbery should not have been as great in this case in which the defendant admitted to a violent attack upon the victim. The defense that he did not know what he was doing depended on the defendant's credibility and increased the importance of the State's evidence on credibility. Rule 609(b) tolls the application of the ten year rule while the defendant is in prison for the conviction. We can conclude from this that the General Assembly felt that evidence of a prior conviction does not become less reliable while the witness is in prison. Although the time the defendant has been incarcerated on the charge in this case is not covered by Rule 609(b), it is a period which the General Assembly has determined does not make the evidence of the conviction less reliable.

It was not error to admit this evidence. This assignment of error is overruled.

[3] The defendant next assigns error to the refusal of the court to let him impeach a witness with a record of the witness' conviction for assault. The victim's brother testified for the State. On cross-examination, the defendant's attorney asked him if he had been convicted of assaulting Mary Ellen Miller. The witness answered that he had not been convicted, but had been found not guilty on this charge. The defendant's attorney then attempted to impeach the witness by introducing a court record which showed the witness was charged with assaulting Mary Ellen Miller. The court document showed he pled not guilty. There was not a verdict shown on the document but it said "PJ cont and costs remitted." It also said, "[h]ave no contact with

each other." The court held that the court record did not show a verdict had been entered and would not allow the defendant to use it to impeach the witness.

The defendant argues that the court could not have ordered a prayer for judgment continued unless it had found the defendant guilty and it was error under Rule 609(a) not to let him impeach the witness with this document. N.C.G.S. § 15A-101(4a) says:

> Entry of Judgment.—Judgment is entered when sentence is pronounced. Prayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment.

Under this section, the court did not enter a judgment unless the phrase "[h]ave no contact with each other[,]" which was on the court document, is something "more" which would keep this section from applying. The phrase is ambiguous. If it means the defendant and the prosecuting witness should have no contact with each other, the court could not bind the prosecuting witness not to seek out the defendant. We hold there was nothing "more" on the record to keep this section from applying. The record did not show a conviction and it was not error to deny the defendant the use of this record.

This assignment of error is overruled.

[4] The defendant next assigns error to the sustaining of objections to three questions asked on cross-examination of Chief Deputy Floyd Laughter of the Rutherford County Sheriff's Department. In order to prove premeditation and deliberation, the State introduced evidence of prior threats by the defendant to the victim. Mr. Laughter testified that the victim had told him the defendant had told her he would have her killed.

On cross-examination, the defendant elicited testimony from Mr. Laughter that he had investigated hundreds of domestic violence cases. The defendant then propounded to Mr. Laughter the following two questions to which objections were sustained.

> Q. Well, sometimes in domestic investigations, because of the nature of domestic relations, the initial report you get about something is not true; isn't that right?
>
> . . . .
>
> Q. Do you sometimes find out in a domestic investigation . . . that the initial report doesn't square with what you learned as part of your separate investigation?

Mr. Laughter had testified that the victim was nervous and upset when he interviewed her in regard to the defendant's threat to her. The following colloquy then occurred between the defendant's attorney and the witness:

> Q. Sometimes it's because people are nervous and upset and scared, like you described. Isn't that right?
>
> A. Yes.
>
> Q. And sometimes it's because they're not telling a police officer the truth; isn't that right?
>
> A. It's possible.
>
> MR. LEONARD: Objection.
>
> THE COURT: Well, that's speculative. Sustained.

The defendant contends it was error to sustain the objections to these three questions. There is nothing in the record to show what the response of the witness would have been if he had been allowed to answer the first two questions. We are not able to determine if the defendant was prejudiced by the exclusion of the answers. The defendant says it is apparent what the answers would have been and the record is adequately preserved for review. *State v. Hester*, 330 N.C. 547, 411 S.E.2d 610 (1992). It is by no means apparent to us that the witness would have answered as the defendant wanted him to answer. We cannot rule favorably to the defendant on this question. *State v. Simpson*, 314 N.C. 359, 334 S.E.2d 53 (1985). As to the third question, the witness answered "[i]t's possible" before the court sustained the objection. We know what the answer would have been. In light of the equivocal nature of the witness' answer, the defendant was not prejudiced by the exclusion of this testimony. This assignment of error is overruled.

[5] The defendant's last assignment of error deals with the testimony of the victim's son. When he was testifying in regard to leaving his mother's house after the surreptitious entry by the defendant, he was asked what was his state of mind at that time. He said, "[f]ear."

The defendant says the testimony by this witness that he was in fear when he climbed out the window of his mother's house was not relevant to any issue in the case and it only went to prove the defendant's character and that he acted in conformity therewith. He says the testimony should have been excluded pursuant to N.C.G.S. § 8C-1,

Rule 404(a). *See State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987) and *State v. Slade*, 71 N.C. App. 212, 321 S.E.2d 490 (1984).

It should have added very little to the knowledge of the jury for the witness to say he was in fear when he fled from the house when he found the defendant in it. The jury had probably concluded on its own that this was so. Nevertheless, this testimony was relevant to prove matters at issue other than the character of the defendant.

Whether the witness' fear at the time of the entry was for his own safety or the safety of his mother, it was relevant to rebut the defendant's contention that he was in the house with the consent of the victim. Further, the witness' feeling of fear served to corroborate the testimony of witnesses indicating the defendant had threatened the victim and demonstrates the state of the familial relationship in the period immediately preceding the murder. This assignment of error is overruled.

NO ERROR.

NISSAN DIVISION OF NISSAN MOTOR CORPORATION IN U.S.A. v. FRED ANDERSON NISSAN, PAUL S. MEEKER AND MEEKER LINCOLN-MERCURY, INC.

No. 422PA93

(Filed 29 July 1994)

Automobiles and Other Vehicles § 187 (NCI4th); Notice § 4 (NCI4th)— relocation of automobile dealership—objection by franchisor—registered or certified mail—U.S. Mail required

The requirement of N.C.G.S. § 20-305(4) that a franchisor's objection to a proposed automobile dealership relocation be sent "by registered or certified mail, return receipt requested" refers exclusively to the delivery service offered by the U.S. Mail and not to a private delivery service that provides a signed receipt. Therefore, Nissan's objection to defendant's proposed relocation of its dealership was invalid under N.C.G.S. § 20-305(4) where it was delivered by Federal Express rather than by the U.S. Mail,

and Nissan waived objection by failing to send proper notice to defendant within the time provided in the statute.

Am Jur 2d, Automobiles and Highway Traffic §§ 150 et seq.; Notice §§ 5-12, 32-40.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchisees. 82 ALR4th 624.

Justice FRYE concurring in part, dissenting in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 111 N.C. App. 748, 434 S.E.2d 224 (1993), reversing a judgment entered by Stephens, J., on 15 June 1993, in the Superior Court, Wake County. Heard in the Supreme Court on 10 May 1994.

Smith, Helms, Mullis & Moore, by David M. Moore and James L. Gale; Latham & Watkins, by Maureen E. Mahoney, for the plaintiff-appellee.

Johnson, Gamble, Mercer, Hearn & Vinegar, by Richard J. Vinegar, for the defendant-appellant Fred Anderson Nissan.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Michael D. Meeker, for Paul S. Meeker and Meeker Lincoln-Mercury, Inc., intervenor-appellants.

Harry H. Harkins, Jr., for North Carolina Automobile Dealers Association, amicus curiae.

MITCHELL, Justice.

The controlling facts in this case are not in dispute. In December of 1981, Fred Anderson Nissan (hereinafter "Anderson") entered into a "Nissan Dealer Sales and Service Agreement" (hereinafter "agreement") with the Nissan Division of Nissan Motor Corporation. Under the terms of the agreement, Anderson was to obtain written consent from Nissan prior to relocating the dealership.

In March of 1991, Anderson learned that Paul Meeker, the owner and sales operator of Meeker Lincoln-Mercury, Inc., was interested in selling his facility located at 252 Patton Avenue in Asheville, North Carolina. On 24 May 1991, Anderson, having outgrown its location at 585 Tunnel Road in Asheville, entered into an "Asset Sales Agree-

ment" with Meeker, which would have enabled Anderson to move to the Patton Avenue site. This agreement was conditioned on Anderson's ability to obtain approval from Nissan for the relocation. Nissan, having heard of Anderson's relocation plans, sent Anderson a letter dated 24 May 1991 informing the dealership that it opposed the move. Anderson replied by letter dated 29 May 1991 that it was merely considering the relocation. Then, on 3 July 1991, Nissan again informed Anderson by letter that it opposed the relocation.

On 3 October 1991, pursuant to N.C.G.S. § 20-305(4), Anderson's general manager personally delivered written notice to Nissan of Anderson's intention to relocate. Nissan continued to oppose the relocation. Nissan sent its notice of objection by Federal Express within the 30-day period prescribed by N.C.G.S. § 20-305(4).

On 27 November 1991, Anderson filed a petition for a hearing with the Commissioner of Motor Vehicles. *See* N.C.G.S. § 20-305(4) (1993). In its petition, Anderson alleged that Nissan's objection to Anderson's proposed dealership relocation was invalid under N.C.G.S. § 20-305(4) since it was delivered by private delivery service rather than U.S. Mail. Anderson also moved for summary judgment, contending that Nissan had waived any objection to the relocation by failing to serve Anderson with proper notice. The hearing officer granted Anderson's motion for summary judgment on the basis that Nissan's service of notice by private delivery service was insufficient. Nissan appealed to the Superior Court, Wake County, and on 13 April 1992 Judge Donald W. Stephens affirmed the hearing officer's decision granting Anderson's motion for summary judgment.

Nissan appealed to the Court of Appeals which reversed the decision of the Superior Court. The majority concluded that "where the controlling statute does not specifically require United States mail, delivery by Federal Express, which provides a signed receipt verifying delivery, is registered mail within the meaning of the statute." *Nissan Motor Corp. v. Fred Anderson Nissan*, 111 N.C. App. 748, 756, 434 S.E.2d 224, 229 (1993). Judge Wells did not "agree that the General Assembly intended to include Federal Express mail" under N.C.G.S. § 20-305(4). *Id.* at 757, 434 S.E.2d at 229. Judge Wells nevertheless concurred, reasoning that it was unnecessary even to consider that question since he could not "discern any harm or prejudice to [Anderson] from [Nissan's] failure to follow the statutory directive in sending its letter." *Id.* We reverse.

Anderson contends that the Court of Appeals erroneously concluded that notice by a private delivery service that provides a signed receipt constitutes "registered or certified mail, return receipt requested" in accordance with N.C.G.S. § 20-305(4). We agree.

Only a few courts in other jurisdictions have considered whether Federal Express constitutes mail. The United States Courts of Appeal for the Fifth and Seventh Circuits have held that it does not. *Audio Enterprisers v. B & W Loudspeakers*, 957 F.2d 406 (7th Cir. 1992); *Prince v. Poulos*, 876 F.2d 30 (5th Cir. 1989). Further, we have found no appellate decision, other than the decision filed by the Court of Appeals in this case, that has held that Federal Express or any other private delivery service constitutes "registered or certified mail."

Traditionally, we have strictly construed notice statutes. *See, e.g., Guthrie v. Ray*, 293 N.C. 67, 235 S.E.2d 146 (1977); *In re Harris*, 273 N.C. 20, 159 S.E.2d 539 (1968); *S. Lowman v. Ballard & Co.*, 168 N.C. 16, 84 S.E. 21 (1915). N.C.G.S. § 20-305(4) provides, in pertinent part:

> No franchise may be . . . relocated . . . unless the franchisor has been given at least 30 days' prior written notice as to the . . . location and site plans of any proposed relocation. The franchisor shall send the dealership notice of objection, *by registered or certified mail, return receipt requested*, to the proposed . . . relocation . . . within 30 days after receipt of notice from the dealer . . . . Failure by the franchisor to send notice of objection within 30 days shall constitute waiver by the franchisor of any right to object to the proposed . . . relocation . . . .

(Emphasis added.) We conclude that the General Assembly intended for the phrase "registered or certified mail, return receipt requested" to refer exclusively to the delivery service offered by the U.S. Mail and not to notice delivered by any private delivery service. Strictly construing the above statute, we conclude that Nissan has waived any objection to Anderson's proposed relocation.

Nissan directs our attention to what it deems to be the "first sentence" of the notice requirement of N.C.G.S. § 20-305(4)—"The franchisor shall send the dealership notice of objection, by registered or certified mail, returned receipt requested, to the proposed . . . relocation . . . within 30 days after receipt of notice from the dealer . . . ." Nissan contends that this "first sentence" does not expressly require that notice be sent through the U.S. Mail and, therefore, notice sent through private delivery services is proper under the statute. Nissan

argues that the General Assembly easily could have inserted language that would have provided for exclusive use of the U.S. Mail if it had intended for franchisors to send notice exclusively in this manner.

Nissan cites the opinion of the Court of Appeals in *Warzynski v. Empire Comfort Systems*, 102 N.C. App. 222, 401 S.E.2d 801 (1991), which held that the phrase "any form of mail," as used in N.C.G.S. § 1A-1, Rule 4(j3) relating to service of process in foreign countries includes Federal Express. But this decision does not alter our conclusions in the present case.

It is clear that, in adopting N.C.G.S. § 20-305(4), our legislature intended for "mail" to refer solely to U.S. Mail. The phrase "registered or certified mail, return receipt requested" specifically denotes a mailing privilege offered by the U.S. Mail for a certain fee. One reasonable purpose for requiring notice by registered or certified mail is to distinguish the manufacturer's notice of objection from the correspondence that dealers receive daily from their franchisors by Federal Express and regular U.S. Mail. The dealership will be made aware of the notice if it is sent in an exclusive manner.

Nissan next focuses on what it terms the "second sentence" of the notice requirement of section 20-305(4): "Failure by the franchisor to send notice of objection within 30 days shall constitute waiver by the franchisor of any right to object to the proposed . . . relocation . . . ." Nissan contends that the "first sentence" of the notice requirement refers both to the manner of sending notice and the timing of the notice. The "second sentence," however, refers only to the timing of the notice. Nissan therefore argues that as long as the notice of objection is timely, failure to deliver the notice in the manner prescribed in the "first sentence" will not constitute waiver.

In support of its interpretation, Nissan notes that the Supreme Court of the United States interpreted provisions of the Miller Act (which required subcontractors to deliver written notice to contractors before suing on a performance bond) in a similar fashion. *See Fleisher Engineering and Construction Co. v. United States*, 311 U.S. 15, 16, 85 L. Ed. 12, 14 (1940) (reasoning that Congress had drawn a "distinction . . . between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice"). We find no such distinction between the timing requirement in the "first sentence" and manner of notice in the "second sentence" of the requirement for notice to the dealership contained in N.C.G.S. § 20-305(4). Instead, we conclude that the leg-

islature meant for the "second sentence" to refer back to the first. The "second sentence" therefore requires that notice of objection must be sent in the manner prescribed by the "first sentence." Use of the word "shall" evidences the intention that the franchisor send notice to its dealer by U.S. Mail ("registered or certified mail, return receipt requested") and U.S. Mail only. If a franchisor sends notice through a private delivery service within the prescribed time, the notice is still invalid. We do not find *Fleisher* persuasive, and we are not compelled to follow the method of statutory interpretation preferred by the Supreme Court of the United States when we are interpreting state law.

Nissan was required to use the U.S. Mail when sending notice of its objection to the relocation of the Anderson dealership. Since the language of the statute requires that notice be sent through "registered or certified mail, return receipt requested" and provides that failure to do so "shall constitute waiver," Nissan waived any objection to Anderson's proposed relocation by sending its notice by Federal Express.

For the foregoing reasons, we conclude that the Court of Appeals erred in holding that notice by a private delivery service that provides a signed receipt constitutes notice by "registered or certified mail, return receipt requested" in accordance with N.C.G.S. § 20-305(4). The decision of the Court of Appeals is reversed and this case is remanded to that court for further remand to the Superior Court, Wake County, for reinstatement of the summary judgment for the defendants.

REVERSED AND REMANDED.

Justice FRYE concurring in part, dissenting in part.

I agree with the majority that the Court of Appeals erred in concluding that notice by Federal Express constitutes mail within the meaning of N.C.G.S. § 20-305(4). I conclude however, as did Judge Wells in the Court of Appeals, that defendant has suffered no prejudice here. I therefore dissent from that portion of the majority opinion holding that because plaintiff sent its notice of objection through Federal Express rather than U.S. Mail it has waived any objection to defendant's proposed relocation.

The purpose of the North Carolina Motor Vehicle Dealers and Manufacturers Licensing Law is to address the historical disparity in

the bargaining positions between manufacturers and dealers and to provide some protection for local dealers and the public from abuse of the franchise system by manufacturers. N.C.G.S. § 20-285 (1993); *American Motors Sales Corp. v. Peters*, 311 N.C. 311, 317 S.E.2d 351 (1984); *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 243 S.E.2d 793 (1978), *rev'd in part on other grounds*, 296 N.C. 357, 250 S.E.2d 250 (1979). As noted by Judge Wells in his concurring opinion in the Court of Appeals, the purpose of the notice requirement of section 20-305(4) is "to prevent franchisors from stonewalling proposed dealership changes or modifications by not responding to the dealer's request or proposal." *Nissan Motor Corp. v. Fred Anderson Nissan*, 111 N.C. App. 748, 756, 434 S.E.2d 224, 229 (1993). In this case, this purpose was attained, although there was not strict adherence to the statute as we have now interpreted it. On 3 October 1991, defendant personally delivered to plaintiff notice of its intent to relocate. Plaintiff responded indicating its opposition to the proposed relocation by a letter dated 31 October 1991, which was delivered by Federal Express on 1 November 1991. Further, the record indicates that one of plaintiff's representatives telephoned defendant's general manager on 1 November to confirm that the notice was received and read. Defendant confirmed receipt of the notice. On 27 November 1991 defendant filed its petition for a hearing which was held on 6 January 1992. Thus, this dealer received a timely response to its request to relocate and consideration of this request—through a hearing pursuant to section 20-305(4)—took place without delay.

The only consequence of plaintiff's use of Federal Express was that defendant most likely received notice of plaintiff's objection sooner than if the notice had been delivered by U.S. Mail. At no time has defendant contended that plaintiff's response was not promptly received. In fact, it was in response to plaintiff's notice of opposition to the relocation that defendant requested a hearing. Under these circumstances, I conclude that defendant suffered no harm as a result of plaintiff's sending its notice of objection to the relocation by Federal Express rather than by U.S. Mail as we now determine the statute requires.

STATE OF NORTH CAROLINA v. TONY PIPKINS

No. 335PA93

(Filed 29 July 1994)

Constitutional Law § 184 (NCI4th)— possession of cocaine—trafficking in cocaine—same act—not double jeopardy

Defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine, based on the same contraband, do not violate the principles of double jeopardy because an examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately. Under *State v. Gardner*, 315 N.C. 444, examining *Elockburger v. United States*, 284 U.S. 299, where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court in a single trial may impose cumulative punishments under the statutes. N.C.G.S. § 90-95(a)(3) combats the perceived evil of individual possession of controlled substances and N.C.G.S. § 90-95(h)(3) is intended to prevent the large-scale distribution of controlled substances to the public; because the perceived evils these statutes attempt to combat are distinct, the legislature's intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession. Certain conflicting holdings from the Court of Appeals are overruled.

Am Jur 2d, Criminal Law §§ 279 et seq.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, 111 N.C. App. 458, 434 S.E.2d 251 (1993), which found no error in defendant's conviction for trafficking in cocaine, vacated a judgment entered upon his conviction for felonious possession of cocaine, and vacated and remanded for resentencing a judg-

ment entered upon his conviction for maintaining a vehicle for drug purposes, all judgments entered by Barefoot, J., at the 6 July 1991 Criminal Session of Superior Court, Franklin County. Heard in the Supreme Court 16 March 1994.

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

Larry E. Norman for defendant-appellee.

WHICHARD, Justice.

On 19 December 1991 an officer of the Franklin County Sheriff's Department executed a search warrant on a duplex in Louisburg, North Carolina. When the officers arrived at the duplex, the door was ajar. Someone inside yelled that the police were coming. Seven or eight people fled through the back door. Several persons who were still inside were secured by the officers.

A search for contraband drugs then began. Officers found defendant hiding in a bedroom closet. They secured defendant; two officers then searched the bedroom and the closet. Inside the closet they found several bags of cocaine, which weighed 53.8 grams. They also found on defendant's person a container of an unknown amount of cocaine.

Defendant was convicted of trafficking in cocaine by possession and felonious possession of cocaine based on the same contraband, the 53.8 grams of cocaine found in the closet. He also was convicted of intentionally maintaining a vehicle for the purpose of keeping or selling a controlled substance. He received a ten-year term of imprisonment for the trafficking offense and a consecutive two-year term for the remaining convictions, which were consolidated for judgment.

Defendant appealed to the Court of Appeals, which held that he could not be punished for both felonious possession of cocaine and trafficking in cocaine based on the same contraband. The Court of Appeals thus vacated defendant's conviction for felonious possession of cocaine. Because the felonious possession conviction was consolidated with the maintaining a vehicle conviction for sentencing purposes, the maintaining a vehicle conviction also was vacated, and that case was remanded for resentencing. We allowed the State's petition for discretionary review on 7 October 1993.

The sole issue is whether defendant's convictions and punishments for trafficking in cocaine by possession and felonious posses-

sion of cocaine, based on the same contraband, violate the principles of double jeopardy. We hold that they do not and accordingly reverse the Court of Appeals.

Defendant correctly argues that the crimes of felonious possession of cocaine and trafficking in cocaine by possession require one act, that of possession, and because the same cocaine is the basis for both convictions, the elements the State must prove are the same for both. The only difference is the amount of cocaine required by the statutes for conviction of the offenses. N.C.G.S. § 90-95(a)(3), the basis for defendant's conviction of felonious possession, provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> . . . .
>
> (3) To possess a controlled substance.

N.C.G.S. § 90-95(a)(3) (1993). N.C.G.S. § 90-95(h)(3)(a), the basis for defendant's conviction of trafficking in cocaine by possession, provides:

> (3) Any person who . . . possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:
>
> a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000)[.]

N.C.G.S. § 90-95(h)(3)(a) (1993). According to defendant, because he received multiple punishments for the same conduct, his right to protection from double jeopardy found in the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution—*see State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972)—has been violated. We disagree.

In *Gardner*, we examined the United States Supreme Court's decisions in this area—specifically *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, and its progeny—and noted: "[T]he Supreme Court of the United States has held that, where a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court *in a single trial* may impose

cumulative punishments under the statutes." *State v. Gardner*, 315 N.C. 444, 453, 340 S.E.2d 701, 708 (1986) (quoting *State v. Murray*, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984)); *see Missouri v. Hunter*, 495 U.S. 359, 365-68, 74 L. Ed. 2d 535, 542-44 (1983). Our task, therefore, is to determine the legislature's intent in creating the separate offenses of felonious possession of cocaine and trafficking in cocaine by possession. *See State v. Perry*, 316 N.C. 87, 102-04, 340 S.E.2d 450, 459-61 (1986) (examining legislative intent and holding that the offenses of possessing, manufacturing, and transporting heroin, based on the same contraband, may be punished separately).

An examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the offenses are based on the same conduct. *See Gardner*, 315 N.C. at 461, 340 S.E.2d at 712. The subject of this legislation is controlled substances. The legislature premised the enactment of the North Carolina Controlled Substances Act on the determination that controlled substances are detrimental to the public. *See State v. Coffey*, 65 N.C. App. 751, 760, 310 S.E.2d 123, 129-30 (1984). N.C.G.S. § 90-95(a)(3), by its language, protects the public by prohibiting any person from possessing any amount, large or small, of a controlled substance. The policy determination underlying this statute is that the possession by any person of any amount of controlled substances is against the public's interest, presumably because it enhances the potential for use of the substance, either by the possessor or by a person to whom the possessor distributes it.

In contrast, N.C.G.S. § 90-95(h)(3), which was added by amendment in 1979, was "responsive to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." *Perry*, 316 N.C. at 102-03, 340 S.E.2d at 460 (quoting *State v. Anderson*, 57 N.C. App. 602, 606, 292 S.E.2d 163, 165, *disc. rev. denied*, 306 N.C. 559, 294 S.E.2d 272 (1982)). Unlike N.C.G.S. § 90-95(a)(3), which combats the perceived evil of individual possession of controlled substances, section (h)(3), by its language, is intended to prevent the large-scale distribution of controlled substances to the public. Because the perceived evils these statutes attempt to combat are distinct, we conclude that the legislature's intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession. *See State v. Steward*, 330 N.C. 607, 411 S.E.2d 376 (1992) (defendant could be convicted of and sentenced for both trafficking

in cocaine by possession and trafficking in cocaine by transportation when the same cocaine was involved in both offenses).

We note that in reaching its decision the Court of Appeals relied on its decisions in *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992) (separate punishments for misdemeanor possession of cocaine and trafficking by possession in the same cocaine held violative of double jeopardy principles), *cert. denied*, 333 N.C. 347, 426 S.E.2d 711 (1993), and *State v. Mebane*, 101 N.C. App. 119, 398 S.E.2d 672 (1990) (separate punishments for possession with intent to sell and deliver cocaine and trafficking in the same cocaine by possession held violative of legislature's intent). To the extent that our decision today conflicts with the Court of Appeals holdings in *Hunter* and *Mebane*, those decisions are overruled. Further, to the extent that our decision conflicts with *State v. Williams*, 98 N.C. App. 405, 390 S.E.2d 729 (1990), and *State v. Oliver*, 73 N.C. App. 118, 325 S.E.2d 682, *cert. denied*, 313 N.C. 513, 329 S.E.2d 401 (1985), those decisions also are overruled.

Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Franklin County, for reinstatement of the judgments entered upon defendant's convictions for felonious possession of cocaine and maintaining a vehicle for drug purposes.

REVERSED AND REMANDED.

Justice FRYE dissenting.

This case presents the issue of whether defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine, based on the same contraband, violate the principles of double jeopardy. The majority concluded that "an examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the offenses are based on the same conduct. *See Gardner*, 315 N.C. at 461, 340 S.E.2d at 712." Because I disagree with the majority's conclusion regarding the legislative intent in creating the separate offenses of felonious possession of cocaine and trafficking in cocaine by possession, I find it unnecessary to reach the constitutional question.

N.C.G.S. § 90-95(a)(3), the basis of defendant's conviction of felonious possession, provides:

> (a) Except as authorized by this Article, it is unlawful for any person:
>
> . . . .
>
> (3) To possess a controlled substance.

N.C.G.S. § 90-95(a)(3) (1993). The punishment for violating subsection (a)(3) is provided under subsection (d) which states that:

> *Except as provided in subsections (h) and (i) of this section*, any person who violates G.S. 90-95(a)(3) with respect to:
>
> (1) A controlled substance classified in Schedule I shall be punished as a Class I felon;
>
> (2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court. . . . If the controlled substance is . . . cocaine . . ., the violation shall be punishable as a Class I felony.

N.C.G.S. § 90-95(d)(1)(2) (1993) (emphasis added).

N.C.G.S. § 90-95(h)(3)(a), the basis of defendant's conviction of trafficking in cocaine by possession, provides that

> [a]ny person who sells, manufactures, delivers, transports, or *possesses 28 grams or more* of cocaine . . . shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:
>
> a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000)[.]

N.C.G.S. § 90-95(h)(3) (1993) (emphasis added).

It seems clear to me that by the language in G.S. § 90-95(d), "*except as provided in subsections (h) and (i) of this section,*" the legislature provided a punishment for possession of cocaine in amounts less than 28 grams. When the amount of cocaine exceeds 28 grams, however, the legislature intended that G.S. § 90-95(h)(3) apply and that a defendant be guilty of the felony known as "trafficking in cocaine." I find the language "*except as provided in subsections (h)*

and (i) of this section, to be strong evidence that the legislature did not intend that these offenses be punished separately but instead that the punishment set forth in G.S. § 90-95(d) would apply only when the punishment set out in G.S. § 90-95(h)(3) did not.

I agree fully with the majority opinion that the "policy determination underlying [N.C.G.S. § 90-95(a)(3)] is that the possession by any person of any amount of controlled substances is against the public's interest, presumably because it enhances the potential for use of the substance, either by the possessor or by a person to whom the possessor distributes it" and that N.C.G.S. § 90-95(h)(3) was "responsive to a growing concern regarding the gravity of the illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." (Citations omitted.) However, I do not agree that the statute as written provides for or that the legislature intended that a defendant be punished separately for the offenses of felonious possession of cocaine and trafficking in cocaine by possession of a specific amount of cocaine in one place at one time.

CHIEF JUSTICE EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM DAVIS WATKINS

No. 407A93

(Filed 29 July 1994)

Searches and Seizures § 80 (NCI4th)— investigatory stop—reasonable suspicion of criminal activity—anonymous tip—corroboration by officer

An officer had a reasonable suspicion of criminal activity to justify an investigatory stop of defendant's vehicle where a dispatcher received an anonymous tip that there was a suspicious vehicle at a well drilling business; the officer received a transmission on an official radio frequency stating that there was a "10-50" or "suspicious vehicle" behind the well drilling company; the officer was asked for assistance by an experienced deputy sheriff; the officer observed a car moving with its lights off in the company parking lot; and the time was 3:00 a.m., the area was

generally rural, and the officer knew that the specific locale was a business which was normally closed at that time. These observations by the officer were sufficient to corroborate the anonymous tip that there was a suspicious vehicle at the locale.

Am Jur 2d, Searches and Seizures §§ 51, 78.

Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.

Appeal by the State 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. 766, 433 S.E.2d 817 (1993), affirming an order granting defendant's motion to suppress entered by John, J., on 1 July 1992, in Superior Court, Rockingham County. Heard in the Supreme Court 17 March 1994.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State-appellant.

McNairy, Clifford & Clendenin, by Locke T. Clifford and Robert O'Hale, for defendant-appellee.

WHICHARD, Justice.

The State appeals from a decision of the Court of Appeals affirming an order granting a motion to suppress all of the evidence obtained by a law enforcement officer pursuant to his stop of defendant's vehicle. The trial court's findings of fact were not excepted to on appeal; therefore, they are not reviewable. *Brown v. Board of Education*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967); *see also State v. Perry*, 316 N.C. 87, 107, 340 S.E.2d 450, 462 (1986). The trial court found that:

1. On the early morning of February 11, 1990, the defendant was on the premises of the [Virginia Carolina] Well Drilling Company, hereafter referred to as "the company," with the permission of the owner/operator of the company, his friend Elbert Smith. The Well Company is located on the [Priddy] Loop Road, and is outside the city limits of the town of Stoneville.

2. The company had a recreational area with a cable tv set and a kitchen and bar which were used at night and on weekends by Mr. Smith and his friends, including the defendant. Some of these people lived in rural areas that were not served by cable and came to the company regularly with family members and friends to watch ball games, play cards, have fish fries, etc.

3. The defendant had been a regular visitor at the company for many years and was in the habit of coming to the company on a daily basis and sometimes staying until late at night.

4. There was an auto detailing business on the premises and it was not unusual for cars to be parked around the company during night or daylight hours.

5. Mr. Smith had given keys to several of his friends, including the defendant[,] so that they could use the recreational facilities at the company whenever they chose to do so.

6. On the night in question, Officer Norman E. Harbor of the Stoneville Police Department was in his police squad car and was monitoring the Rockingham County Sheriff's Department radio frequency. The Rockingham County Sheriff's Department provides dispatch/communication services to/for the Stoneville Police Department as well as for its own department, and both agencies communicate using the same frequency.

7. At approximately 3:00 a.m. Officer Harbor overheard a radio transmission from the dispatcher to Officer Robert E. Knight saying that there was a "10-50" behind the Virginia Carolina Well Drilling Company.

8. No evidence was introduced that tended to show:

a. The identity of the dispatcher.

b. The identity of the caller.

c. Whether the caller refused to identify himself/herself.

d. What description of the vehicle the caller gave, if any.

e. Any statements given the dispatcher by the caller to support the conclusion that it was a "10-50," or "suspicious" vehicle.

f. Whether the dispatcher knew or recognized the caller.

g. What, if anything, the dispatcher did to verify the believability of the caller.

h. What, if anything, the caller told the dispatcher was "suspicious" about the vehicle.

9. The "10-50" was understood by Officer Harbor to mean "suspicious vehicle[.]"

10. Officer Harbor had no idea who had made the call or whether the caller was a reasonable, believable or reliable person.

11. Officer Harbor was given no description of any alleged "suspicious vehicle" nor any information as to why any vehicle parked behind the company would be suspicious.

12. Deputy Robert Knight advised the dispatcher that he was a good distance away. Then Officer [Harbor] advised Deputy Knight of his location, which was at the Commer Road and the Settle Bridge Road, approximately five hundred feet away from the Virginia Carolina Well [Drilling] Company, and Deputy Knight asked Officer Harbor to assist him.

Officer Harbor proceeded to the company. There were "approximately" two or three vehicles on the premises when he arrived. When Officer Harbor arrived, he saw several buildings, one of which had a light on inside. He parked his car near the building with the light on and exited his car, and started toward the building.

13. Officer Harbor had driven past the Virginia Carolina Well Drilling Company on many occasions before, had seen cars parked on the premises and had never investigated any of the cars on prior occasions. Officer Harbor testified that it would be normal to see a few cars on the premises during day and night.

14. While he was outside his vehicle, he observed a car pull out of the company parking lot onto the Priddy Loop Road and drive away. The car's light[s] went on as [the car] turned onto Priddy Loop Road. There is no evidence that the defendant saw Officer Harbor before Officer Harbor turned on his blue light.

15. Officer Harbor then got in his car and followed the car turning on his blue light as he pulled out of the company parking lot and turned left onto Priddy Loop Road.

16. Officer Harbor testified that he believed that "at three o'clock in the morning" any vehicle at a "place of business that is closed normally" is a suspicious vehicle.

17. Officer Harbor testified that the car was "continually weaving" within its lane, but that "he never crossed the center line or go [sic] off the road". Officer Harbor testified that as he followed the car with the blue light on, the car was continually weaving within its lane, but that he never crossed the center line or went off the road.

18. Officer Harbor turned on his blue lights and stopped the car for the purpose of continuing his "10-50" investigation and not because of anything he observed about the defendant's driving.

19. Upon stopping the vehicle and having the driver, the defendant William Davis Watkins, exit the vehicle, Officer Harbor smelled alcohol on the defendant and asked him to perform some roadside sobriety tests, and thereafter arrested him for driving while impaired.

The single issue is whether, based on these findings, the trial court and the Court of Appeals properly concluded that Officer Harbor did not have a reasonable suspicion of criminal activity when he activated his blue light and decided to stop defendant's vehicle. We conclude that they did not, and we accordingly reverse.

The Fourth Amendment protects the "right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). It applies to seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle. *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893 (1980).

Only unreasonable investigatory stops are unconstitutional. *Terry v. Ohio*, 392 U.S. 1, 9, 20 L. Ed. 2d 889, 899 (1968). An investigatory stop must be justified by "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d

at 906; *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch." *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989).

Here, Officer Harbor received a transmission on an official radio frequency stating that there was a "10-50" or "suspicious vehicle" behind the Virginia Carolina Well Drilling Company. Deputy Robert Knight, a five-and-one-half-year veteran on the county force, asked Officer Harbor for assistance. Officer Harbor observed a car moving with its lights off in the company parking lot. The time was 3:00 a.m., the area was generally rural, and the specific locale was a business which Officer Harbor knew to be "closed normally" at that time. These observations by Officer Harbor were sufficient to corroborate the tip that there was a "suspicious vehicle" at the locale. An anonymous tip may provide the requisite reasonable suspicion for an investigatory stop if it is corroborated by independent police work on the scene. *Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990).

Defendant argues that the facts here are similar to those in *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), where the Court of Appeals held that officers acted unreasonably when they stopped and frisked a defendant merely because he had been standing in an open area between two apartment buildings and then chose to walk in a direction away from the officers. *Fleming*, however, is distinguishable, in that the officers there had only a generalized suspicion. Additionally, that incident occurred in Greensboro, an urban area, shortly after midnight, while the incident here occurred in a rural area at 3:00 a.m. The "unusual hour" is an appropriate factor for a law enforcement officer to consider in formulating a reasonable suspicion. *State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981).

The facts of this case are comparable to those in *State v. Fox*, 58 N.C. App. 692, 294 S.E.2d 410 (1982), *aff'd per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983). The court concluded that the officer there had a reasonable suspicion justifying a stop of a vehicle proceeding slowly on a dead-end street of locked businesses at 12:50 a.m. in an area with a high incidence of property crime. The defendant, who was driving, appeared to avoid the officer's gaze. Similarly, in *State v. Tillet and State v. Smith*, 50 N.C. App. 520, 274 S.E.2d 361, *appeal dismissed*, 302 N.C. 633, 280 S.E.2d 448 (1981), the court held that an

investigatory stop was justified by a reasonable suspicion in that the officer there was aware of reports of "firelighting" deer in the area and he saw a car entering a heavily wooded, only seasonally occupied area at approximately 9:40 p.m.

Like the officers in *Fox* and *Tillet*, Officer Harbor had a reasonable suspicion sufficient to justify a stop of defendant's vehicle. All of the facts, and the reasonable inferences from those facts, known to the officer when he decided to make the investigatory stop, would lead a reasonably cautious law enforcement officer to suspect that criminal activity was afoot. Officer Harbor received a dispatch from an official frequency stating that there was a "10-50" or "suspicious vehicle" behind the Virginia Carolina Well Drilling Company. A veteran officer requested his assistance. Officer Harbor then saw a vehicle driving with its lights off in the parking lot of a business which was normally closed at that hour. It was 3:00 a.m. in a rural area. We conclude that when these facts are considered as a whole and from the point of view of a reasonably cautious officer on the scene, the officer had a reasonable suspicion to detain defendant for a brief investigatory stop.

Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Rockingham County, for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF MORGAN SAMUEL WARD, III

No. 476PA93

(Filed 29 July 1994)

Incompetent Persons § 14 (NCI4th)— incompetency hearing— authority of clerk to reopen

The clerk of court had the authority to reopen an incompetency hearing where the respondent was in an automobile accident in Texas; he initially filed a suit in federal court; one of the defendants, Imperial Trucking Co., filed motions to dismiss on grounds including the two-year Texas statute of limitations; a

change of venue to a Texas federal court was granted; respondent took a voluntary dismissal without prejudice; respondent's attorney filed an incompetency petition in Durham; Imperial was not listed as an interested party and did not receive notice of the subsequent hearing; the Clerk in Durham entered an order ruling that respondent was incompetent as a result of the accident; respondent's attorney, acting as his guardian, filed suit in Texas state court against Imperial and its driver the day after the federal action was dismissed; Imperial then sought to have the incompetency hearing reopened; the Clerk in Durham reopened the hearing with the consent of the parties and determined that respondent had been incompetent since the date of the accident, but that the Clerk was without authority to declare him legally incompetent prior to the institution of the incompetency proceeding; and the Court of Appeals concluded that the order was null and void because the Clerk did not have authority to rehear the adjudication of incompetency. Although respondent contends that all interested parties were notified as set forth in N.C.G.S. § 35A-1109, the interest of the opposing party clearly falls within the intended scope of the statute and should be protected by notice to that party where a determination of incompetency may effect the tolling of an otherwise expired statute of limitations. And, although Imperial nominally filed its motion under N.C.G.S. § 35A-1207 and nothing in Chapter 35A expressly provides for the rehearing of an incompetency adjudication, this case is an appropriate one for application of N.C.G.S. § 1A-1, Rule 60(b) and the effect of the order is to treat the motion as one pursuant to Rule 60(b)(6).

Am Jur 2d, Incompetent Persons §§ 8-25.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a unanimous panel of the Court of Appeals, 112 N.C. App. 202, 435 S.E.2d 125 (1993), affirming an order dismissing petitioner's notice of appeal entered 11 August 1992 by Thompson, J., in Superior Court, Durham County. Heard in the Supreme Court 11 May 1994.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and Robert E. Levin, for petitioner-appellant, Imperial Trucking Co., Inc.

Constantinou Law Group, P.A., by John M. Constantinou, for respondent-appellee, Morgan Samuel Ward, III.

WHICHARD, Justice.

On 23 December 1987 respondent Morgan Samuel Ward, III, was in an automobile accident in Texas involving his U-Haul van and a tractor-trailer truck owned by petitioner Imperial Trucking Co., Inc. [hereinafter "Imperial"] and operated by its agent. Ward was injured, and on 26 January 1990 he filed suit in the United States District Court for the Middle District of North Carolina. Imperial filed a motion to dismiss based on lack of personal jurisdiction and on the expiration of the Texas two-year statute of limitations on personal injury claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (1986). Ward filed a motion to change venue. The court granted Imperial's motion to dismiss for lack of personal jurisdiction and, finding subject matter jurisdiction, granted Ward's motion for change of venue but declined to rule on the statute-of-limitations question. The court then transferred the case to the United States District Court for the Southern District of Texas, where on 13 November 1990 Ward took a voluntary dismissal without prejudice.

On 16 August 1990, prior to Ward's voluntary dismissal of the federal action, John Constantinou, Ward's attorney, filed a Petition for Adjudication of Incompetence and Application for Appointment of Guardian in Durham County, seeking to have the Clerk of Superior Court, James Leo Carr, declare Ward incompetent as of 23 December 1987, the date of the accident. Imperial was not listed in the petition as an interested party and did not receive notice of the subsequent hearing. On 11 October 1990, following the hearing, the Clerk entered an order ruling that Ward was rendered incompetent on 23 December 1987 as a result of the accident. The Clerk appointed Constantinou as Ward's guardian and ordered that he "be allowed to file a personal injury action for the ward without further permission from this Court."

The day after Ward voluntarily dismissed his federal action, Constantinou, as Ward's guardian, filed suit in Texas state court against Imperial and its driver seeking personal injury damages. Imperial first learned of the prior incompetency proceeding at that time. Imperial then sought to have the incompetency proceeding reopened in Durham County by filing a motion in the cause denominated as under N.C.G.S. § 35A-1207(a). On 10 October 1991 the Clerk ordered the proceeding reopened, stating that Constantinou, as Ward's guardian, had agreed to the rehearing. The order was signed by attorneys for both parties to reflect their consent. Following a hearing in March

1992, the Clerk entered an order on 12 June 1992 which stated that Imperial's motion pursuant to N.C.G.S. § 35A-1207 was filed improperly because that statute addresses guardianships and has no application to an original incompetency determination. The order then stated:

> The court finds, however, that the Guardian has consented to the motion, and that both the Petitioner and the Guardian have requested a full hearing on the merits, therefore, the court concludes in the interest of justice that the motion is properly before the court pursuant to Article I of G.S. 35A.

The Clerk found as fact that Ward had been incompetent since the date of the accident, but determined that he was without authority to declare Ward legally incompetent prior to the institution of the incompetency determination proceeding. He then decreed that Ward was incompetent on 16 August 1990, the date the original Petition for Adjudication of Incompetence was filed.

Imperial gave notice of appeal to the superior court. Ward, through his attorney, moved to dismiss the notice, and the superior court granted his motion. Imperial then appealed to the Court of Appeals, which affirmed the superior court. On 27 January 1994 we allowed Imperial's petition for discretionary review.

The issue is whether the Clerk had authority to reopen the incompetency proceeding and issue the order of 12 June 1992. If so, Imperial has the right to appeal to the superior court for a trial *de novo* pursuant to N.C.G.S. § 35A-1115, which provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." N.C.G.S. § 35A-1115 (1987). The Court of Appeals concluded that the order was null and void because the Clerk did not have the express authority under Chapter 35A, and therefore did not have jurisdiction, to rehear Ward's adjudication of incompetency. For reasons that follow, we hold that the Clerk had authority to reopen the proceeding, and, accordingly, we reverse the Court of Appeals.

The Clerk had original jurisdiction to appoint a guardian for Ward. N.C.G.S. § 35A-1203(a) (1987) ("Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, . . . and of related proceedings brought or filed under this Subchapter."). The issue thus is not one of jurisdiction, but of whether the Clerk could reopen the incompetency

proceeding, over which he clearly had jurisdiction under the foregoing statute, where an interested party was not notified of the original proceeding. Ward notes that all interested parties, as set forth in the statute, were notified. *See* N.C.G.S. § 35A-1109 (Supp. 1993) ("The petitioner, within five days after filing the petition, shall mail or cause to be mailed, . . . copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate . . . ."). Imperial was not notified because it was not one of Ward's next of kin and was not designated by the Clerk as an interested party.

Based on a purely literal reading of the statute, Ward is correct in contending that he followed the required notice procedure. Where a determination of the incompetency of a party to a lawsuit may effect the tolling of an otherwise expired statute of limitations, however, the interest of the opposing party clearly falls within the intended scope of the statute and should be protected by notice to that party of the hearing.

As the Court of Appeals held, and as Ward argues, nothing in Chapter 35A expressly provides for the rehearing of an incompetency adjudication. Imperial nominally filed its motion in the cause under N.C.G.S. § 35A-1207, which provides: "Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship." N.C.G.S. § 35A-1207(a) (1987). As the Clerk noted in his order, this statute does not relate to the original adjudication of incompetency; rather, its purpose is to allow for modifications of guardianship appointments or for orders as to other aspects of guardianship proceedings.

The lack of express authority in Chapter 35A for reopening the incompetency proceeding does not foreclose relief for Imperial, however. Though Imperial did not designate Rule 60(b) of the North Carolina Rules of Civil Procedure as the authority under which it sought relief, this case is an appropriate one for application of that rule, which provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b) (1990). Rule 60(c) authorizes the Clerk to exercise the powers Rule 60(b) grants to judges: "The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in section[] . . . (b). . . . Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law." *Id.* § 1A-1, Rule 60(c). The lack of notice to Imperial of the original incompetency proceeding would clearly justify granting it relief pursuant to Rule 60(b)(6). If Imperial had made a motion expressly pursuant to that rule, the Clerk would have been authorized to reopen the incompetency proceeding thereunder.

While the motion and order to reopen the proceeding denominate N.C.G.S. § 35A-1207 as the applicable statute, the effect of the order is to treat the motion as one pursuant to Rule 60(b)(6). It results in allowance of the motion to reopen the proceeding for a "reason justifying relief from the operation of the [order of incompetency]," Rule 60(b)(6), *viz*, "so that all interested parties shall have the right to be heard, offer evidence, examine and cross-examine any and all witnesses offered in support of the original Petition, and . . . contest that proceeding as it relates to the alleged incompetency, and the date of onset of any incompetency . . . ." The Clerk had authority under Rule 60(b) and (c)—especially in view of the consent of the parties—to reopen the proceeding for this altogether appropriate purpose. To deny the order this effect places form over substance. We thus treat the order as entered pursuant to Rule 60(b). So treated, N.C.G.S. § 35A-1115 authorized Imperial to appeal from the subsequent order

which resulted from the rehearing, and the Court of Appeals erred in affirming the superior court's dismissal of the appeal.

Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for reinstatement of petitioner's appeal from the Clerk's order and for other proceedings not inconsistent with this opinion. As to Imperial's remaining issues, we conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA v. JONATHAN McNEIL HORN

No. 552PA93

(Filed 29 July 1994)

Evidence and Witnesses § 2522 (NCI4th)— rape—mentally handicapped victim—requirement of psychological evaluation—no authority

The trial court erred in a prosecution for the sexual assault of a nineteen-year-old mentally handicapped female by appointing a licensed psychologist to examine the victim and directing the psychologist to testify if called as a witness. Although this Court has not addressed the question of whether a trial judge has the discretion to compel a victim to submit to a psychological examination in the context of an indictment alleging rape based solely upon the victim's mental condition, to allow a trial judge to compel the victim of a crime to submit to a psychological examination in the interest of a defendant's defense would violate the public policy designed to protect victims from further intrusion into their private lives and would discourage victims of crimes from reporting such offenses. The victim's rights to privacy and protection from further invasion and trauma are compelling, and this case does not call for a departure from precedent established by the Supreme Court. There are several alternatives available to the

trial judge should a victim refuse to voluntarily submit to a psychological examination necessary to a defendant's defense.

Am Jur 2d, Witnesses § 84.

Appealability of state criminal court order requiring witness other than accused to undergo psychiatric examination. 17 ALR4th 867.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution. 45 ALR4th 310.

On discretionary review pursuant to N.C.G.S. § 7A-31 upon the State's petition, and subsequent to denial of review by the Court of Appeals, of an order entered by Martin (Lester, P., Jr.), J., at the 11 October 1993 Criminal Session of Superior Court, Iredell County, requiring a victim of rape, sexual offense, and crimes against nature to submit to psychological testing. Heard in the Supreme Court 12 May 1994.

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

E. Bedford Cannon for defendant-appellee.

MEYER, Justice.

In January 1993, the Troutman Police Department and the Iredell County Sheriff's Department began an investigation of an alleged sexual assault of Sharon Andrews, a nineteen-year-old mentally handicapped female. After interviewing Andrews, officers obtained a warrant to search defendant Jonathan McNeil Horn's residence. Upon searching defendant's residence, officers seized a videotape depicting a number of male subjects engaged in various sexual acts with Andrews. Defendant then gave investigators a statement indicating his involvement in sexual acts with Andrews on several occasions.

On 17 May 1993, an Iredell County grand jury indicted defendant on two counts of second-degree rape, six counts of second-degree sexual offense, and two counts of crime against nature for performing sexual acts with Andrews, "who was at the time mentally defective."

Kay Dignan, a psychologist for the Winston-Salem/Forsyth County Schools, had previously examined Andrews when she was fifteen

years old. At that time, Dignan found Andrews to be mildly mentally deficient and that she possessed the IQ and visual-motor skills of a nine and one-half year old.

Prior to filing any charges, the Troutman Police Department asked psychologist Patrick Sullivan to examine Andrews. Sullivan concluded that Andrews was mentally handicapped. He found her to be mildly mentally retarded, severely emotionally immature, and easily influenced and manipulated.

During pretrial discovery, the State provided copies of both psychological evaluations to defendant.

On 11 October 1993, defendant filed a motion for appointment of an independent psychologist and requested that Andrews be ordered to submit to psychological testing. The motion was heard by Judge Lester P. Martin, Jr., at the 11 October 1993 Criminal Session of Superior Court, Iredell County. On 1 November 1993, Judge Martin entered an order appointing a licensed psychologist and directing her to examine Andrews and to testify, if called as a witness, concerning Andrews' mental capacity.

On 15 November 1993, the State applied to the Court of Appeals for a writ of certiorari, a writ of supersedeas, and an application for temporary stay. On 16 November 1993, the Court of Appeals granted the temporary stay. However, on 3 December 1993, the Court of Appeals dissolved the temporary stay and denied the petitions for writ of certiorari and supersedeas.

On 21 December 1993, this Court allowed the State's motion for temporary stay. On 27 January 1994, this Court allowed the State's petitions for writ of supersedeas and for writ of certiorari.

The sole question presented for review in this case is whether a trial judge may order a victim to submit to a psychological examination when the victim's mental status is an element of the crime. Defendant argues that an independent psychological evaluation is necessary to his defense since Andrews' mental deficiency is an element of second-degree rape and second-degree sexual offense. The State, however, contends that Judge Martin's order requiring Andrews to submit to psychological testing by an expert is void for lack of authority, and we agree.

This Court has previously held that a trial judge has neither statutory authority nor discretionary power to compel an unwilling wit-

ness to submit to a psychiatric examination. *See State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293 (1991) (trial judge has no statutory authority to order witness to undergo psychiatric evaluation; defendants suffered no prejudice from denial of their motions for independent psychiatric examinations of child witnesses since testimony of doctor performing prior evaluations available to defendants at trial), *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991); *State v. Liles*, 324 N.C. 529, 379 S.E.2d 821 (1989) (trial judge has no discretionary power to require psychiatric examination to determine witness' (a codefendant) competence as condition precedent to testifying); *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633 (1988) (no statutory authority gives defendant right to require prosecuting witness (child victim) to submit to psychological examination); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988) (trial judge has no discretionary power to order psychiatric evaluation to determine competency of the State's witness to a crime to testify at trial); *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982) (trial judge has no discretionary power to compel victim to submit to a psychiatric examination to determine her competency and reliability as a witness); *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978) (trial judge has no discretionary power to require victim to undergo psychiatric examination before being permitted to testify).

Looney and its progeny stand for the proposition that to compel a victim to submit to psychiatric examination constitutes "a drastic invasion of the witness' own right of privacy. To be ordered by a court to submit to such an examination is, in itself, humiliating and potentially damaging to the reputation and career of the witness." *Looney*, 294 N.C. at 27, 240 S.E.2d at 626. In *Looney*, we reasoned that "the possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them." *Id.* at 28, 240 S.E.2d at 627. In balancing the rights of the victim and the defendant, we noted that "zealous concern for the accused is not justification for a grueling and harassing trial of the victim." *Id.* at 27, 240 S.E.2d at 627.

In *State v. Clontz*, we recognized that " '[p]art of the reluctance of victims to report and prosecute rape stems from their feeling that the legal system harasses and humiliates them.' " 305 N.C. at 123, 286 S.E.2d at 797 (quoting *State v. Fortney*, 301 N.C. 31, 42, 269 S.E.2d

110, 116 (1980)) (emphasis omitted). We also noted that "[t]o order the victim of a sex crime to unwillingly submit to a psychiatric examination would result in a profound invasion of her privacy which, in our opinion, would deter innocent victims of such crimes from ever making complaints." *Id.*

Although this Court has not addressed the question of whether a trial judge has the discretion to compel a victim to submit to a psychological examination in the context of an indictment alleging rape based solely upon the victim's mental condition, public policy considerations remain the same in the present case. To allow a trial judge to compel the victim of a crime to submit to a psychological examination in the interest of a defendant's defense would violate the public policy designed to protect victims from further intrusion into their private lives and would discourage victims of crimes from reporting such offenses. The victim's rights to privacy and protection from further invasion and trauma are compelling, and this case does not call for a departure from precedent established by this Court. Therefore, we hold that a trial judge has no authority to order a victim to submit to a psychological examination when the victim's mental status is an element of the crime with which he is charged.

Furthermore, we believe that "so drastic a change in the criminal trial procedure of this State, if needed, should be brought about . . . by a carefully considered and drafted statute, not by our pronouncement leaving the matter to the unguided discretion of the trial judge." *Looney*, 294 N.C. at 28, 240 S.E.2d at 627.

We recognize, however, that the trial judge has a duty to protect defendant's rights by allowing him to present an adequate defense. We note that there are several alternatives available to the trial judge should a victim refuse to voluntarily submit to a psychological examination necessary to a defendant's defense.

One option is for the trial judge to allow the defendant to submit evidence rebutting the alleged victim's mentally deficient status. A defendant may employ the services of his own mental health expert to interpret and dispute the findings of psychological evaluations already performed on the victim. If the defendant is indigent, a trial judge may appoint a mental health expert to assist in his defense as allowed by N.C.G.S. § 7A-454. *See State v. Smith*, 315 N.C. 76, 101, 337 S.E.2d 833, 849 (1985) (doctor who had not actually examined victim allowed to testify based on his review of medical reports); *see also State v. Bonney*, 329 N.C. 61, 72-73, 405 S.E.2d 145, 151-52 (1991)

(without actually interviewing defendant, psychiatrist concluded and testified that defendant's expert may have incorrectly diagnosed defendant based on flaws in the expert's interviewing and testing techniques).

Alternatively, the trial judge may deny the admission of the State's proffered psychological evidence demonstrating the alleged victim's mentally deficient status. Further, the trial judge may even consider dismissing the case against the defendant if the defendant's right to adequately present a defense is imperiled.

In summary, we hold that a trial judge does not have the authority to order a victim to submit to a psychological examination, even when the victim's mental status is an element of the crime charged. The trial judge's order appointing a licensed psychologist to examine the victim and directing the psychologist to testify, if called as a witness, concerning the victim's mental capacity is hereby vacated. The case is remanded to the Superior Court, Iredell County, for further proceedings not inconsistent with this opinion.

ORDER VACATED; CASE REMANDED.

STATE OF NORTH CAROLINA v. STEVEN CLARENCE LEAZER, MICHAEL WAYNE MOORE

No. 398A93

(Filed 29 July 1994)

1. Evidence and Witnesses § 1731 (NCI4th)— videotape—removal of victim's body—relevancy

Where there was a question of fact concerning the presence of blood in elevator 4 in the cellblock in which a murder occurred, a videotape of the removal of the victim's body and its placement in elevator 2 was relevant to refute defendant inmates' suggestion that the blood came from the victim's body or from those who removed the body.

Am Jur 2d, Evidence §§ 979 et seq.

Admissibility of videotape film in evidence in criminal trial. 60 ALR3d 333.

2. Evidence and Witnesses § 284 (NCI4th)— murder of inmate—victim's murder convictions—not pertinent character trait of victim

In a prosecution of defendant inmates for the murder of a fellow inmate wherein defendants contended that another inmate killed the victim because he was afraid the victim would kill him, and the other inmate testified to this effect, evidence that the victim had twice been convicted of murder was not admissible under Rule 404(a)(2) as a pertinent character trait of the victim since neither defendant relied on self-defense or any other justifiable homicide which would have made the victim's character pertinent; and evidence that the victim had been convicted of two murders, in support of defendants' theory that another inmate killed the victim, would be more prejudicial than probative after the other inmate testified that he committed the murder but did not contend that he killed in self-defense.

Am Jur 2d, Evidence § 373.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant. 11 ALR5th 831.

3. Constitutional Law § 251 (NCI4th)— confidential informant—denial of motion for disclosure of identity—absence of prejudice

Defendant inmates were not prejudiced in their murder trial by the trial court's refusal to compel the State to reveal the name of a confidential informant who told an SBI agent that he saw defendants and two others enter the victim's cell, heard noise inside the cell, and saw the four men come out of the cell with one brandishing a knife or shank and another with blood on his shirt where the State furnished the name of the informant to defendants when it gave them a list of the witnesses it would call; the informant testified at the trial; and defendants could have determined the identity of the informant by interviewing the State's witnesses.

Am Jur 2d, Criminal Law §§ 778-780, 1002-1005.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer. 76 ALR2d 262.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by DeRamus, J., at the 19 October 1991 Criminal Session of Superior Court, Rowan County, upon a jury verdict of guilty of first-degree murder. The defendants' motion to bypass the Court of Appeals as to an additional judgment imposed for conspiracy was allowed 30 September 1993. Heard in the Supreme Court 10 May 1994.

Steven Clarence Leazer and Michael Wayne Moore, the defendants, and the victim, Rufus Coley Watson, were inmates at the Piedmont Correctional Center in Rowan County. On 13 May 1989, the body of Rufus Coley Watson was found in his cell. He died as the result of approximately twenty-one stab wounds. Bloody clothes, the weapon (a shank), fingerprints and an informant's tip led authorities to the defendants and several other inmates. The defendants and Watson were incarcerated for violent felonies and were serving extensive sentences. The defendants were found guilty of murder in the first degree. The jury could not reach a verdict as to sentencing and the defendants were sentenced to life in prison.

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

Thomas M. King for defendant-appellant Leazer.

J. D. Hurst for defendant-appellant Moore.

WEBB, Justice.

[1] The defendants first assign as error the trial court's decision admitting, over objection, a videotape of the crime scene including the removal of the body from the scene. The defendant relies upon North Carolina Rules of Evidence, Rules 401 and 403 in arguing that the videotape was irrelevant, inflammatory and that its probative value was greatly outweighed by the risk of unfair prejudice. N.C.G.S. § 8C-1, Rules 401 and 403 (1992); *see State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988).

The videotape in question was approximately six minutes in length; however, the objection only addresses the first three-minute segment. The videotape was a condensed version of some forty-five minutes of videotape filmed during the approximately ten hours of

on-site investigation. The contested portion of the condensed tape included footage of the body being turned over, placed in a body bag and on a stretcher, then the transporting of the body to one of the elevators for removal from the facility. The State asserted at trial that the videotape was relevant to illustrate the crime scene prior to the arrival of medical personnel. This included evidence not photographed by the still photographer, who arrived after medical personnel disturbed the scene, in an effort to ascertain the condition of the victim. Also, the videotape served to address a contested fact in the case involving blood found in elevator 4. The State asserted that "taking the body into elevator 2 is highly relevant in that it negates the possibility that the body or the personnel involved in [removing the body] could have caused the blood which was left in elevator number 4[.]"

The defendants are correct in asserting that "[e]vidence is relevant if it has a logical tendency to prove a fact in issue in the case[.]" *See State v. Sloan*, 316 N.C. 714, 343 S.E.2d 527 (1986). Recently, we reiterated the view 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. Jones, 336 N.C. 229, 243, 443 S.E.2d 48, 54 (1994) (quoting *State v. Arnold*, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973)). In the instant case, there was a question of fact regarding the presence of blood in an elevator in the cellblock in which the murder occurred. The defendants sought to undermine the State's case and enhance the defendants' theory of the case by suggesting that the blood in the elevator came from the removal of the body or from those charged with its removal. The primary means of refuting this suggestion was illustrative evidence indicating how the body was removed from the crime scene. In light of the contents of the videotape, the trial court determined correctly that the videotape was neither excessive nor cumulative evidence. *Hennis*, 323 N.C. 279, 372 S.E.2d 523. We find no error in the trial court's decision admitting the tape.

[2] The defendants next assign error to the court's exclusion from evidence of the fact that the victim had twice been convicted of murder. The court excluded this evidence on the ground it was irrelevant. The defendants' theory of the case was that Wendell Flowers, another inmate, had killed the victim because he was afraid the victim would kill him. Wendell Flowers testified to this effect.

The defendants say that this evidence should have been admitted under N.C.G.S. § 8C-1, Rule 404 which provides in part:

> (a) *Character evidence generally.*—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, except:
>
> . . . .
>
> (2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . . .

The defendants contend this section makes admissible the evidence of the former crimes.

This section deals with character evidence. Assuming that the victim's character could be proved by evidence of crimes he had committed, which is doubtful under *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 266 (1982) and *State v. Adams*, 90 N.C. App. 145, 367 S.E.2d 362 (1988), the evidence is not pertinent. Neither of the defendants relied on self-defense or any other justifiable homicide, which would have made the victim's character pertinent. Evidence of the fact that the victim had been convicted of two murders, in support of their theory that Wendell Flowers had killed the victim, would be more prejudicial than probative after Mr. Flowers had testified he committed the murder. Mr. Flowers did not contend that he killed in self-defense. Evidence that the victim had been previously convicted of two murders would have added little credence to the claim that Mr. Flowers had killed the victim, but could have prejudiced the State's argument that the defendants had murdered the victim.

This assignment of error is overruled.

[3] In their final assignment of error, the defendants challenge the court's refusal to compel the State to reveal the name of a confidential informant. During the investigation of the case, an agent of the State Bureau of Investigation procured a search warrant based in part

on an affidavit in which the SBI agent said that an informant had told him he had seen the defendants and two other persons enter the victim's cell, that he heard noise inside the cell and that he saw the four men come out of the cell with one brandishing a knife or shank and another with blood on his shirt.

The defendants made a motion to compel the State to disclose the name of the informant, arguing that the affidavit showed he was an eyewitness to the crime and it was necessary for the defendants to know his identity in order to prepare their defenses. The court denied the defendants' motion but the prosecuting attorney agreed to furnish the defendants with the names of all witnesses he would call. The parties agree that the informant's name was among the names of the witnesses furnished to the defendants and the informant testified as to what was in the affidavit.

In *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639 (1957), the United States Supreme Court held it was error not to order the Government to reveal the name of an informant when it was alleged that the informant actually took part in the drug transaction for which the defendant was being tried. The Supreme Court recognized the State has the right to withhold the identity of persons who furnish information to law enforcement officers, but said this privilege is limited by the fundamental requirements of fairness. It said that where an informant's identity is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege must give way. The Supreme Court said:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62, 1 L. Ed. 2d at 646.

We have interpreted *Roviaro* in many cases. *See State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987); *State v. Watson*, 303 N.C. 533, 279 S.E.2d 580 (1981); *State v. Ketchie*, 286 N.C. 387, 211 S.E.2d 207 (1975); *State v. Moose*, 101 N.C. App. 59, 398 S.E.2d 898 (1990), *disc. rev. denied*, 328 N.C. 575, 403 S.E.2d 519 (1991); *State v.*

Grainger, 60 N.C. App. 188, 298 S.E.2d 203 (1982), *disc. rev. denied*, 307 N.C. 579, 299 S.E.2d 648 (1983). Relying on these cases, we hold that on the facts of this case it was not prejudicial error to deny the defendants' motion. Although the court did not order the State to reveal the identity of the informant, the State nevertheless furnished his name to the defendants when it gave them a list of the witnesses it would call. The defendants, by interviewing the State's witnesses, could have determined the identity of the informant. The defendants received substantially what they requested.

This assignment of error is overruled.

NO ERROR.

THOMAS L. HICKMAN, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, T. DANIEL WOMBLE, AND DARLENE HICKMAN PRUITT v. ANGELA LYNN McKOIN, TERRY LEE McKOIN AND JUDY PASS McKOIN

No. 170PA93

(Filed 29 July 1994)

Negligence § 19 (NCI4th)— negligent infliction of emotional distress—injury to parent—parent-child relationship insufficient to show foreseeability

When a child sues for negligent infliction of emotional distress because of injury to a parent caused by the negligence of a third party, the parent-child relationship, standing alone, is insufficient to establish reasonable foreseeability.

Am Jur 2d, Negligence §§ 488 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. 478, 428 S.E.2d 251 (1993), reversing the judgment dismissing plaintiffs' claims against defendants entered by *Rousseau, J.*, at the 28 October 1991 Civil Session of Superior Court, Forsyth County. Heard in the Supreme Court on 31 January 1994.

Robert A. Lauver, P.A., by Robert A. Lauver, for plaintiff-appellees.

Petree Stockton, L.L.P, by Richard J. Keshian, for defendant-appellants.

EXUM, Chief Justice.

On 6 June 1991 plaintiffs sued for negligent infliction of emotional distress resulting from an injury to their mother which was caused by a motor vehicle accident involving defendant Angela McKoin. The trial court granted defendants' motion to dismiss, and the Court of Appeals reversed. We granted discretionary review on 7 October 1993.

Plaintiffs' complaint alleges that they are the children of Tommie R. Hickman, who was badly injured on 7 June 1988 in a head-on collision with defendants' car. Plaintiffs maintain the accident was caused by defendants' negligence. According to the complaint, plaintiffs, Thomas and Darlene, ages 12 and 15, respectively, at the time of the accident, were at the family home when they learned of the accident. Later that day they were told their mother was not likely to survive her injuries. Plaintiffs were permitted to see their mother briefly in the intensive care unit and suffered "great emotional anguish at the sight of their mother in such condition." Plaintiffs witnessed their mother in constant pain and suffering and observed her undergo a series of life-threatening operations and treatment over the course of several years from the time of the accident. As a result, plaintiffs allege they suffered "fear, shock, emotional and mental anguish and distress."

Defendants moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (1990). After a hearing, Judge Rousseau allowed defendants' motion and dismissed plaintiffs' action with prejudice.

The Court of Appeals held "that plaintiffs' emotional distress could have been foreseeable to defendants when it arose from seeing their injured mother in the hospital shortly after the accident and continues to be caused by her severe injuries and ongoing difficulties." *Hickman v. McKoin*, 109 N.C. App. 478, 482, 428 S.E.2d 251, 254 (1993). The Court of Appeals, therefore, decided plaintiffs stated a claim and reversed the trial court's dismissal of the complaint. We disagree.

Because this case was dismissed prior to trial pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) (1990), it is clear under North Carolina law that we must treat the allegations of the complaint as true. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993) (citing *Johnson v. Ruark Obstetrics and Gynecology Assocs.*, P.A., 327 N.C. 283, 395 S.E.2d 85 (1990); *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974)).

It is similarly well established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 321-22 (quoting *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97). Where, as in the instant case, plaintiffs are attempting to recover for their own severe emotional distress arising from concern for another person, they may recover only if they can prove they "suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.* at 672, 435 S.E.2d at 321 (citing *Ruark*, 327 N.C. 283, 395 S.E.2d 85) (emphasis in original). To determine whether such distress was foreseeable:

> [T]he "factors to be considered" include, *but are not limited to:* (1) "the plaintiff's proximity to the negligent act" causing injury to the other person, (2) "the relationship between the plaintiff and the other person," and (3) "whether the plaintiff personally observed the negligent act." However, such factors are not mechanistic requirements the absence of which will inevitably defeat a claim for negligent infliction of emotional distress . . . . [T]he question of reasonable foreseeability under North Carolina law "must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury."

Id. at 672-73, 435 S.E.2d at 322 (quoting *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98) (emphasis in original).

In the instant case plaintiffs' complaint sufficiently alleges defendants' negligence and that this negligence did in fact cause plaintiffs severe emotional distress. The remaining question is whether plaintiffs have sufficiently alleged that it was reasonably foreseeable to defendants that their negligent conduct would cause plaintiffs severe emotional distress. We believe they have not.

In *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), this Court affirmed summary judgment for a defendant sued for negligent infliction of emotional distress. The forecast of evidence showed that the plaintiff mother "suffered severe emotional distress upon seeing her son in the emergency room undergoing resuscitative efforts a period of time after [an automobile] accident, and upon learning subsequently of his death." Plaintiff was several miles away at the time of the accident and learned of it by telephone. We concluded the parent-child relationship was not sufficient to compensate for plaintiff's lack of close proximity to the negligent act and lack of observance of defendant's negligent act; therefore, we decided plaintiff failed to establish the element of reasonable foreseeability. *Id.* at 667, 435 S.E.2d at 328.

In *Sorrells*, we affirmed a Rule 12(b)(6) motion to dismiss a complaint for negligent infliction of emotional distress, concluding "plaintiffs' alleged severe emotional distress arising from their concern for their son was a possibility 'too remote' to be reasonably foreseeable." *Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323. The *Sorrells* complaint alleged that employees of defendant continued to serve alcohol to plaintiffs' son, Travis, even when they knew he was intoxicated. Plaintiffs later learned "that their son had been killed in a car accident and 'his body mutilated,' " and they suffered severe emotional distress as a result. *Id.* at 671, 435 S.E.2d at 321. Despite the parent-child relationship between plaintiffs and the victim of defendants' alleged negligence, we concluded plaintiffs had failed to state a claim. We said:

> We conclude as a matter of law that the possibility (1) the defendant's negligence in serving alcohol to Travis (2) would combine with Travis' driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause Travis' parents (if he had any) not only to become distraught, but also to suffer "severe emotional distress" as defined in *Ruark*, simply was a possibility too remote to permit a finding that it was reasonably foreseeable. This is so despite the parent-child relationship between the plaintiffs and Travis.

Id. at 674, 435 S.E.2d at 323.

Reviewing motions to dismiss under Rule 12(b)(6), this Court has held that the Rule

> "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." . . . A complaint should not be dismissed under Rule 12(b)(6) "unless it affirmatively appears that 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) (citations omitted).

Reviewing the Rule 12(b)(6) dismissal before us, we conclude that *Gardner* and *Sorrells* control the issue favorably to defendants. These cases establish that when a parent sues for negligent infliction of emotional distress because of injury to a child caused by the negligence of a third party, the parent-child relationship, standing alone, is insufficient to establish that the severe emotional distress was reasonably foreseeable. It follows that when the suit is by a child seeking recovery for negligent infliction of emotional distress because of injury to a parent, the parent-child relationship, standing alone, is insufficient to establish reasonable foreseeability. Here, on the issue of reasonable foreseeability, plaintiffs allege nothing more than a parent-child relationship. Thus, under no state of facts which might otherwise be proved can plaintiffs establish the necessary element of reasonable foreseeability.

For the foregoing reasons, the decision of the Court of Appeals, reversing the trial court's order granting defendants' motion to dismiss, is

REVERSED.

STATE OF NORTH CAROLINA v. DWIGHT C. DOBSON

No. 149A93

(Filed 29 July 1994)

Constitutional Law § 318 (NCI4th)— noncapital first-degree murder—submitted under *Anders*—no error

Defense counsel in a noncapital first-degree murder prosecution complied with the requirements of *Anders v. California*, 386 U.S. 738, where counsel found no errors in the trial but submitted

a brief referring to defendant's contention that the signing and entry of the judgment against him was in error, a contention which "might arguably support the appeal"; counsel provided defendant with the State's brief, defendant's brief, and the record on appeal; and defendant was notified that he could file a brief on his own behalf, raising any arguments he wished to make, but chose not to do so. The Supreme Court conducted a complete examination of the proceedings to determine whether there was prejudicial error in defendant's trial and found no error warranting reversal of defendant's conviction.

Am Jur 2d, Criminal Law §§ 752, 985-987.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

Adequacy of defense counsel's representation of criminal client regarding appellate and postconviction remedies. 15 ALR4th 582.

Appeal pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Albright, J.*, at the 19 October 1992 Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Calendared for argument in the Supreme Court 13 September 1993; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(d).

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

Laurel O. Boyles for defendant-appellant.

EXUM, Chief Justice.

Defendant was convicted in a noncapital trial of first-degree murder pursuant to N.C.G.S. § 14-17 (1983). From judgment of life imprisonment he appealed to this Court. On 10 May 1993 defendant's counsel filed a brief on behalf of defendant. Defendant's counsel presented defendant's assignment of error with respect to "the signing and entry of the judgment against the defendant" but counsel himself found "no errors in the trial of this case with regard to any issue of law." Instead, pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), counsel requested this Court to review the proceedings for any error prejudicial to defendant. We find no error.

I.

The State's evidence tended to show the following: On the evening of 17 April 1992 Oliver Cleo Kimbrough was playing cards and drinking alcohol with Willa Jean Miller, Fannie Johnson, and Ralph Ross in the dining room of a private home in which alcoholic beverages were sold. Defendant Dwight Dobson worked selling drinks at the house and was in the kitchen with Sheila Hairston and Maybelle Scott while the others played cards.

Defendant walked into the dining room and demanded a "cut" of the money from the card game. The card players responded by telling him the game was over. Defendant immediately asked Kimbrough if he "want[ed] to die" or was "ready to die" or something to that effect. Kimbrough did not respond in any way, and, within a matter of seconds, defendant drew a pistol from his pants and shot Kimbrough in the chest, killing him.

Miller and Johnson pleaded with defendant not to shoot Kimbrough again. Defendant chambered another round and pointed the pistol at Kimbrough's head. The women ran from the room. No more shots were fired.

Winston-Salem police arrived at the scene of the shooting and apprehended defendant without resistance. Later that evening defendant and Ross cooperated with the police in retrieving the weapon used in the shooting.

Defendant's evidence tended to show a different version of events. Defendant testified as follows:

There had been a history of altercations between himself and Kimbrough, including several incidents the night of the shooting. On that night, when defendant asked for a "cut" of the money, he and Kimbrough began to argue. Kimbrough threatened defendant with violence. Ross attempted to step between the two and prevent a fight. Defendant drew his pistol and told Kimbrough to sit down. Kimbrough repeatedly said to defendant, "Shoot me," while advancing on defendant in a threatening manner. Defendant attempted to retreat while Kimbrough continued to advance. Although defendant admitted shooting Kimbrough, he testified he never intended to do so. Defendant is easily startled by sudden movements, loud noises, and touching. When he pulled the gun he was only trying to make Kimbrough sit back down and leave him alone. He did not flee after

the shooting because he did not believe he had done anything wrong. He admitted to the police he had shot Kimbrough.

Defense witnesses testified to Kimbrough's violent reputation, his history of provoking confrontations with defendant, and his threatening advance on defendant the night of the shooting. Kimbrough had no weapon but was approximately six feet two inches tall and weighed about 275 pounds; defendant was about five feet eight inches tall and weighed 140 pounds.

During the charge conference at the close of the evidence defendant requested that instructions be given to the jury regarding self-defense and voluntary and involuntary manslaughter. The trial court allowed the motions and instructed the jury on these charges and defenses as well as on the charges of first-degree murder and second-degree murder. The jury found defendant guilty of first-degree murder, and the trial court imposed a sentence of life imprisonment.

II.

Under *Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498, a defendant may appeal even if defendant's counsel has determined the case to be "wholly frivolous." In such a situation counsel must submit a brief to the court "referring to anything in the record that might arguably support the appeal." Counsel must furnish the defendant with a copy of the brief, the transcript, and the record and inform the defendant of his or her right to raise any points he or she desires and of any time constraints related to such right. *Id.* at 744, 18 L. Ed. 2d at 498; *State v. Randolph*, 328 N.C. 724, 403 S.E.2d 276 (1991). Finally, the court conducts a full examination of all the proceedings, including the transcript, record, and briefs, for prejudicial error. *State v. Randolph*, 328 N.C. 724, 403 S.E.2d 276.

In the instant case defendant's counsel has complied with the requirements of *Anders*. Counsel has found no errors in the trial but has submitted a brief to this Court referring to defendant's contention that the signing and entry of the judgment against him was in error, a contention which "might arguably support the appeal." Counsel provided defendant with the State's brief, defendant's brief, and the record on appeal. Pursuant to an order of this Court, defendant was notified that he could file a brief on his own behalf, raising any arguments he wished to make. Defendant did not choose to do so. Finally, we conducted a complete examination of the proceedings to determine whether there was prejudicial error in defendant's trial.

After thorough review of the transcript, record, and briefs, this Court finds no error warranting reversal of defendant's conviction. We find no error in defendant's trial.

Sufficient evidence existed at trial to warrant submission to the jury of each of the degrees of homicide actually submitted. The factual inconsistencies between the State's evidence and the defendant's evidence were for the jury to resolve. It resolved them against defendant.

NO ERROR.

STATE OF NORTH CAROLINA v. JOSEPH TIMOTHY KEEL

No. 134A93

(Filed 9 September 1994)

1. **Jury § 226 (NCI4th)— first-degree murder—jury selection—death qualification—opportunity to rehabilitate**

The trial court not err in a first-degree murder prosecution by allowing the State's challenges for cause of prospective jurors on the basis of their opposition to capital punishment without first giving the defendant an opportunity to attempt to rehabilitate where each of the excused jurors unequivocally stated that he or she was opposed to the death penalty and could not vote for its imposition and the defendant has shown nothing tending to indicate that further questioning was likely to have produced any different answers.

Am Jur 2d, Jury § 290.

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

2. **Criminal Law § 874 (NCI4th)— first-degree murder—reinstruction on elements—"sixth" element omitted—no plain error**

There was no plain error in a first-degree murder prosecution where the trial court's initial instruction on the elements of first-degree murder included the sixth element that defendant did not act in self-defense or was the aggressor, the jury returned and asked the court to restate the six requirements, the court reinstructed the jury according to its original instruction but omitted the sixth element, the jury indicated that its request had been answered, the jury continued its deliberations and returned with a guilty verdict, and the court subsequently made findings that it had only instructed the jury on the first five requirements and that counsel had indicated in court that there was nothing further and had later informed the court in chambers that he had not wanted the court to instruct on the sixth requirement. Assuming that the evidence raised an issue of self-defense and required an initial instruction on that defense, the failure of the trial court to reinstruct on this matter in response to the jury's inquiry was not plain error because the jurors indicated that the trial court's

response answered their question and was a sufficient response, despite the fact that their question clearly indicated that they were aware that the initial instruction had included a sixth "requirement" for conviction in the present case, leading to the conclusion that the jury was concerned with some matter involving one of the elements of the crime of first-degree murder and not with any issue of self-defense. Moreover, defendant's own evidence indicates that the trial court's failure to reinstruct the jury concerning absence of self-defense had no effect on the jury.

Am Jur 2d, Trial §§ 1108 et seq.

3. Homicide § 230 (NCI4th)— first-degree murder—sufficiency of evidence

There was sufficient evidence of first-degree murder where the evidence presented at trial would support inferences and findings to the effect that the defendant plotted to kill his father-in-law; lured the victim to a farm on a pretext; shot him twice causing his death; and thereafter made every effort possible to conceal his crime by giving various contrived versions of what had occurred and by concealing or destroying physical evidence that the crime had been committed.

Am Jur 2d, Homicide §§ 425 et seq.

4. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—prior conviction for involuntary manslaughter

The trial court did not err in a capital sentencing procedure by allowing the jury to consider defendant's previous conviction for involuntary manslaughter as the basis for the sole aggravating circumstance of a previous conviction of a felony involving the use or threat of violence to a person. Although defendant argued that involuntary manslaughter is by definition an unintentional killing and that the General Assembly intended to make only intentional crimes of violence aggravating circumstances, nothing in the wording of the statute hints at a legislative intent that the prior felony conviction must have involved such an intentional use or a threat of violence to another person. The prior felony conviction can be either for a felony which has as an element the use or threat of violence to the person, or a felony which does not have the use or threat of violence as an element but which is committed with the use or threat of violence. N.C.G.S. § 15A-2000(e)(3).

Am Jur 2d, Criminal Law §§ 598, 599.

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.

5. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—prior felony involving violence—requested instruction on violence

The trial court did not err at a capital sentencing proceeding by declining to give defendant's requested instruction on the aggravating circumstance of a prior felony involving violence that ". . . violence is the use of extreme force with the intent to inflict harm or destruction."

Am Jur 2d, Criminal Law §§ 598, 599.

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.

6. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—definition of aggravating circumstances

The definition of aggravating circumstance created by N.C.G.S. § 15A-2000(e) is not vague and overbroad.

Am Jur 2d, Trial §§ 1441 et seq.

7. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—definition of mitigating circumstances

The trial court did not err in a capital sentencing proceeding by failing to give defendant's requested instruction defining mitigating circumstances and directing the jurors that they could properly base their sentencing recommendation upon any sympathy they might have for defendant. The instruction given by the court, in context, clearly informed the jurors that they could consider any circumstance, including sympathy for the defendant, which they found to arise from the evidence and deemed to have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

8. Constitutional Law § 370 (NCI4th); Criminal Law § 1333 (NCI4th)— first-degree murder—sentencing—issues and recommendation sheet—weighing aggravating and mitigating circumstances

The trial court's use of the issues and recommendation sheet in a capital sentencing proceeding did not violate the cruel and unusual punishment clause in the Eighth Amendment and deny defendant due process where defendant argued that the language is defective because it allows a jury to recommend death if it finds that the mitigating circumstances are of equal weight and value to the aggravating circumstances found, but that argument has been previously rejected.

Am Jur 2d, Criminal Law §§ 598, 599, 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.

9. Constitutional Law § 370 (NCI4th); Criminal Law § 1351 (NCI4th)— first-degree murder—sentencing—instructions—mitigating circumstances—burden of proof

A defendant in a capital sentencing proceeding was not deprived of his right to be free from cruel and unusual punishment where the court instructed the jury that the defendant had the burden of proving mitigating circumstances by a preponderance of the evidence.

Am Jur 2d, Criminal Law §§ 598, 599, 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.

10. Criminal Law § 1349 (NCI4th)— first-degree murder—sentencing—instructions—consideration of mitigating circumstances

The trial court did not err in a capital sentencing proceeding in the issues contained on the Issues and Recommendation as to Punishment Form where the jury instructions were strictly in accord with the Pattern Jury Instructions as amended to conform to the dictates of *McKoy v. North Carolina*, 494 U.S. 433; the instructions given expressly state that any single juror may find that a nonstatutory mitigating circumstance exists and may deem

it to have mitigating value; the Issues and Recommendation as to Punishment Form used by the trial court, together with the trial court's instructions in their entirety during the capital sentencing proceeding, emphasized that each juror was to consider and give weight to all evidence that juror found to be mitigating; and the Supreme Court was convinced that each juror was permitted to and did consider all of the mitigating evidence he or she found to exist.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

11. Constitutional Law § 370 (NCI4th)— death penalty—jury discretion—not unconstitutional

The North Carolina death penalty statute is not facially unconstitutional because jury discretion is not guided appropriately by objective standards. N.C.G.S. § 15A-2000.

Am Jur 2d, Criminal Law § 628.

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

A sentence of death for first-degree murder was upheld where the record fully supports the aggravating circumstances found by the jury; there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration; and the sentence of death was not disproportionate. 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. N.C.G.S. § 15A-2000(d)(2).

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.

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 Brown, J., on 30 March 1993

in Superior Court, Edgecombe County, upon a jury verdict finding the defendant guilty of murder in the first degree. Heard in the Supreme Court on 11 April 1994.

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

Thomas R. Sallenger for the defendant-appellant.

MITCHELL, Justice.

This is the second time this case has been before this Court on appeal. The defendant was initially tried at the 12 August 1991 Criminal Session of Superior Court, Edgecombe County, at which time he was convicted of murder in the first degree and sentenced to death. Concluding that the trial court had committed prejudicial error, this Court held that the defendant must receive a new trial. *State v. Keel*, 333 N.C. 52, 423 S.E.2d 458 (1992).

The defendant was again tried capitally during the 5 March 1993 Criminal Session of Superior Court, Edgecombe County, for murder in the first degree. The jury returned a verdict finding the defendant guilty of that crime. At the conclusion of a separate capital sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended that the defendant be sentenced to death. On 30 March 1993, the trial court entered judgment sentencing the defendant to death. Thereafter, the defendant gave notice of this appeal of right, which we now undertake to review.

Some of the State's evidence introduced during the guilt-innocence determination phase of the defendant's second capital trial in this case tended to show the following. At approximately 10:00 p.m. on 10 July 1990, the defendant Joseph Timothy Keel knocked on the door of Aubrey Thurman's mobile home. When Thurman answered the door, the defendant told him that John Simmons, the defendant's father-in-law, had been shot. Aubrey Thurman testified that the defendant's shirt was covered with blood. Simmons was outside the Thurman mobile home seated in the center of the seat of a small truck and positioned so that he faced the steering wheel. Aubrey Thurman never detected any movement on the part of Simmons. Aubrey Thurman's wife Shelby called the 911 emergency services telephone number immediately. Shelby Thurman testified that the defendant told her that Simmons had been shot in a drive-by shooting on Gay Road by a person in a station wagon.

Edgecombe County Deputy Sheriff Bob Davis testified that he was called to Baker's Park, where the Thurmans' mobile home was located, on the night of 10 July 1990. When he arrived, the defendant met him at the front door of the Thurmans' mobile home. The defendant told Davis that he had received a phone call earlier in the evening asking him to go to Shell Bank Farm, the hog farm where the defendant was employed. The defendant said that Simmons had driven him to the farm. On the way back from the farm, while Simmons was driving, someone in a station wagon had shot Simmons near the intersection of Leggett Road and Gay Road. Deputy Davis examined the truck the defendant and Simmons had been using and found that the windows were rolled down and intact. There was a bullet hole on the driver's side of the truck in the cab section and what appeared to be an exit hole made by a bullet on the interior of the truck. A pool of blood was located near the center of the seat of the truck toward the passenger side.

Sergeant Donnie Lynn of the Edgecombe County Sheriff's Department also interviewed the defendant on the night of the shooting. The defendant stated that he and his wife lived with his wife's father, Johnny Simmons. The defendant told Sergeant Lynn that on the night of the shooting, Simmons had driven the defendant to Shell Bank Farm after the defendant's boss had called to tell him to check on the hogs. The defendant stated that he had taken the company truck from the driveway of the farm manager's house and had driven that truck to the farm while Simmons followed in the small pick-up truck. After attending to business at the hog farm, the defendant left the company truck there and rode with Simmons. When they were on Gay Road near some trash dumpsters, a car passed them and the defendant heard two pops. Simmons slumped over, and the defendant then managed to stop the truck. The defendant moved Simmons over to the passenger's side of the truck and drove away.

On the night of the shooting, the defendant showed Sergeant Lynn the locations where the events he had described allegedly occurred. Sergeant Lynn testified that he found nothing in the vicinity of the Gay Road dumpsters to indicate that a drive-by shooting had occurred. Lynn testified that he returned to the farm the following day and noticed what appeared to be blood outside the farm office. He found a fired .22 caliber shell casing nearby. Inside the building, Sergeant Lynn saw blood spattered on the walls and floors and found a jumpsuit which bore blood stains. He also found a bloody mop and

two boxes of .22 caliber shells, as well as some loose shells in a drawer in the office.

Dr. Louis Levy, Medical Examiner for Edgecombe County, testified that Simmons had suffered two gunshot wounds to the head. One wound was in the right malar region and the other was behind the left ear. Both were entrance wounds. Dr. Levy testified that the cause of John Simmons' death was shock resulting from these gunshot wounds.

Dr. Levy testified that, in addition to the gunshot wounds, the victim had suffered bruises and abrasions of the lips, nose and forehead. He had also suffered a blunt force injury beginning at the right eyebrow and extending upward. The victim also had suffered abrasions on his left side and hemorrhaging to his buttocks and both legs. His body also bore a figure-eight shaped lesion over the left knee.

Dr. Levy testified that the victim could not have received both gunshot wounds from the same side, since the paths of the wounds entered on opposite sides of the head. Dr. Levy opined that this configuration of wounds was inconsistent with a drive-by shooting. On cross-examination, he testified that the wounds were consistent with a .22 caliber bullet, and that the victim was alive at the time both of the wounds were inflicted.

Gary Stanbough, the manager of Shell Bank Farm, testified that he spoke by telephone with the defendant at approximately 8:00 p.m. on 10 July 1990. The defendant asked for permission to go fishing in a pond at the farm. The defendant stated that he wanted to know if he could come by to get the farm truck to drive to the pond. Stanbough allowed the defendant to borrow the truck. Stanbough testified that a single-shot .22 caliber rifle was kept behind the seat of the farm truck, but that he never saw the rifle again after the defendant borrowed the truck that night.

James Stevey, an employee of the farm, testified that he went to work on the day after the shooting. The key that was usually over the front door of the office building at the farm was missing. Stevey was able to enter the building only after the defendant entered by a side door and opened the front door from inside. Stevey had noticed a puddle of blood in front of the building and saw the defendant kick dirt over the puddle. Once they were inside the building, the defendant went ahead of Stevey into the area of the building in which workers change their clothes. By the time Stevey entered, the defendant

was already running the washing machine. Stevey had never seen the defendant run the machine before. The defendant then began wiping blood off the floor with a rag. The defendant said that his father-in-law had been shot but did not admit to Stevey that he had shot the victim.

Lieutenant Jerry Wiggs of the Edgecombe County Sheriff's Department testified that he interviewed the defendant on 13 July 1990—three days after the shooting—at the office of the sheriff's department. After being advised of and waiving his constitutional rights, the defendant made a statement which Wiggs wrote down and which was signed by the defendant. In his statement, the defendant admitted that he had shot the victim at the hog farm on 10 July 1990. He stated that he had asked Simmons for a ride to the farm. When they arrived at the farm, the defendant picked up the farm truck. He then proceeded to the farm building, driving ahead of Simmons. The defendant went into the farm building upon his arrival. When Simmons drove up outside the building, the defendant was inside the building and fired a shot into the cab of Simmons' truck. Simmons got out of the truck, saying that he was hit. The defendant told him to sit down in the kitchen area of the farm building. The defendant stated that he then shot Simmons again, because Simmons had a knife and was coming after him. The defendant said that Simmons fell, but got up again, and the defendant then helped him into the truck. The defendant then drove to the Thurmans' mobile home for help. The defendant stated that he had thrown the rifle he used to shoot the victim into a hog pen. He stated that he did not know why he had shot Simmons the first time.

Cecila Edmondson, the defendant's next door neighbor, testified that on 9 July 1990—the day before the victim was shot—the defendant was standing outside her house. She overheard the defendant state that he was going to kill "the bull-headed mother f---ing son of a bitch." Edmondson testified that the victim and the defendant had been arguing before she heard the defendant make that statement.

The defendant introduced evidence tending to show the following. On the evening of 10 July 1990, John Simmons told the defendant that he had received a telephone call telling the defendant to go to work. Simmons drove the defendant to Gary Stanbough's house to get the farm truck. The defendant then drove the farm truck from Stanbough's house to the area in which the farm office was located. Upon arrival, the defendant went into the office and came back out.

The defendant and Simmons began to discuss prior arguing that had occurred between the defendant and John Simmons' wife and his daughter, Amy. Simmons told the defendant that the defendant and Amy needed to find another place to live. Simmons and the defendant then engaged in a fist fight. Simmons ran into the office, where the two men began pushing each other. The defendant told Simmons that he wished that Simmons would stop accusing him of "messing" with Simmons' wife, Jennifer. The two men began fighting again, and the defendant kicked Simmons on his knee and in his chest. Simmons fell and hit a counter in the kitchen area of the office. When he got up he had blood on his hand.

Simmons picked up a knife from the counter and pushed the defendant. The defendant fell over some chairs and against a refrigerator. The defendant then pulled out a .25 caliber pistol and told Simmons to stop. The defendant fired the pistol one time, hitting Simmons and knocking him down. The defendant then went to assist Simmons. He drove Simmons' truck to the front of the office and put Simmons inside. The defendant then pulled the truck up to a window of the office. He went back to the farm truck and took out the rifle. He went into the office and fired a shot through the window into Simmons' head as Simmons was sitting in the truck slumped over. The defendant took mops from the office and cleaned the blood off the floor. Then he drove Simmons to the Thurmans' mobile home where he tried to assist emergency personnel upon their arrival.

The defendant also introduced evidence tending to show that he had been drinking and using cocaine on the evening of the killing. His brother and sister-in-law testified that he smelled of alcohol and was crying shortly after the shooting. The defendant testified that he did not intend to kill or hurt Simmons.

After arguments of counsel and instructions by the trial court, the jury returned a verdict finding the defendant guilty of murder in the first degree. Thereafter, the trial court conducted a separate capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000.

During the sentencing proceeding, the State expressly relied on the evidence previously introduced and also presented additional evidence. The State introduced a certified record of a conviction of the defendant on 20 March 1987 for the offense of involuntary manslaughter. Dr. George C. Hemingway, a pediatrician and Medical Examiner for Edgecombe County, testified that at approximately 5:00 a.m. on 26 June 1986, he examined an eleven-month-old infant named Victor

Matthew Keel at the emergency room at Heritage Hospital. Dr. Hemingway observed bruises about the child's head, face, legs and arms. The bruises were relatively recent bruises, six to eight hours old.

Dr. Louis Levy testified that he performed an autopsy on the body of the child Victor Keel on 26 June 1986 and found a three-inch fracture of the skull located on the right side of the head. In Dr. Levy's opinion, that injury caused the child's death.

The defendant also presented evidence during the sentencing proceeding. The defendant testified that when he had been in prison, he had been president of the prison Jaycee Club and had helped organize functions to raise money for the prison and to help people in the community. He testified that he participated in a wood drive during which inmates would get together to go out of the prison and cut and split wood to provide for those who did not have firewood. He also testified that he had started a choir in Granville County, completed his high school education, obtained an associate degree from Heritage Bible College and had enrolled in and completed drug and alcohol abuse classes.

The defendant testified that he did not intentionally kill his eleven-month-old son. He testified, in fact, that his son had injured himself by falling down the front steps of the defendant's mobile home. The defendant testified that his son had also received a bruise on his forehead when he hit a door at his grandmother's house on the date of his death. The defendant said that when he had learned that his son had breathing trouble, he attempted to get help. When his son again stopped breathing, the defendant attempted to revive the child. The defendant acknowledged that he was an alcoholic and had blacked out in the past.

The defendant also offered evidence through his parents and brother to the effect that the defendant's son had struck his head on a door on the day of his death. The defendant's mother testified that he had lost interest in school when he had been taken off the wrestling team. She also testified that he had sought treatment for alcohol abuse. The defendant's brother testified that once when he was twelve years old, he and the defendant were walking in a field and saw some wild dogs coming their way. The defendant grabbed him by the arm and got him up a tree until the dogs left.

Dr. Jonathan Weiner, an expert in forensic psychiatry, testified that he had diagnosed the defendant as being dependent on alcohol

and marijuana. Dr. Weiner felt that he was probably dependent on cocaine as well. Dr. Weiner testified that from the time the defendant was young, he had problems dealing with feelings and impulses. When he was young, the defendant dealt with problems with people by fighting. Dr. Weiner further diagnosed the defendant as having a borderline personality disorder in that he never was able to come to a sense of who he was. Dr. Weiner testified that the defendant had a history of alcoholism in his family. In an earlier part of his life, the defendant had thought about hurting himself. During one episode when he was in a drug treatment program and withdrawing from drugs, the defendant cut himself with a razor blade. Dr. Weiner testified that the defendant seemed to function better in a prison environment than outside of prison because he did not have access to alcohol and drugs in prison.

Lane B. Simpson, a pastor, testified that he met the defendant when the defendant's child died. Simpson testified that the defendant had accepted the Lord while in jail and wanted to be a fine Christian young man.

John College testified that he was the defendant's direct supervisor at Shell Bank Farm for approximately six months. The defendant was a good worker.

Dr. Robert L. Conder, Jr., an expert in the field of neuropsychology, testified that he examined the defendant, took a history from the defendant and administered a battery of tests to him. Dr. Conder testified that the defendant was in the borderline area between low-average IQ and mild mental retardation. The defendant's IQ is 78 and his intellectual functioning in the lower seven percent of the population. Dr. Conder diagnosed the defendant as having an organic personality syndrome.

At the conclusion of all evidence at the capital sentencing proceeding, and after arguments of counsel and instructions by the trial court, the jury recommended that the defendant be sentenced to death. The trial court entered judgment sentencing the defendant to death, and the defendant gave notice of appeal to this Court.

[1] In his first assignment of error, the defendant contends that the trial court erred in allowing the State's challenges for cause of prospective jurors on the basis of their opposition to capital punishment without first giving the defendant an opportunity to attempt to rehabilitate them. During jury selection, the State challenged ten

prospective jurors for cause on the basis of their opposition to the death penalty. The defendant moved to be allowed to attempt to rehabilitate each of those jurors. The trial court denied all such requests. Thereafter, the defendant presented the trial court with a list of seventeen "rehabilitation" questions he wished to ask those prospective jurors before they were excused for cause. That list of "rehabilitation questions" was not made a part of the Record on Appeal and cannot be considered by this Court in passing upon the defendant's present argument that the trial court erred by refusing to allow him to attempt to rehabilitate prospective jurors. Nevertheless, we are able to resolve this issue in the present case without examining the seventeen questions proposed by the defendant.

A juror is properly excused for cause in a capital case if his or her views on capital punishment 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). As we have recently stated:

> Where a person's responses reveal that 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.

State v. Gibbs, 335 N.C. 1, 29, 436 S.E.2d 321, 337 (1993), *cert. denied*, — U.S. —, — L. Ed. 2d — (1994).

In the present case, each of the ten prospective jurors who are the subject of this assignment of error indicated that he or she did not believe in the death penalty and could not imagine circumstances under which he or she would vote to recommend a sentence of death. Prospective juror Boone stated that he did not believe in the death penalty. He further stated that he knew of no circumstances under which he would vote for the death penalty and that he would automatically vote against that penalty.

Prospective juror Vick stated that she had never believed in the death penalty and could foresee no set of facts under which she would vote for death. She further stated that she would automatically vote against recommending the death penalty.

Prospective juror Atkinson stated that she had never believed in the death penalty. She stated that regardless of the facts in a particu-

lar case, she would vote to recommend life imprisonment rather than death.

Prospective juror Murray stated that although he believed in the death penalty, he would not vote for it since he could not make that decision. He stated that he would vote for life imprisonment under all circumstances.

Prospective juror Finch stated that she had never believed in the death penalty and could think of no facts under which she would vote for that penalty. She said that she would automatically vote for a life sentence rather than for the death penalty.

Prospective juror Artis first said that he could consider both life and death and that, although he did not believe in the death penalty, he would not automatically vote against death. Thereafter, the bifurcated nature of a capital trial was explained to prospective juror Artis. The prosecutor then asked him again whether he could vote for the death penalty. Juror Artis replied that he would not. He indicated that he would vote for life imprisonment rather than death, regardless of the facts.

Prospective juror Blackmon stated that she did not believe in the death penalty and could not foresee any case in which she would vote for its application. She said that she did not know whether she would automatically vote against the death penalty. After the nature of a capital sentencing proceeding was explained to her, prospective juror Blackmon said that she did not think she could sit on a capital jury. Thereafter, she stated that she would automatically vote against a sentence of death and for life imprisonment.

Prospective juror Ashley stated that she did not believe in the death penalty and could not foresee any facts or circumstances under which she would vote for its imposition. She said that in every case she would always vote for life.

Prospective juror Peterson stated that for religious reasons she did not believe in the death penalty and could not foresee any case in which she would vote for its imposition. She said that she would automatically vote for life in every case.

Finally, prospective juror Harris stated that he did not believe in the death penalty and knew of no facts or circumstances under which he would vote for that penalty. He stated that he would automatically vote for life imprisonment in every case.

The foregoing statements by the ten prospective jurors in question here clearly were sufficient to require their excusal for cause. *Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52; *Gibbs*, 335 N.C. at 29, 436 S.E.2d at 37. Further, we have held that when a challenge for cause is supported by a prospective juror's answers to questions propounded by the prosecutor and by the trial court, the trial court does not abuse its discretion, at least absent a showing that further questioning would likely have produced different answers, by refusing to allow the defendant to question the challenged prospective juror about the same matter. *State v. Brogden*, 334 N.C. 39, 44, 430 S.E.2d 905, 908 (1993).

> The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. The reasoning behind this rule is clear. It prevents harassment of 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).

In the present case, each of the prospective jurors excused for cause due to their views on the death penalty unequivocally stated that he or she was opposed to the death penalty and could not vote for its imposition. The defendant has shown nothing tending to indicate that further questioning was likely to have produced any different answers. Therefore, the trial court did not err in denying the defendant's request to attempt to rehabilitate these prospective jurors by further questioning. This assignment of error is without merit.

[2] By another assignment of error, the defendant contends that the trial court erred when it failed to instruct the jury properly on the "sixth element" of first-degree murder. During the trial court's instructions, it instructed that for the jury "to find the defendant guilty of first-degree murder, the State must prove six things beyond a reasonable doubt." The trial court then instructed the jury *inter alia* that it could convict only if it found that the defendant (1) "intentionally and with malice killed the victim with a deadly weapon," (2) "that the defendant's act was a proximate cause of the victim's death," (3) "that the defendant intended to kill the victim," (4) "that the defendant acted with premeditation," and (5) "that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind." The trial court also instructed: "And sixth, that the defendant did not act in self-defense or that the defendant was the aggressor

in bringing on the fight with the intent to kill or inflict serious bodily harm upon the deceased." After receiving these and other instructions, the jury retired to deliberate.

After deliberating for approximately one hour, the jury returned to the courtroom and requested that the trial court "restate the six requirements necessary to prove first-degree murder." The trial court reinstructed the jury according to its original instruction in this regard, but omitted the sixth instruction quoted above. The defendant made no objection.

The trial court then asked, "does that answer the request of the jury?" The jury indicated that it did. The trial court then allowed the jury to continue its deliberations. Thereafter, the jury returned with a unanimous verdict finding the defendant guilty of murder in the first degree.

After the lunch break, with all parties present and out of the presence of the jury, the trial court made the following findings:

> Let the record show that during jury deliberations, the jury advised the court that they [sic] would like the six requirements necessary to prove first-degree murder.
>
> Pursuant to that request, the court instructed the jury on the first five requirements set out in the Criminal Pattern Jury Instruction 206.10; that the court thereupon asked counsel for the State and the defendant if there was anything further; that Mr. Thomas Sallenger, one of the attorneys for the defendant, approached the bench with Assistant District Attorney Graham and asked the court to instruct on voluntary intoxication.
>
> The court thereupon instructed the jury on voluntary intoxication. The court then inquired of counsel for the defendant if there was anything further and Mr. Sallenger indicated that there was nothing further for the defendant.
>
> The court inquired of the jury if the court had answered its question and the jury indicated that it had; that thereafter the jury returned with its verdict of first-degree murder. The court had the jury returned to its room and the court went into chambers for a brief discussion with the attorneys as to how the court planned to proceed during the next phase.
>
> That while in chambers, the Judge inquired of counsel for the defendant if the court had made any error in the trial and counsel

> informed the court [that] the court had not instructed the jury on the sixth requirement and that he had not wanted the court to so instruct.

The trial court then asked counsel for the defendant and for the State whether they wished to add to or object to those findings, and they indicated that they did not.

The following dialogue then occurred between counsel for the defendant and the trial court.

> MR. SALLENGER: Your Honor, out of the presence of the jury and after having heard read into the record the statement by the court, *which is in all respects accurate*, on behalf of the defendant we move for a mistrial and we would also move for . . . the court to set aside the verdict of the jury in this case. Thank you, sir.
>
> THE COURT: I will withhold ruling on your motion at this time.

(Emphasis added). The trial court ultimately denied both of these motions.

The defendant now argues that the trial court's reinstructions on first-degree murder had "the effect of directing a verdict for the State on the sixth essential element of first-degree murder [absence of self-defense]," and that this "impermissibly lessened the State's burden of proving each and every essential element of the crime charged beyond a reasonable doubt." He contends that this was error entitling him to a new trial.

Where, as here, the defendant fails to object to the trial court's instructions at trial, our review is limited to a review for "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Before we will conclude that an error by the trial court amounts to "plain error," we must be convinced that absent the error the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). In other words, we must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. *Id.* "Therefore, the test for 'plain error' places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection." *Id.* Bearing these principles in mind, we must determine

whether the trial court committed plain error in the instructions the defendant challenges here.

The defendant argues that the trial court's failure to reinstruct that the jury must find that the defendant did not act in self-defense before finding him guilty was a failure to instruct on an "essential element" of murder in the first degree. We do not agree.

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Huffstetler*, 312 N.C. 92, 109, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). The absence of self-defense is not an "element," essential or otherwise, of murder. *Id.*; N.C.G.S. § 14-17 (1993). Nevertheless, a reasonable argument can be made that, upon the particular evidence presented in the present case, the trial court correctly instructed the jury during its initial instructions that to convict the defendant of murder in the first degree the jury must find that he did not act in self-defense; this is so because the defendant's self-serving statements that the victim was attacking the defendant with a knife the first time—but not the second time—the defendant shot him were introduced as evidence at trial. For purposes of this appeal, we assume *arguendo* that the trial court properly instructed the jury in this regard during its initial instructions.

Having assumed *arguendo* that the evidence in the present case raised an issue of self-defense and required an initial instruction on that defense, we nevertheless conclude that the failure of the trial court to reinstruct on this matter in response to the jury's inquiry was not plain error. After deliberating for approximately one hour, the jury returned to the courtroom and indicated that it wished to have the trial court "restate the six requirements necessary to prove first-degree murder." The trial court then reinstructed the jury on the elements of first-degree murder, but omitted any reference to self-defense. Thereafter, the jurors indicated that the trial court's response answered their question and was a sufficient response. They did so despite the fact that their question clearly indicated that they were aware that the initial instruction had included a sixth "requirement" for conviction in the present case. This leads to the conclusion that the jury was concerned with some matter involving one of the elements of the crime of first-degree murder and not with any issue of self-defense—which is a justification for killing, the absence of which is not an element of murder. Therefore, it is unlikely that the

trial court's failure to reinstruct on the issue of absence of self-defense had any effect on the jury.

Additionally, the defendant's own statements at trial indicated that when the victim was advancing upon him with a knife, the defendant shot the victim who then fell to the floor. The defendant put the victim in the truck and moved the truck to a place beside the window of the farm office. The defendant went back into the building with a rifle and went into the office. He fired a shot through the window into the victim's head while the victim was sitting slumped over in the truck. When taken in light of the defendant's threat the night before the killing and physical evidence at the scene of the crime, we believe that the defendant's own evidence indicates that the trial court's failure to reinstruct the jury concerning absence of self-defense had no effect on the jury. Certainly, we cannot say that absent the alleged error the jury probably would have reached a different verdict or that the alleged error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, we conclude that any error by the trial court in this regard did not amount to plain error. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. This assignment of error is without merit.

[3] By another assignment of error, the defendant contends that the trial court erred in failing to dismiss the first-degree murder charge against him. In support of this assignment he argues that the evidence was insufficient as a matter of law to permit a rational finding of the elements of the charged offense.

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The trial court's function is to determine whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crimes charged. *Earnhardt*, 307 N.C. at 67, 296

S.E.2d at 652. "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Id.* It is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss. *Powell*, 299 N.C. at 101, 261 S.E.2d at 118; *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956).

State v. Vause, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991).

It is by now familiar learning that:

> "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

Id. at 237, 400 S.E.2d at 61 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). The issue before us here is whether, applying the foregoing rules, a reasonable inference of the defendant's guilt can be drawn from the evidence presented at trial.

In applying the foregoing rules to a motion to dismiss a prosecution for murder in the first degree, it must be determined whether the evidence, viewed in the light most favorable to the State, is sufficient to permit a jury to make reasonable inferences and findings that the defendant, after premeditation and deliberation, formed and executed a fixed purpose to kill. *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969).

> "First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981). Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily " 'are not susceptible to proof by direct evidence.' " *Id.* (quoting *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978)). "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. *Id.* "Deliberation" means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influ-

> ence of a violent passion suddenly aroused by sufficient provocation. *Id.* In the context of determining the existence of deliberation, however, the term "cool state of blood" does not mean " 'an absence of passion and emotion.' " *Id.* (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). One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. *Id.*

Vause, 328 N.C. at 238, 400 S.E.2d at 62.

Premeditation and deliberation are mental processes. Generally, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are "(1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds." *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 870, 93 L. Ed. 2d 166 (1986).

In the present case, the State presented substantial evidence to support the jury in finding that on the day before the killing, the defendant threatened the victim by declaring that he would kill the victim. Further, there was evidence of ill-will between the parties as a result of arguments between the defendant and the victim's wife and due to the fact that the victim felt that the defendant had been "messing" with the victim's wife. The defendant's own testimony at trial was that he dealt a lethal wound to the deceased after the deceased had been felled and rendered helpless. The defendant testified that after initially shooting and felling the victim in the farm office, he placed the victim in the victim's truck and parked it immediately outside the office. He then shot through the window of the truck rendering a second lethal wound to the victim. Overall, the evidence presented at trial would support inferences and findings to the effect that the defendant plotted to kill his father-in-law. He then lured the victim to the farm on a pretext, where he shot him twice causing his death. Thereafter, the defendant made every effort possible to conceal his

crime by giving various contrived versions of what had occurred and by concealing or destroying physical evidence that the crime had been committed. The evidence in the present case clearly was substantial evidence tending to show that the defendant unlawfully killed his victim with malice and after premeditation and deliberation. The trial court did not err in denying the defendant's motions to dismiss the charge against him. This assignment of error is without merit.

[4] By another assignment of error, the defendant contends that the trial court erred during his capital sentencing proceeding by allowing the jury to consider his previous conviction for involuntary manslaughter as the basis for finding an aggravating circumstance. The sole aggravating circumstance submitted to and found by the jury was 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 evidence introduced by the State during the capital sentencing proceeding to support this aggravating circumstance was in the form of a certified copy of a judgment entered upon the defendant's 20 March 1987 conviction for the involuntary manslaughter of his infant son, Victor Keel. The State also introduced evidence tending to show that the child had suffered many injuries shortly prior to his death. These included a three-inch fracture to the base of the skull which caused the brain to swell by approximately twenty-five percent. Expert testimony tended to show that it would have taken a considerable amount of force to inflict the child's skull fracture, and it could have been caused by the infliction of blows to the child's head. Further, evidence tended to show that at the time of the child's death, he had suffered very recent bruises and abrasions to the forehead, the back of the head, the back, the arms, the bridge of the nose, the ears and the back of the legs, all of which were consistent with being struck substantial blows.

The defendant first contends that the trial court erred in submitting the aggravating circumstance because his conviction for involuntary manslaughter could not be considered a felony "involving the use of violence to the person" within the meaning of N.C.G.S. § 15A-2000(e)(3). He reasons that this is so because involuntary manslaughter is by definition an *unintentional* killing. He contends that the intent of the General Assembly in recognizing as an aggravating circumstance that a defendant had "been previously convicted of a felony involving the use of violence to the person" was to make only intentional crimes of violence aggravating circumstances. We do not agree.

For purposes of N.C.G.S. § 15A-2000(e)(3), the prior felony conviction can be either a conviction for a felony which has as an element the use or threat of violence to the person, such as rape or armed robbery, or a conviction for a felony which does not have the use or threat of violence to the person as an element, but is committed with the use or threat of violence to the person. *State v. McDougall*, 308 N.C. 1, 18, 301 S.E.2d 308, 319, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). Further, it is not required that the defendant's prior felony conviction involve the "intentional" use or threat of violence to another person. Nothing in the wording of the statute hints at a legislative intent that the prior felony conviction must have involved such an intentional use or a threat of violence to another person. We conclude that the prior felony conviction may properly be used in the present case as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(3). *Cf. State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978) (while involuntary manslaughter imports an unintentional killing, that is the absence of a specific intent to kill, it is nevertheless accomplished by means of an intentional act). The trial court did not err by submitting this aggravating circumstance for the jury's consideration in the present case.

[5] The defendant also argues that the trial court erred in declining to give the defendant's proposed instruction with regard to this aggravating circumstance. The defendant expressly requested that the trial court instruct the jury: "Members of the jury, I instruct you that violence is the use of extreme force with the intent to inflict harm or destruction." For the reasons we have just discussed, this proposed instruction is an erroneous statement of law. Therefore, the trial court did not err in refusing to give the requested instruction to the jury.

[6] By another assignment of error the defendant contends that the definition of the aggravating circumstance created by N.C.G.S. § 15A-2000(e)(3) is vague and overbroad and, for that reason, violates the Constitution of the United States and the Constitution of North Carolina. We have previously decided this issue contrary to the defendant's position and he has presented no convincing reason for us to deviate from our prior holding on this issue. *State v. Brown*, 320 N.C. 179, 213-14, 358 S.E.2d 1, 23-24, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). This assignment of error is without merit.

[7] By another assignment of error, the defendant contends that the trial court erred in failing to give his requested instruction defining

mitigating circumstances and directing the jurors that they could properly base their sentencing recommendation upon any sympathy they might have for the defendant. The requested instruction stated that mitigating circumstances are not limited to circumstances that extenuate the gravity of the offense but also extend to any aspect of the defendant's background or character a juror deems a reason supporting a sentence less than death. The requested instruction also stated, "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case."

The trial court declined to give the requested instruction and, instead, instructed the jury that:

> 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.

The defendant, citing *California v. Brown*, 479 U.S. 538, 93 L. Ed. 2d 934 (1987), contends that the trial court erred in refusing his requested instruction because this ruling unconstitutionally prevented the jury from considering as mitigating any sympathy it had for the defendant that arose from the evidence presented in this case. We do not agree.

In *Brown*, the Supreme Court of the United States held that it was constitutionally permissible for a trial court to admonish the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Brown*, 479 U.S. at 542, 93 L. Ed. 2d at 940. The Supreme Court reasoned in *Brown* that the use of the word "mere" in the trial court's instruction had indicated to the jury that it was to avoid responding to emotional appeals divorced from an evidentiary basis. The Supreme Court concluded in *Brown* that a defendant's Eighth Amendment rights are jeopardized only when the jury is urged to ignore such feelings *that arise from evidence introduced during the defendant's trial.* The trial court's instructions in the present case had no such effect.

After defining the term "mitigating circumstance" as quoted above, the trial court instructed the jury:

> 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 [form] a basis for a sentence less than death and any other circumstance arising from the evidence which you deem to have mitigating value.

We conclude that, taken in context, this instruction clearly informed the jurors that they could consider any circumstance—including sympathy for the defendant—they found to arise from the evidence and deemed to have mitigating value. Therefore, we deem the trial court's instructions in the present case to be consistent with the teaching of *Brown* and not in violation of the Eighth Amendment. *Cf. State v. Price*, 326 N.C. 56, 86-88, 388 S.E.2d 84, 101-02 (prosecutor's argument deemed to amount to an argument that feelings of sympathy arising in the jurors' hearts but not also supported by evidence could not be permitted to affect their verdict), *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, —— U.S. ——, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, —— U.S. ——, —— L. Ed. 2d —— (1994). This assignment of error is without merit.

[8] By another assignment of error, the defendant contends that the trial court's use of the Issues and Recommendation sheet in the present case violated the prohibition against cruel and unusual punishment contained in the Eighth Amendment and denied him due process in violation of the Fifth Amendment. Issue Three on the Issues and Recommendation sheet which was given to the jury during the capital sentencing proceeding in this case required that the jury answer the following question: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance found?" The defendant argues that this language is defective because it allows a jury to recommend death if it finds that the mitigating circumstances are of equal weight and value to the aggravating circumstances found. We have previously rejected precisely the same argument. In doing so, we stated:

> The defendant says [Issue Three] is deficient because if the jury is in equipoise it must answer the issue "yes" and impose the death penalty. We do not believe that the defendant['s] . . . analy-

> sis of the issue is correct. If the jury must be satisfied beyond a reasonable doubt before finding the mitigating circumstances are insufficient to outweigh the aggravating circumstances and the jury is in a state of equipoise as to the issue it would answer the issue "no." We hold [that Issue Three] was properly submitted.

State v. Hunt, 323 N.C. 407, 433, 373 S.E.2d 400, 416-17 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, —— U.S. ——, 120 L. Ed. 2d 913 (1992). For the same reason, we hold that this assignment of error is without merit.

[9] By another assignment of error, the defendant contends that the trial court deprived him of his right to be free from cruel and unusual punishment, as guaranteed by the Constitution of the United States and the Constitution of North Carolina, when the trial court instructed the jury that the defendant had the burden of proving mitigating circumstances by a preponderance of the evidence. We have consistently held that this instruction is constitutionally permissible. *E.g.*, *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (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). This assignment of error is without merit.

[10] By another assignment of error, the defendant contends the trial court erred by instructing the jurors that they were not to consider any mitigating circumstances unless they deemed those mitigating circumstances to have mitigating value. We do not agree.

The issues submitted to the jury during the capital sentencing proceeding in the present case were set forth in writing on the Issues and Recommendation as to Punishment Form. They were:

> Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of the following aggravating circumstance?
>
> . . . .
>
> Issue Two: Do you find from the evidence the existence of one or more of the following mitigating circumstances?
>
> . . . .
>
> Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstances found is, or are, insufficient to outweigh the aggravating circumstance found?

. . . .

> Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

The defendant now argues that the issues contained on the form, when taken with the trial court's instructions regarding nonstatutory mitigating circumstances, deprived him of his constitutional rights. He contends that this is so because the decision of the Supreme Court of the United States in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), mandates that constitutional consideration of mitigating evidence in North Carolina take place at Issues Three and Four, but the trial court's instructions limited consideration of mitigating evidence to Issue Two. The defendant further argues that the question of whether a mitigating circumstance, if proved, has mitigating value is a question of law and may not be left to the individual jurors.

This Court has consistently held that when a jury determines that a *statutory* mitigating circumstance exists, it is not free to refuse to consider the circumstance and must give it some weight in its final sentencing determinations, but the amount of weight any circumstance may be given is a matter left to the jury. *Huff*, 325 N.C. 1, 381 S.E.2d 635. We have also consistently held, however, that it is for the jury to determine whether submitted *nonstatutory* mitigating circumstances established by the evidence should be given any mitigating value. *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765, *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993); *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (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). As a matter of law, *nonstatutory* mitigating circumstances are mitigating only when one or more jurors deem them to be so. N.C.G.S. § 15A-2000(f)(9) (1988). We conclude that this procedure is not unconstitutional. As the Supreme Court of the United States has recently stated:

> "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by

> limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."

Johnson v. Texas, —— U.S. ——, ——, 125 L. Ed. 2d 290, 302, *reh'g denied*, —— U.S. ——, 125 L. Ed. 2d 767 (1993) (quoting *McKoy*, 494 U.S. at 456, 108 L. Ed. 2d at 389 (Kennedy, J., concurring in judgment)).

Under the North Carolina capital sentencing scheme, the only limit on the use of any proffered *nonstatutory* mitigating circumstance is that one or more jurors must determine that it exists and that it in fact has mitigating value. In the present case, the jury instructions given were strictly in accord with the North Carolina Pattern Jury Instructions as amended to conform to the dictates of the Supreme Court of the United States in its opinion in *McKoy*. The instructions given expressly state that any single juror may find that a nonstatutory mitigating circumstance exists and may deem it to have mitigating value. If one juror does so, the foreman writes "yes" after Issue Two and writes "yes" again after the proffered nonstatutory mitigating circumstance as listed on the form. After considering each nonstatutory mitigating circumstance submitted, the jury then proceeds to Issue Three, where each juror is required to weigh all such mitigating circumstances he or she has found to exist and to have mitigating value against the aggravating circumstance or circumstances found by the jury to exist. Here the jury was properly instructed *inter alia* that when deciding Issue Three, "each juror may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two."

With regard to Issue Four, the jury was further instructed *inter alia* that in making its comparison when deciding the sentence to recommend, "each juror may consider any mitigating circumstance or circumstances that any juror determined to exist by a preponderance of the evidence." We conclude that the Issues and Recommendation as to Punishment Form used by the trial court, together with the trial court's instructions in their entirety during the capital sentencing proceeding, emphasized properly that each juror was to consider and give weight to all evidence that juror found to be mitigating. Therefore, we conclude that consideration of mitigating evidence was not foreclosed by the failure of one or more jurors to find one or more of the proffered mitigating circumstances included in writing

under Issue Two on the form. *See McKoy*, 494 U.S. at 443, 108 L. Ed. 2d at 381.

The Issues and Recommendation as to Punishment Form reveals that the jury found six of the nonstatutory mitigating circumstances proffered as well as the "catch-all" mitigating circumstance of "[a]ny other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value." We are convinced that each juror was permitted to, and in fact did, consider all of the mitigating evidence he or she found to exist and that the instructions given by the trial court here were without error. *Johnson*, —— U.S. at ——, 125 L. Ed. 2d at 302. This assignment of error is without merit.

[11] By another assignment of error, the defendant contends that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is facially unconstitutional because jury discretion is not guided appropriately by objective standards. Additionally, he argues that the statute is unconstitutional as applied because the absence of objective standards has caused it to be applied in an arbitrary and capricious manner. As the defendant concedes, this question has been decided contrary to his position on numerous occasions. *E.g.*, *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990) (holding that *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), did not invalidate North Carolina's statutory capital sentencing scheme). The defendant has presented no new argument on this issue. We conclude that the statute does not violate the Constitution of the United States or the Constitution of North Carolina. This assignment of error is without merit.

[12] Having concluded that the defendant's trial and separate 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 and conclude that the record fully supports the aggravating circumstance found by the jury. Further, we find no indication that the sentence of death in this case 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, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983).

> In comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E.2d at 355. "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). It is important to note, as we have recently pointed out, that the composition of this "proportionality pool" of cases reflects post-conviction relief awarded to death-sentenced defendants. *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994).

> Because the "proportionality pool" is limited to cases involving first-degree murder convictions, a post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is acquitted or found guilty of a lesser included offense results in the removal of that case from the "pool." When a post-conviction proceeding results in a new capital trial or sentencing proceeding, which, in turn, results in a life sentence for a "death-eligible" defendant, the case is treated as a "life" case for purposes of proportionality review. The case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated. Finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing proceeding ordered in a post-conviction proceeding, which sentence is subsequently affirmed by this Court, is treated as a "death-affirmed" case.

Id. at —, 446 S.E.2d at —. Further, we have pointed out that:

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for

example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

In the present case, the defendant was convicted of murder in the first degree upon the theory that the murder was committed after premeditation and deliberation. The jury found a single 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 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 was physically or psychologically dependent on alcohol or physically or psychologically dependent on drugs, (3) that the defendant was gainfully employed and had a good work record at the time of the offense, (4) that the defendant had a good prison record while previously in prison, (5) that the defendant organized a prison choir, was president of Community Outreach Assistance, and helped raise funds used to improve his prison unit while in prison, (6) that the defendant satisfactorily completed Bible courses at Heritage Bible College while in prison, (7) that the defendant obtained a high school equivalency diploma while in prison, and (8) the catch-all mitigating circumstance of "[a]ny other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value."

In our proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum* 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, —— U.S. ——, —— L. Ed. 2d —— (1994). This case is not particularly similar to any of the cases in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases may be distinguished 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 circum-

stance of murder for pecuniary gain. *Benson* is not similar to the present case. Here, the evidence tended to indicate that the defendant planned the murder in advance, lured his victim to the murder scene by virtue of a ruse, shot the defendant from a concealed position and attempted to conceal his crime by making it appear that the victim had been killed as a result of a random drive-by shooting.

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 distinguishable from the present case. In *Stokes* there was evidence which tended to show that the actual killing of the victim occurred on the spur of the moment and was not carefully planned. Further, some of the evidence, if believed, tended to show that Stokes himself was minimally involved in the actual killing of the robbery victim. In the present case, overwhelming evidence tended to show that the defendant planned the murder well in advance, executed it carefully, and then carried out a plan to conceal the fact that he had done the killing.

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 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. The evidence tended to show that the defendant and two men who were sitting in a car got into an argument outside a bar near midnight. The victim was gesturing with his hands and arguing when the defendant suddenly pulled a pistol and shot him. The evidence in the present case tended to show a calculated murder, carefully planned and executed. Further, the defendant here, unlike the defendant in *Rogers*, had previously been convicted of another homicide.

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 distinguishable from *Young*. Here, the defendant had previously been convicted of another homicide, unlike the defendant in *Young*.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the 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 *Hill*, unlike the present case, all of the evidence tended to show that the defendant did not plan the killing in advance. The killing was a sudden, but inexcusable, response to being seized by the officer. In the present case, evidence tended to indicate that the defendant carefully planned and executed the murder and its concealment. Further, the defendant in the present case, unlike the defendant in *Hill*, had previously been convicted of another homicide.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waived 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 aggravating circumstance found was that the murder was committed for pecuniary gain. No evidence in *Jackson* tended to show the precise circumstances under which the killing occurred. Here, however, the evidence was to the effect that the defendant carefully planned and executed the killing and then attempted to conceal his participation. Additionally, the defendant in the present case, unlike the defendant in *Jackson*, had been convicted of a prior homicide.

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 carefully posi-

tioned himself to shoot his victim a second time in order to ensure his death. Additionally, the defendant in the present case had previously been convicted of another homicide.

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 is not particularly similar 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 comparisons, 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 matters 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. For that reason, 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. To the contrary, we plainly stated 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. Additionally, "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." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (1994).

The defendant in the present case refers us to several cases in which juries during capital sentencing proceedings recommended life sentences. Most of those cases are factually dissimilar from the present case and involved situations in which the juries found aggravating circumstances other than the one found in the present case. One of those cases is, however, somewhat similar to the present case.

In *State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984), a Mecklenburg County jury recommended a life sentence upon a first-degree murder conviction, although the defendant had been convicted of a prior violent felony. In *Withers*, the defendant shot an eleven-year-old child twice in the back causing her death and also wounded the child's mother. The State presented evidence that the defendant had been paroled after serving thirteen years of a life sentence imposed upon a previous conviction for murder in the first degree. The jury returned verdicts finding the defendant guilty of murder in the first degree and of assault with a deadly weapon with intent to kill.

A capital sentencing proceeding was then conducted before the same jury. The jury found two aggravating circumstances: (1) that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, and (2) that this murder was part of a course of conduct in which the defendant engaged and which included the commission by him of other crimes of violence against a person or persons. The jury also found one or more of the ten mitigating circumstances submitted without specifying which ones it had found. The jury found that the aggravating circumstances were insufficient to outweigh the mitigating circumstances and recommended a sentence of life imprisonment. As required by law, the trial court followed the jury's recommendation and entered a sentence of life imprisonment.

We acknowledge that *Withers* is rather similar to the present case when considered for purposes of proportionality review. However, we conclude that *Withers* stands in stark contrast to the ordinary run of capital cases. Using just two cases as examples of this point, we note that juries recommended death in both *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), and *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*,

484 U.S. 970, 98 L. Ed. 2d 406 (1987). In both of those cases, the jury found the prior violent felony aggravating circumstance. In any event, we reiterate here that "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." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. Certainly, *Withers* is an aberration and does not represent a consistent trend of life sentences sufficient to provide us with any strong basis for concluding that the death sentence in the present case is disproportionate.

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 "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 that sentence disproportionate or those in which juries have *consistently* returned recommendations of life imprisonment. *E.g.*, *McDougall*, 308 N.C. 1, 301 S.E.2d 308 (murder where jury found as an aggravating circumstance that the defendant had previously been convicted of a felony involving the use of violence to the person). 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 sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's trial and capital sentencing proceeding were free of prejudicial error and that the resulting sentence of death was not disproportionate punishment. Therefore, the sentence of death entered against the defendant must be and is left undisturbed.

No error.

STATE OF NORTH CAROLINA v. RANDY JOE PAYNE

No. 355A92

(Filed 9 September 1994)

1. **Criminal Law § 103 (NCI4th)— capital sentencing—prior crimes to be introduced by State—disclosure motion properly denied**

The trial court did not err in the denial of defendant's motion to require the State to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce at a capital resentencing hearing pursuant to Rule 404(b) since (1) this rule addresses the admissibility of evidence and is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder; (2) the State did not directly introduce or use evidence of prior crimes or bad acts committed by defendant but only cross-examined defendant about the acts; and (3) the motion did not request a copy of defendant's criminal record, and defendant's failure to make such a request waived his right to discovery of his record under N.C.G.S. § 15A-903(c). N.C.G.S. § 8C-1, Rule 404(b)(1992).

Am Jur 2d, Depositions and Discovery § 438.

2. **Jury § 141 (NCI4th)— capital sentencing—jury voir dire—beliefs about parole eligibility—questions properly excluded**

The trial court properly denied defendant's oral motion for permission to question potential jurors in a capital sentencing proceeding regarding their beliefs about parole eligibility where defendant would have been eligible for parole had he been given a life sentence.

Am Jur 2d, Jury §§ 201, 202.

3. **Criminal Law § 1303 (NCI4th); Jury § 70 (NCI4th)— capital sentencing—defendant's life sentence for rape—instruction to prospective jurors not required**

The trial court did not err by denying defendant's request that prospective jurors in a resentencing hearing for first-degree murder be instructed during preselection that defendant had received a life sentence for first-degree rape of the victim since nothing in N.C.G.S. § 15A-1213 or in the case law requires the court to

instruct prospective jurors about sentences defendant may have received for other offenses either related or unrelated to the crime for which the jurors ultimately selected will recommend sentencing. The Court did not reach the merits of defendant's argument that he was entitled to present his life sentence to the jury as mitigating evidence pursuant to *Lockett v. Ohio*, 438 U.S. 586, and its progeny because defendant never moved to introduce the rape sentence at any time during the evidentiary phase of the resentencing proceeding.

Am Jur 2d, Criminal Law § 600; Jury §§ 189 et seq.

4. Constitutional Law § 230 (NCI4th); Criminal Law § 412 (NCI4th)— capital resentencing—statement to jury panel—opening statement—aggravating circumstance not submitted in prior hearing—comments not in bad faith

The prosecutor did not act in bad faith in a third capital sentencing proceeding by his comments to the prospective jury panel and in his opening statement that the State intended to rely on the especially heinous, atrocious, or cruel aggravating circumstance when he knew that this aggravating circumstance had not been submitted to the jury in the second sentencing proceeding, and the trial court was not required to intervene *ex mero motu*, where the prosecutor also knew that this circumstance had been submitted and found in the first sentencing proceeding and that, though the circumstance was not submitted in the second proceeding, on appeal the N.C. Supreme Court did not address the question of whether the evidence was sufficient to support this circumstance.

Am Jur 2d, Trial §§ 513 et seq.

5. Criminal Law § 1309 (NCI4th)— capital resentencing—questions about victim's wounds—no injection of heinous, atrocious, or cruel aggravating circumstance into hearing

The prosecutor did not improperly inject the especially heinous, atrocious, or cruel aggravating circumstance into a capital resentencing hearing by asking witnesses about the victim's defensive and other wounds when he knew that this circumstance was not submitted to the jury in a prior sentencing hearing where the prosecutor's questions did not refer specifically to the circumstance and were relevant to sentencing because the jury had to hear evidence concerning the offense in order to

consider the aggravating circumstance of whether the capital felony was committed while the defendant was engaged in the commission of a rape.

Am Jur 2d, Criminal Law §§ 598, 599

6. Criminal Law § 455 (NCI4th)— capital sentencing—prosecutor's argument—death penalty—deterrence of defendant—not comment about parole

The prosecutor's jury argument in a capital resentencing hearing that the only way to be sure that defendant never did this again is to give him the death penalty did not suggest to the jury that defendant might be released on parole if sentenced to life and was not improper since the prosecutor never mentioned parole or the consequences of life imprisonment, and specific deterrence arguments and arguments that death will have a deterrent effect on defendant personally are permissible during the penalty phase of a capital trial.

Am Jur 2d, Trial §§ 572 et seq.

Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.

7. Criminal Law § 1361 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—intoxication—instructions

The trial court's statement in its instructions to the jury on the mitigating circumstance of impaired capacity in a capital sentencing proceeding that "generally voluntary intoxication is no excuse for crime" could not have misled jurors to interpret impaired capacity as excluding impairment due to voluntary gasoline or alcohol intoxication since (1) it was immediately followed by the statement that a juror would find this circumstance if he or she found that defendant sniffed gas, drank beer or was of low intelligence so that his capacity to appreciate the criminality of his conduct was impaired, and (2) the statement, when considered in context of the whole instruction, merely reiterated the court's prior instruction that a finding of a mitigating circumstance is not the equivalent of excusing the crime and in essence assured the jury that it would not be excusing defendant of culpability for the murder if it were to find the mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

8. Criminal Law § 452 (NCI4th)— capital sentencing—prosecutor's argument—gasoline inhalation—voluntary intoxication—impaired capacity mitigating circumstance—proper comment on weight

The prosecutor did not improperly urge the jury in a capital resentencing hearing to reject voluntary gasoline inhalation as mitigating because it does not qualify as an excuse for the crime when he stated in his closing argument, "He goes and voluntarily does that, and voluntary intoxication of any kind is no excuse for any crime in this State. If it was, he would have been found not guilty by reason of insanity," where these statements were immediately followed by statements to the effect that a doctor's testimony indicated that defendant's appreciation of the criminality of his actions might have been impaired but that the possible impairment was insignificant in light of the brutal attack on the victim. In the context of the whole argument, the prosecutor's statements were directed to the weight the jury should give the impaired capacity mitigating circumstance.

Am Jur 2d, Trial §§ 572 et seq.

9. Criminal Law § 1358 (NCI4th)— capital sentencing—mental or emotional disturbance mitigating circumstance—possible sources—propriety of instructions

The trial court did not err by failing to include personality disorder and borderline intelligence as grounds for considering the mental or emotional disturbance mitigating circumstance in an instruction which included the effects of gasoline sniffing and alcohol consumption as evidence of this circumstance where the instruction did not preclude the jurors from considering other evidence in addition to gasoline sniffing and alcohol consumption; neither of defendant's experts stated that, at the time defendant murdered the victim, he was under the influence of a mental or emotional disturbance as a result of a borderline I.Q. or a personality disorder; defendant's experts did testify that defendant suffered from a lowered I.Q., neurological damage, impaired attention span, and impulse control problems as a result of his long-term inhalation of gasoline; and the instruction thus accorded with defendant's evidence in that the jury could consider defendant's lower intellectual functioning as one of the effects of his substance abuse. Furthermore, the trial court's use of the con-

junctive in this instruction accorded with defendant's evidence that the effects of gasoline inhalation and alcohol intoxication interact with each other and cause a greater effect than if administered separately and was not plain error.

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

10. Criminal Law § 1360 (NCI4th)— capital sentencing—impaired capacity mitigating circumstance—possible sources—propriety of instructions

The trial court did not err by failing to mention defendant's personality disorder as a possible source of the impaired capacity mitigating circumstance in an instruction which included gasoline inhalation, alcohol consumption and low intelligence as possible causes of this circumstance where defendant's experts did not link defendant's personality disorders to any impairment in capacity; one expert stated that they were the result of substance abuse; and the instruction did not preclude the jury from considering other evidence. Furthermore, the trial court's use of the conjunctive in this instruction accorded with defendant's evidence which concentrated on the combined effects of gasoline inhalation, alcohol consumption and lower intelligence and was not plain error.

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

Effect of voluntary drug intoxication upon criminal responsibility. 73 ALR3d 98.

11. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—use of "little, if any" in instruction—no plain error

The trial court's use of the phrase "little, if any" prior criminal activity in its instruction on the no significant history of criminal activity mitigating circumstance was not plain error when considered in context where the instruction correctly informed the

jury that, in determining the significance of defendant's criminal history, it should consider the nature and quality of defendant's activity rather than focus solely on the number of acts; no evidence of prior convictions and only a small amount of evidence of prior criminal activity by defendant was presented, so that a reasonable juror was unlikely to have found that defendant had a significant number of prior acts or convictions and rejected this mitigating circumstance on that basis alone; and the phrase was in the form of "would find," which suggests a possibility, rather than "must find," which would operate as a condition to making the finding.

Am Jur 2d, Criminal Law §§ 598, 599.

12. Criminal Law § 1326 (NCI4th)— capital sentencing—mitigating circumstances—burden of proof—instructions

The trial court's failure to define "preponderance of the evidence" of its own accord in its instructions on defendant's burden of proof for mitigating circumstances was not plain error. Nor was there plain error in the trial court's explanation that "preponderance of the evidence" requires that the evidence "satisfy" the juror that the circumstance exists.

Am Jur 2d, Trial §§ 1441 et seq.

13. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—mitigating value—instruction

The trial court did not err by instructing the jury that it could consider nonstatutory mitigating circumstances if it found that such circumstances existed and that such circumstances had mitigating value.

Am Jur 2d, Trial §§ 1441 et seq.

14. Criminal Law §§ 1357, 1360 (NCI4th)— capital sentencing—rejection of mitigating circumstances by jury—no constitutional or statutory violation

The rejection by all jurors in a capital sentencing hearing of the mental or emotional disturbance and impaired capacity mitigating circumstances was not arbitrary and did not violate either the Eighth Amendment of the U.S. Constitution or N.C.G.S. § 15A-2000(d)(2) where the evidence presented as to these circumstances was not uncontroverted as defendant contended,

and a reasonable juror could have found that the testimony of defendant's experts was not inherently credible. N.C.G.S. §§ 15A-2000(f)(2), 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

15. Criminal Law § 1373 (NCI4th)— death penalty not excessive or 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 defendant was found guilty based on both the felony murder rule and malice, premeditation and deliberation; the jury found no mitigating circumstances and found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a rape; and the evidence tended to show: the twenty-eight-year-old defendant broke into the victim's home and brutally killed her by sixteen blows with a hatchet to her head, neck, back, arms and hands; defendant raped the victim while she was still alive; defendant showed no remorse for the crime; and after the murder, defendant returned to a barn, hid the hatchet, changed clothes, and slept.

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.

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 Seay, J., at the 21 September 1992 Criminal Session of Superior Court, Alexander County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 May 1994.

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

Michael F. Easley, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

WHICHARD, Justice.

This appeal is from a resentencing proceeding. In 1985 at defendant's first trial, he was convicted of the first-degree rape and first-degree murder of Kathleen Weaver, a sixty-nine-year-old widow, and sentenced to death for the murder and a consecutive mandatory life sentence for the rape. On defendant's first appeal, we ordered a new trial. *See State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). In 1988 at defendant's second trial, he again was convicted of the first-degree rape and first-degree murder of Kathleen Weaver. He was sentenced to mandatory life imprisonment for the first-degree rape, to run consecutively to the death sentence he received for the first-degree murder. On defendant's second appeal, *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991) [hereinafter *Payne II*], we found no error in the guilt phase of his trial but ordered a new sentencing proceeding on the first-degree murder conviction based on the United States Supreme Court's decision in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). The evidence presented in the guilt phase of defendant's trial is summarized in *Payne II*, 328 N.C. at 384-86, 402 S.E.2d at 586-87. The issues raised here relate only to resentencing; therefore, we will discuss only such evidence as is necessary for this appeal.

The State's evidence tended to show that on 9 November 1983 Kathleen Weaver lived alone in Lexington, North Carolina. On that day between 10:15 a.m. and 10:30 a.m., Frances Leonard, an employee of an animal hospital located across from Mrs. Weaver's home, was looking out a window of the hospital toward the back door of Mrs. Weaver's home. She saw the back door fly open. A man ran from the house, across the yard, and jumped over a chain-link fence. She saw something green in the man's hand and noted that he was wearing a white or yellow T-shirt and jeans or faded pants. She left the window to alert a fellow worker. When she returned she saw a man's feet sticking out of the door of a barn located behind the hospital.

Sergeant Robert Henderson and Officer Kenneth Owens from the Sheriff's Department arrived at approximately 10:40 a.m. They entered the barn and noticed a can of gasoline. They found defendant asleep upstairs in a loft. He was wearing blue jeans and a brown shirt.

Sergeant Henderson then entered Mrs. Weaver's home where he found her body covered in blood on the floor. Her legs were spread apart and her pajamas were split in the crotch area. He noticed that

there were bloodstains on the bed, which was in disarray. He left the house and secured the scene.

Chief Deputy Johnson arrived shortly thereafter and entered Mrs. Weaver's home. He saw that the back door had been pried open and found bloodstains in the kitchen and hallway. He entered the bedroom and saw Mrs. Weaver's body. He noted that there were several wounds on her left hand that appeared to be defense wounds. Johnson then left the house and went to the barn. He raised a loose board in the floor of the barn and found a hatchet and a white sock drenched in blood. The hatchet and sock were only a few feet inside the door, which suggested that had a man run into the barn and either fallen or lain down to put something under the board in the floor, his feet would stick out of the barn door.

Defendant was taken into custody and advised of his *Miranda* rights. He stated that he understood his rights and refused to answer questions about Mrs. Weaver, denying that he knew her. Chief Deputy Johnson noticed that during the questioning defendant did not slur his words. He stated that there was nothing unusual about defendant's eyes nor was there an odor of alcohol about his person. He did not think defendant was under the influence of alcohol or any other narcotic.

Dr. Robert Anthony, a forensic pathologist, performed the autopsy on 10 November 1983. He was not available to testify during the resentencing proceeding; therefore, his testimony from defendant's second trial was read to the jury. He stated that the victim was five feet, one-inch tall and weighed one hundred thirty-one pounds. He found sixteen cut injuries on her head, neck, back, arms, and hands. Several of the wounds were over three-inches long. Two deep cuts went through the skull; the brain and bone in the head were exposed through these cuts. The victim's skull was fractured, which caused fragments of bone to be driven into the brain's surface. A three-inch cut on the left arm opened the elbow joint and entered the bones of the forearm. The cuts were caused by a large, heavy, sharp object, such as a cleaver, ax, or machete. The victim also suffered a blow of some magnitude to the liver.

Dr. Anthony stated that the victim died as a result of loss of blood and the blows to the head which penetrated the brain. He characterized the injuries to the victim's hands and arms as defense wounds, which usually occur when a person is trying to ward off blows. Dr.

Anthony concluded that the vagina was penetrated by a foreign object shortly before the victim died.

An SBI agent testified that blood consistent with that of the victim was found on the hatchet and the sock in the barn, on the defendant's socks and one of his shoes, and on his jeans. Other agents testified that fibers on the hatchet matched those from the victim's pajamas, that hairs removed from the victim's fingernails could have originated from defendant, and that spermatozoa were found on slides made from a vaginal swab.

Defendant presented evidence tending to show that he had sniffed gasoline habitually since he was seven or eight years old. By the time he was fifteen, he would sniff gasoline six to eight hours at a time, three to four times a week. Two of defendant's five siblings and his mother testified about his problems with gasoline. They also stated that defendant's father was an alcoholic and often beat defendant for sniffing gasoline.

Defendant testified that he began sniffing gasoline when he was eight and also began drinking alcohol at that time. When he was nine he began using drugs such as Quaaludes, Valium and marijuana. He sniffed other inhalants, including paint thinner, plastic rubber, wood glue, airplane glue, and lighter fluid. He further testified that he does not regard sniffing inhalants as a problem and that he still uses them in Central Prison. He stated that he had had many jobs but none for more than two and one-half months.

Defendant inhaled gasoline five days a week for eight to twelve hours at a time in the year before the murder. He kept the gasoline in the barn. On the day before the murder, he bought a twelve-pack of beer and drank the contents of eleven and one-half cans and sniffed gasoline. He then went to sleep, awoke once, and then awoke again to find two policemen standing over him. He stated that he was not capable of committing the crimes against Mrs. Weaver. He suggested that the Sheriff's Department might have set him up by putting the victim's blood on his socks. He denied taking a hatchet from Mrs. Weaver's tool shed and killing her with it.

Dr. Anthony Colucci, an expert in pharmacology and toxicology, testified about the effects of gasoline inhalation and alcohol consumption. People who are exposed to gasoline, especially when they are young, begin to manifest mental retardation syndromes because the brain has been eaten away little by little. He stated that consum-

ing eleven and a half beers would render most people physically unable to function. Dr. Colucci had never spoken with or examined defendant.

Dr. John Warren, an expert in psychopharmacology and psychology, testified that he examined defendant for the first time in August 1992 and again in September 1992. He interviewed family members and reviewed prior trial testimony, defendant's 1974 records from Dorothea Dix Hospital, and his school records. He administered an I.Q. test to defendant, which placed his I.Q. in the seventy to eighty range of scores. This score showed borderline mental retardation and cognitive problems. Dr. Warren testified that based on the information he had from the records and the nine hours he spent with defendant, he believed that at the time of the murder defendant's capacity to appreciate the criminality of his conduct was impaired by substance abuse and by his low I.Q.

Defendant and the State stipulated that defendant had been convicted of the first-degree rape of the victim. The jury found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a rape, which was the only aggravating circumstance submitted. The trial court submitted four statutory and eleven non-statutory mitigating circumstances. None of the jurors found any of these to exist. The jury then recommended a sentence of death, and the court sentenced defendant in accord with that recommendation.

[1] Defendant assigns as error the trial court's denial of his motion to disclose evidence of prior crimes or bad acts by defendant that the State intended to introduce pursuant to Rule 404(b). Defendant contends that disclosure by the State was necessary to insure basic fairness and reliability in the capital sentencing proceeding because defendant then would have had an adequate chance to rebut allegations of prior crimes or bad acts that were relevant either to aggravating or mitigating circumstances. During cross-examination, defendant repeatedly testified that he did not remember participating in certain crimes. He argues that his inability to refute the allegations was prejudicial.

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other

> purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). This rule addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder. Further, the State did not directly introduce or use evidence of prior crimes or bad acts committed by defendant; rather, it cross-examined defendant about the acts. Finally, the motion did not indicate that a request was made for a copy of defendant's criminal record. Failure to make such a request constitutes a waiver by defendant of his right to discovery of his record under N.C.G.S. § 15A-903(c). *See State v. Jones*, 295 N.C. 345, 358-59, 245 S.E.2d 711, 719 (1978). This assignment of error is overruled.

[2] In another assignment of error, defendant argues that the trial court erred by denying his oral motion for permission to question potential jurors regarding their beliefs about parole eligibility. We previously have held that evidence about parole eligibility is not relevant in a capital sentencing proceeding because it does not reveal anything about defendant's character or record or about any circumstances of the offense. *See, e.g., State v. Green*, 336 N.C. 142, 157-58, 443 S.E.2d 14, 23 (1994); *State v. Price*, 326 N.C. 56, 83, 388 S.E.2d 84, 99-100, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888 (1994); *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). The United States Supreme Court's recent decision in *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), does not affect our prior rulings on this issue. There, the Court ruled that a sentencing jury must be informed that a defendant is parole ineligible when the State argues to the jury for the death penalty based on the premise that the defendant will be dangerous in the future. The Court, however, noted that where a defendant is eligible for parole, "[s]tates reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide 'greater protection in [the States'] criminal justice system than the Federal Constitution requires.' " *Id.* at —, 129 L. Ed. 2d at 145 (quoting *California v. Ramos*, 463 U.S. 992, 1014, 77 L. Ed. 2d 1171, 1189

(1983)); *see also State v. Bacon*, 337 N.C. 66, 97-98, 446 S.E.2d 542, 558-59 (1994). Here, defendant would have been eligible for parole had he been given a life sentence. We continue to adhere to our prior rulings on this issue. This assignment of error is overruled.

[3] In his next assignment of error, defendant argues that the trial court committed reversible error by denying his request that prospective jurors be instructed during preselection about his life sentence for first-degree rape. Defendant was convicted of the murder and first-degree rape of Kathleen Weaver during his second trial in 1988. That jury recommended a sentence of death for the murder; the trial court imposed the death sentence and a life sentence for the collateral crime of first-degree rape. It ordered that the life sentence run consecutively to the sentence for murder. Defendant contends that the trial court's refusal to instruct the venire panel about his sentence for first-degree rape violates jurisprudence addressing the constitutional guarantee that a defendant in a capital case is entitled to present mitigating evidence, specifically *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), and its progeny. Defendant cites *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986), for the proposition that a sentencer in a capital case may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 4, 90 L. Ed. 2d at 6. His life sentence for first-degree rape is, according to defendant, an aspect of his record that could be a basis for a sentence less than death, and under *Skipper*, he was entitled to present it to the jurors during preselection as mitigating evidence.

The statute governing the information the trial court is to give to prospective jurors provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

N.C.G.S. § 15A-1213 (1988). Nothing in this statute or in the case law requires the court to instruct prospective jurors about sentences a defendant may have received for other offenses, either related or unrelated to the crime for which the jurors ultimately selected will

recommend sentencing. The purpose of the informative statement by the court to the prospective jurors is a limited one. The official commentary to the statute states that "[t]his procedure is designed to orient the prospective jurors as to the case." *Id.*

> In response to defendant's request, the trial court stated:
>
> Well, I don't think I'm going to get into that [the first-degree rape life sentence]. I'm going to tell them that's what he was convicted of [first-degree rape] and then the trial we are about: the sentencing on the murder charge. I don't want to broaden this beyond what is necessary.

The trial court properly decided to instruct the prospective jurors only on those matters required by statute. Further, the court's ruling was procedurally prudent given the possibility that no prospective juror would be chosen from the particular venire to serve in the sentencing proceeding. We do not reach the merits of defendant's argument based on *Lockett* and its progeny because defendant never moved to introduce the first-degree rape sentence at any time during the evidentiary phase of the resentencing proceeding; his sole request was for the court to inform *prospective* jurors, none of whom would necessarily in fact serve, of the first-degree rape sentence. We find no error or abuse of discretion in the court's decision, and we overrule this assignment of error.

[4] Defendant next assigns as error the prosecutor's comments during his statement to the prospective jury panel and during his opening statement in which he stressed that the murder was especially heinous, atrocious and cruel. Defendant did not object to these comments, but he contends the court should have intervened *ex mero motu* because the prosecutor acted in bad faith by mentioning this aggravating circumstance. He argues that because the trial court ruled at the second sentencing proceeding that the evidence was not sufficient to submit the aggravating circumstance that the murder was especially heinous, atrocious or cruel, any mention of the circumstance was barred in this, the third, sentencing proceeding. According to defendant, the prosecutor's comments were an attempt to persuade the jury to rely on an ineligible, and therefore arbitrary, aggravating circumstance, which thereby violated the Eighth Amendment, the North Carolina Constitution, and the capital sentencing statute. Defendant cites *State v. Silhan*, 302 N.C. 223, 267-71, 275 S.E.2d 450, 482-83 (1981), as holding that, based on double jeopardy principles, a judicial finding of insufficiency of evidence to support

an aggravating circumstance in one capital sentencing proceeding bars the use of it in a resentencing proceeding in the same case. We disagree with defendant's interpretation of the application of *Silhan* to this case.

In *Silhan* this Court stated:

> If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the [S]tate from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was either not then submitted to the jury or, if submitted, the jury then found it to exist.

Id. at 270, 275 S.E.2d at 482. In the first sentencing proceeding the jury found the aggravating circumstance that the murder was especially heinous, atrocious or cruel. In the second and third sentencing proceedings the trial court did not submit the circumstance. In our review of the second sentencing proceeding, we determined in a similar issue that the prosecutor had not engaged in misconduct by stating to the jury that it could consider evidence of an especially heinous, atrocious or cruel murder as an aggravating circumstance in sentencing where the trial court later declined to submit the circumstance. *Payne II*, 328 N.C. at 392, 402 S.E.2d at 590. There we stated that, based on the evidence, the statements were made in good faith because the prosecutor could reasonably interpret the evidence as supporting the circumstance. We did not rule on whether the evidence was sufficient to support the circumstance. *Id.*

Defendant argues that the difference between the issue before us now and the issue before us in his second appeal is that here a judicial determination of insufficiency of the evidence had been made by the trial court in the second sentencing proceeding. The prosecutor therefore had notice that the circumstance was not supported by the evidence, and he thus should not have commented on it to the jury. In *Silhan* we stated that the State may rely "on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed from and which was . . . not submitted to the jury" without violating double jeopardy prohibitions. *Silhan*, 302 N.C. at 270, 275 S.E.2d at 482. Because the trial court determines whether to submit an aggravating circumstance, and must submit a statutory circumstance where the evidence supports its submission—*see* N.C.G.S. § 15A-2000(b) (1988); *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323, *sentence vacated on other grounds*, 488 U.S. 807, 102

L. Ed. 2d 18, *on remand*, 323 N.C. 622, 407 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)—the implication of our statement was that it is not the trial court's ruling on the submission that determines whether the State is barred from reliance on the circumstance. Clearly we were referring to a judicial determination of insufficiency made by this Court, not the trial court.

At the time of the third sentencing proceeding the prosecutor knew the circumstance had been submitted and found in the first proceeding. He also knew that though the circumstance was not submitted at the second proceeding, on appeal this Court did not address the question of whether the evidence was sufficient to support the circumstance. Following our statement that we did not answer the sufficiency question, we noted that the case was "not so lacking in evidentiary support for this factor that it was impermissible for the prosecutor to forecast reliance on it at the outset of the trial." *Payne II*, 328 N.C. at 392, 402 S.E.2d at 590. We conclude that the prosecutor did not improperly rely on the circumstance given our silence on the question of the sufficiency of the evidence and the fact that a previous jury had found the circumstance to exist. *See Silhan*, 302 N.C. at 270, 275 S.E.2d at 482 (double jeopardy prohibitions not violated where, in a subsequent sentencing proceeding, an aggravating circumstance is submitted that a jury found to exist in a previous proceeding because defendant, in essence, had not been acquitted of the circumstance); *see also Poland v. Arizona*, 476 U.S. 147, 157, 90 L. Ed. 2d 123, 133 (1986) (holding that trial judge's refusal to final aggravating circumstance was not acquittal of that circumstance for double jeopardy purposes). The prosecutor's comments to the prospective jury panel and in his opening statement briefly mentioned the State's intention to rely on the circumstance based on the brutality of the killing. These comments would have had to be " 'glaring or grossly egregious for this Court to determine that the trial court erred in failing to take corrective action *sua sponte*.' " *State v. Brown*, 320 N.C. 179, 200, 358 S.E.2d 1, 16 (quoting *State v. Pinch*, 306 N.C. 1, 18, 292 S.E.2d 203, 218, *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)), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). These comments were not grossly improper and did not require *ex mero motu* intervention. After the trial court ruled that it would not

submit the circumstance, the prosecutor did not mention it to the jury again. The prosecutor did not act in bad faith; the *Silhan* principles were not violated.

[5] In the same assignment of error, defendant argues that the prosecutor improperly injected the aggravating circumstance into the State's presentation of the evidence by asking witnesses about the victim's defensive and other wounds. Defendant did not object to these questions; thus, review is limited to consideration of whether the testimony constituted plain error. *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). Plain error is such that its presence " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). The prosecutor did not refer specifically to the circumstance but instead questioned witnesses about the nature of the wounds on the victim's hands. Where a different jury from the one that served in the guilt phase determines punishment, the evidence from the guilt phase "is competent for the jury's consideration in passing on punishment," including evidence as "to any matter that the court deems relevant to sentence." N.C.G.S. § 15A-2000(a)(3) (1988); *see Pinch*, 306 N.C. at 19, 292 S.E.2d at 219. In this case, the jury had to hear evidence concerning the offense in order to consider the aggravating circumstance of whether the capital felony was committed while the defendant was engaged in the commission of a rape. The prosecutor's questions did not refer specifically to the circumstance and were relevant to sentencing. They thus did not constitute plain error. This assignment of error is overruled.

[6] Defendant next assigns as error the trial court's overruling of his objections to closing statements made by the prosecutor that, according to defendant, implicitly referred to the danger of defendant's possible release on parole. In his closing argument the prosecutor made the following statements:

> The only way, the only way that we're ever going to be sure that this defendant right here will never do this again is to put him in the gas chamber.
>
> That is the only way that we'll ever be sure. . . . You've got it in your power to see that he never does it again . . . . And the only way you're going to be sure is to give him the death penalty.

> You say to yourself, what can I do to make sure he'll never do it again? And the answer to that is to put him where he belongs for what he did to Kathleen Weaver.
>
> [D]o what you can to make sure Randy Joe Payne does not ever do this again.

Defendant argues that because this Court has ruled that parole eligibility is irrelevant to capital sentencing, the State should be bound by the assumption that a life sentence means life and that defendant will never be released from prison. Defendant contends that the prosecutor's statements suggested to the jury that defendant might be released on parole and were therefore improper. We disagree.

In *State v. Laws*, 325 N.C. 81, 120, 381 S.E.2d 609, 632 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *sentence reinstated*, 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), this Court held that specific deterrence arguments are permissible during the penalty phase of a capital trial. Further, the prosecutor may argue to the jury that death will have a deterrent effect on defendant personally. *State v. Lee*, 335 N.C. 244, 281-82, 439 S.E.2d 547, 567 (1994); *State v. Gibbs*, 335 N.C. 1, 69, 436 S.E.2d 321, 360 (1993), *cert. denied*, — U.S. —, — L. Ed. 2d — (1994); *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994). Here, the prosecutor never mentioned parole or the consequences of life imprisonment. The prosecutor's argument therefore was not improper. This assignment of error is overruled.

[7] Defendant assigns as error the trial court's following statement in its instructions to the jury on the mitigating circumstance of impaired capacity, N.C.G.S. § 15A-2000(f)(6): "You must remember, members of the jury, that generally voluntary intoxication is no excuse for crime." He argues that the court's statement indicated to the jury that evidence must excuse a crime to be mitigating and that voluntary intoxication does not constitute an excuse. Defendant contends that one or more jurors were reasonably likely to interpret impaired capacity as excluding impairment due to voluntary gasoline or alcohol intoxication. The jurors were precluded thereby from considering and giving full effect to the mitigating circumstance. We disagree.

Defendant did not object to the instruction. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure bars this assignment of

error. Our review therefore is for plain error. *See Odom*, 307 N.C. at 659-61, 300 S.E.2d at 378-79. To constitute plain error, an instructional error 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). When reviewing the instruction for error, we must construe it contextually. If the charge, read as a whole, is correct, isolated portions will not be held prejudicial. *See State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987); *State v. Jackson*, 284 N.C. 383, 389, 200 S.E.2d 596, 600 (1973); *State v. Cook*, 263 N.C. 730, 734, 140 S.E.2d 305, 309 (1965).

The trial court explained mitigating circumstances to the jury by stating:

> Now, a mitigating circumstance, members of the jury, 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 the extreme punishment than other first-degree murders.
>
> . . . .
>
> [I]t would be your duty to consider as a mitigating circumstance any aspects of the defendant's character or record 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.

The trial court's complete instruction to the jury on the impaired capacity mitigating circumstance was as follows:

> Members of the jury, . . . you would take up mitigating circumstance B which reads as follows: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired."
>
> And a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he's doing at a given time is killing or that such killing is wrong. A person may indeed know that killing is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he's doing or how wrong it is.

> Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform his conduct to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.
>
> Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of his impairment is lessened or diminished because of such impairment.
>
> You must remember, members of the jury, that generally voluntary intoxication is no excuse for crime. You would find this mitigating circumstance if you find that the defendant sniffed gas, drank beer, was below intelligence [sic] and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

The court correctly instructed the jury that a mitigating circumstance does not constitute a justification or excuse for killing but may be considered as extenuating or reducing the moral culpability of the murder so that it is less deserving of a death sentence than other first-degree murders. *See State v. Boyd*, 311 N.C. 408, 421, 319 S.E.2d 189, 198 (1984) (quoting *State v. Brown*, 306 N.C. 151, 178, 293 S.E.2d 569, 586 (1982)), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985). The court did not state that defendant's burden was to establish by a preponderance of the evidence such facts as would constitute a justification or excuse for the killing. The court's statement that generally voluntary intoxication is not an excuse for crime was immediately followed by the statement that the juror would find the circumstance if he or she found that defendant sniffed gas, drank beer or was of low intelligence so that his capacity to appreciate the criminality of his conduct was impaired. In the context of the whole instruction, the complained-of statement reiterated the court's prior instruction that a finding of a mitigating circumstance is not the equivalent of excusing the crime. In essence the statement assured the jury that it would not be excusing defendant of culpability for the murder if it were to find the mitigating circumstance. The statement thus was to defendant's advantage and did not prejudice the jury's sentencing recommendation.

[8] Defendant also assigns as error the trial court's overruling of his objections to certain of the prosecutor's closing statements to the jury because he contends they compounded the effect of the court's statement on impaired capacity that voluntary intoxication is not an excuse for the crime. Alternatively, defendant argues that the court's overruling of his objections was itself reversible error. According to defendant, the prosecutor urged the jury to reject defendant's voluntary gasoline inhalation as mitigating because voluntary intoxication is not an excuse and because the inhalation did not qualify for the excuse of insanity.

In closing the prosecutor stated, "He goes and voluntarily does that, and voluntary intoxication of any kind is no excuse for any crime in this State. If it was, he would have been found not guilty by reason of insanity." Defendant objected, the objection was overruled, and the prosecutor continued:

> You heard what the doctor said. No, he knew right from wrong. All the doctor is saying is that, well, he maybe could not appreciate the criminality of his action. . . . You consider every bit of the evidence. And when you think to yourself has this man suffered some mental or emotional disturbance that would be a mitigating circumstance for this (showing autopsy pictures), for that.

Counsel is afforded wide latitude in closing argument to the jury at sentencing and may argue the law and facts in evidence and all reasonable inferences drawn therefrom. *State v. Artis*, 325 N.C. 278, 323, 384 S.E.2d 470, 496, *sentence vacated on other grounds*, 494 U.S. 1024, 108 L. Ed. 2d 604 (1989), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). We have stated that "prosecutorial statements are not placed in an isolated vacuum on appeal." *Pinch*, 306 N.C. at 24, 292 S.E.2d at 221. Here, in the context of the whole argument, the prosecutor did not improperly urge the jury to reject voluntary gasoline inhalation as mitigating because it does not qualify as an excuse. Rather, the prosecutor's statements to the jury were directed to the weight the jury should give the mitigating circumstance of impaired capacity. The prosecutor noted that the doctor's testimony indicated that defendant's appreciation of the criminality of his actions might have been impaired but that the possible impairment was insignificant in light of the brutal attack. The juror may attach whatever weight, significance, and credibility he or she may choose to defendant's evidence even where the State offers no direct evidence in refutation. *See State v. McKoy*, 323 N.C. 1, 28-29, 372 S.E.2d 12, 26-27

(1988), *rev'd and remanded on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). We also note that defense counsel emphasized to the jury several times in closing that mitigating circumstances were not justifications or excuses for the crime. In light of the overall circumstances, we conclude that the prosecutor's statements did not compound the effect of the court's statement that voluntary intoxication is not an excuse for crime, nor do these statements alone constitute reversible error. This assignment of error is overruled.

In another assignment of error, defendant disputes the manner in which the trial court instructed the jury on two of the mitigating circumstances submitted to the jury: N.C.G.S. § 15A-2000(f)(2), mental or emotional disturbance, and N.C.G.S. § 15A-2000(f)(6), impaired capacity. None of the jurors found either of these circumstances to exist. He contends as to both circumstances that the court improperly excluded evidence that would have supported the circumstance. He further complains that the court used the conjunctive in listing the potentially supporting evidence, thereby conditioning a finding of the circumstance on a finding of all the listed factors. Defendant did not object to the instructions. We therefore review them for plain error.

[9] The trial court instructed on mental or emotional disturbance as follows:

> The first mitigating circumstance designated as A reads, "The murder was committed while the defendant was under the influence of a mental or emotional disturbance." And you would find this mitigating circumstance if you find that the defendant was suffering from the effects of gasoline sniffing and alcohol consumption and that as a result the defendant was under the influence of mental or emotional disturbance when he killed the victim.

According to defendant, the trial court properly included the effects of substance abuse as a ground for considering mental or emotional disturbance as a mitigating circumstance. He points out, however, that Dr. Warren mentioned defendant's personality disorder and his borderline intellectual functioning as evidence of his mental or emotional disturbance. He therefore contends that the court erred by failing to include personality disorder and borderline intelligence as grounds for considering the circumstance. He suggests that it was also error to condition a finding of the circumstance on findings of both gasoline inhalation and alcohol consumption. We disagree.

In this instruction the trial court did not preclude the jurors from considering other evidence in addition to gasoline sniffing and alcohol consumption. *See State v. Hill*, 331 N.C. 387, 420, 417 S.E.2d 765, 781-82 (1992), *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993). Further, the court is not required to summarize all of the evidence in its charge to the jury. N.C.G.S. § 15A-1232 (1988). Neither Dr. Warren nor Dr. Colucci stated that as a result of a borderline I.Q. or a personality disorder, defendant was under the influence of a mental or emotional disturbance at the time he killed Mrs. Weaver. *See Pinch*, 306 N.C. at 28-29, 292 S.E.2d at 224-25.

Further, Dr. Warren and Dr. Colucci stated that one of the effects of defendant's abuse of gasoline was that his I.Q. was lowered. Dr. Warren also stated that defendant showed signs of organicity, such as impaired attention span and impulse control problems, which were the effects of long-term inhalation of gasoline. Dr. Colucci testified that gasoline compounds produce neurological damage, which is manifested in mental retardation symptoms. The instruction therefore accorded with defendant's evidence in that the jury could consider defendant's lower intellectual functioning as one of the effects of his substance abuse.

As to defendant's complaint that the court used the conjunctive in the instruction, Dr. Colucci testified that the effects of gasoline inhalation and alcohol intoxication interact with each other and cause a greater effect than if administered separately. Dr. Warren agreed in his testimony that voluntary alcohol intoxication combined with inhaling gasoline would decrease defendant's judgment and inhibition. Defendant's own evidence linked these two substance abuses; therefore, the instruction in the conjunctive basically accorded with defendant's evidence and was not plain error. *See State v. Johnson*, 317 N.C. 343, 390-92, 346 S.E.2d 596, 622-24 (1986).

[10] The trial court instructed the jury on the impaired capacity circumstance, in pertinent part, as follows:

> Members of the jury, . . . you would take up mitigating circumstance B, which reads as follows: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired."
>
> . . . .

> . . . You would find this mitigating circumstance if you find that defendant sniffed gas, drank beer, was below intelligence [sic] and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Defendant notes that the trial court correctly included defendant's substance abuse and lower intelligence as possible causes of impaired capacity based on Dr. Warren's testimony that defendant's low intelligence and substance abuse impaired his capacity to appreciate the criminality of his conduct at the time of the crime. Defendant points out, however, that Dr. Warren also cited defendant's records from a mental institution from 1984 and 1985 as evidence of impaired capacity. He stated that those records indicated that another doctor diagnosed defendant as suffering from a personality disorder. Defendant therefore argues that the trial court wrongly excluded evidence of his personality disorder as a ground for considering impaired capacity. He also maintains that the trial court erred by conditioning a finding of the circumstance on a finding of all of the listed factors: gasoline inhalation, alcohol consumption, and low intelligence. We disagree.

The trial court did not err by failing to mention defendant's personality disorder as a possible source of impaired capacity. Dr. Warren did testify that defendant had personality disorders, but he did not link these disorders to any impairment in capacity. Dr. Colucci also did not mention the personality disorders as affecting defendant's capacity but rather stated that they were a result of substance abuse. Further, the trial court's instruction did not preclude the jury from considering other evidence. *See Hill*, 331 N.C. at 420, 417 S.E.2d at 781-82.

Defendant's evidence focused on the combined effects that defendant's gasoline inhalation and alcohol consumption had on his capacity to appreciate the criminality of his conduct and to conform his conduct to the law's requirements. Dr. Warren testified that defendant's ability to understand and control his actions was impaired by his substance abuse problem and further impaired by his low I.Q. Dr. Warren never testified that gasoline inhalation, alcohol consumption, or a low I.Q. alone resulted in impaired capacity. Dr. Colucci also stated that if defendant had been sniffing gasoline and consuming a large quantity of beer before the murder, he would have been compromised physically at the time of the killing. He also testified to the effects that gasoline inhalation had on defendant's I.Q. Defendant's evidence thereby concentrated on the combined effects

of gasoline inhalation, alcohol consumption and lower intelligence. The trial court's instruction in the conjunctive accorded with defendant's evidence and was not plain error. *See Johnson*, 317 N.C. at 390-92, 346 S.E.2d at 622-24. Thus, the instruction on impaired capacity did not constitute plain error.

Assuming *arguendo* that a juror might have heard either of these instructions as precluding the consideration of any evidence, we note that the trial court submitted the "catchall" circumstance found in N.C.G.S. § 15A-2000(f)(9): "Any other circumstances arising from the evidence that the jury deems to have mitigating value." Any such juror could have considered such additional evidence in making his or her determination of the existence of the "catchall" circumstance.

[11] In his next assignment of error, defendant contends that the trial court erred in its instruction to the jury on the mitigating circumstance found in N.C.G.S. § 15A-2000(f)(1), that defendant has no significant history of criminal activity. The court gave the following instruction:

> Now, members of the jury, . . . you would take up and consider . . . mitigating Issue Three which reads as follows: "That the defendant has no significant history of prior criminal activity." Significant, members of the jury, means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all the facts and circumstances which you find from the evidence. However, you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record.
>
> Rather, you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant. And as to your determination and consideration on this—as to this particular mitigating circumstance as to significant history of prior criminal activity, you must not consider his convictions in this case, that is, of the first-degree murder and first-degree rape.
>
> You would find this mitigating circumstance if you find that the defendant has little, if any, prior criminal activity and find that the criminal activity that does exist is not a significant history of prior criminal activity.

The jury did not find that this mitigating circumstance existed. Defendant concedes that the court properly defined "significant," but he maintains that it was error to condition a finding of the circum-

stance on whether defendant has "little, if any," prior criminal activity. Defendant posits that the circumstance could be found to exist even where a defendant has committed several crimes, as long as they are sufficiently minor and therefore not significant. According to defendant, this phrase required the jury to find that defendant had "little, if any," history of prior criminal activity and find that that history was not significant in order to find this mitigating circumstance. We disagree.

Defendant neither objected to the instruction nor asked for a clarifying instruction. He thus is entitled to relief only if plain error occurred. *See Gibbs*, 335 N.C. at 57-58, 436 S.E.2d at 321. To constitute plain error, an error in the trial court's instructions must be a " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

The court's instruction correctly informed the jury that in determining the significance of defendant's criminal history it should consider the nature and quality of defendant's activity rather than focus solely on the number of convictions. *See Lloyd*, 321 N.C. at 311-13, 364 S.E.2d at 323-24. In its explanation of what is significant, the court did not imply that the jury had to find "little, if any," criminal history to find the existence of the circumstance; rather, the instruction emphasized to the jury that the nature and quality of the criminal activity was the determinative factor.

Further, little evidence of defendant's history of criminal activity was presented. Defendant testified that he had broken into a few places and that "the only thing I was breaking into was coin-operating machines." He also testified that he was driving a car when two other individuals committed a breaking and entering. No evidence was presented of prior convictions. Defendant either failed to remember or denied involvement in other criminal events when questioned about them by the prosecutor. There thus was little evidence of any history of prior acts or convictions before the jury. The court instructed the jury that it was the quality, not the number of acts, that determined significance. A reasonable juror thus was unlikely to have found that defendant had a significant number of prior acts or convictions and rejected this mitigating circumstance on that basis alone. Finally, the phrase was in the form of "would find," which suggests a possibility, rather than "must find," which would operate as a condition to making the finding. We conclude that in the context of the overall instruc-

tion the phrase, "little, if any," did not constitute plain error. This assignment of error is overruled.

Defendant next argues that the trial court erred in its instructions on defendant's burden of proof for mitigating circumstances. Defendant did not preserve this issue for review because he failed to include it in those assignments of error listed in the record on appeal. Our review is limited to those issues so presented by Rule 10(a) of the North Carolina Rules of Appellate Procedure. However, because of the gravity of this crime and its attendant punishment, we will exercise our discretion and review this issue.

The court gave the following instruction:

> The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you beyond a reasonable doubt. Excuse me. That is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt. I should have said not beyond a reasonable doubt but simply satisfy you that any mitigating circumstance exists.
>
> If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the Issues and Recommendation form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence, whether or not that circumstance was found to exist by all of the jurors.

Defendant contends that the court's use of the words "satisfy you" was reversible error. Defendant also suggests that the court should have defined "preponderance" as "more likely than not." He posits that the instruction created a "standardless standard" for the jury to apply in determining the existence of a mitigating circumstance, thereby violating the Eighth Amendment's requirement of guided discretion and N.C.G.S. § 15A-2000(d)(2). Defendant did not object to the instruction or request a clarifying instruction but argues that the instruction was plain error. We disagree.

The trial court correctly instructed that the defendant's burden of establishing that a mitigating circumstance exists is by the preponderance of the evidence and that that standard requires less proof than proof beyond a reasonable doubt. We have held that by a "preponderance of the evidence" is the correct burden of proof for establishing the existence of mitigating circumstances. *See, e.g., State v.*

Moore, 335 N.C. 567, 610, 440 S.E.2d 797, 821-22 (1994); *Price*, 326 N.C. at 94, 388 S.E.2d at 106; *State v. Holden*, 321 N.C. 125, 158, 362 S.E.2d 513, 534 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988); *see also Brown*, 320 N.C. at 207, 358 S.E.2d at 20 (approving instruction similar to the one at issue). There was no plain error in the court's failing to define "preponderance of the evidence" of its own accord.

Nor is there plain error in the court's explanation that "preponderance of the evidence" requires that the juror must be satisfied that the circumstance exists. We have held consistently that "[i]t is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury." *State v. Hutchins*, 303 N.C. 321, 356, 279 S.E.2d 788, 809 (1981); *see also Green*, 336 N.C. at 185, 443 S.E.2d at 39; *Brown*, 306 N.C. at 178, 293 S.E.2d at 586-87. The use of the term "satisfy" did not create a "standardless standard."

We have examined similar arguments and rejected them: In *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988), the defendant argued that the trial court erred by refusing to define "satisfaction" in its instruction to the jury on the defendant's burden of proof for his insanity defense. The defendant there contended that the term gave unbridled discretion to the jury. We found no error in the instruction and stated, "from its own determination and from the trial court's instructions, a jury knows what satisfies it, and a 'jury is presumed to have understood the plain English contained' in the trial court's instruction." *Id.* at 175, 367 S.E.2d at 909 (quoting *State v. Franks*, 300 N.C. 1, 18, 265 S.E.2d 177, 187 (1980)).

In *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977), we analyzed an instruction in a homicide case that informed the jury that the defendant could rebut the presumption of malice by proving to the satisfaction of the jury that he killed in the heat of passion or self-defense. There, we stated, "Satisfying the jury . . . means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence." *Id.* at 648, 220 S.E.2d at 587; *see also State v. Freeman*, 275 N.C. 662, 665-66, 170 S.E.2d 461, 463-64 (1969) (construing "to the satisfaction of the jury" to require as little as "proof by the greater weight of the evidence—a bare preponderance of the proof" and stating that "the jury alone determines by what evidence it is satisfied"); *State v. Prince*, 223 N.C.

392, 393-94, 26 S.E.2d 875, 876 (1943) (jury alone is judge of what satisfies it).

Here, the trial court's use of the word "satisfy" did not increase defendant's burden of proof. We continue to adhere to our view that "satisfies" denotes a burden of proof consistent with a preponderance of the evidence. It is for the jury to determine what evidence satisfies it, and the jury is presumed to have understood the term "satisfy," which is plain English. We have stated previously that "[i]t is well settled that it is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions." *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980) (no error in court's failure to define "intent" because the word is self-explanatory). Defendant's argument is meritless. This assignment of error is overruled.

[13] Defendant next argues that the court erred when it instructed the jury that it could consider non-statutory mitigating circumstances if it found that such circumstances existed and that such circumstances had mitigating value. Defendant contends that the instruction allowed the jury to decide that a non-statutory circumstance existed but that it had no mitigating value. According to defendant, *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978) is violated by this instruction because there the Court held that "the sentencer . . . [may] not be precluded from considering *as a mitigating factor*" any aspect of defendant's character or record or the circumstances of the offense which the defendant offers as a basis for a sentence less than death. *Id.* at 604, 57 L. Ed. 2d at 990. We consistently have decided this issue against defendant's position. *See, e.g., Lee*, 335 N.C. at 292, 439 S.E.2d at 572; *State v. Fullwood*, 323 N.C. 371, 395-97, 373 S.E.2d 518, 533 (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); *State v. Huff*, 325 N.C. 1, 60-61, 381 S.E.2d 635, 669 (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). Non-statutory mitigating circumstances "do not have mitigating value as a matter of law." *Lee*, 335 N.C. at 292, 439 S.E.2d at 572. It is the juror's province to determine whether such a circumstance has mitigating value if the juror determines that the circumstance exists. The jurors in this case were not precluded from considering evidence offered by defendant as mitigating. *Lockett* and its progeny therefore were not violated. Defendant's arguments fail to persuade us to change our prior rulings on this issue. This assignment of error is overruled.

[14] Defendant next assigns as error the rejection by all jurors of the statutory mitigating circumstances found in N.C.G.S. § 15A-2000(f)(2), that defendant committed the murder while under the influence of a mental or emotional disturbance, and N.C.G.S. § 15A-2000(f)(6), that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. Defendant did not request a peremptory instruction on either of these circumstances. He believes, however, that the evidence supporting them was uncontroverted; therefore, the rejection of these circumstances allowed the jury to exercise discretionary power to disregard proven mitigating circumstances and was arbitrary and unconstitutional. *See State v. Kirkley*, 308 N.C. 196, 219-20, 302 S.E.2d 144, 158 (1983), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). Defendant bases his argument on the Eighth Amendment to the United States Constitution and on the prohibition against arbitrary capital sentencing decisions found in N.C.G.S. § 15A-2000(d)(2).

In support of his argument that the evidence supporting the mitigating circumstances was uncontroverted, defendant points to the testimony of Drs. Colucci and Warren, who discussed the chronic effects of defendant's substance abuse. Lay witnesses, including defendant's family members and defendant himself, testified about defendant's chronic gasoline inhalation and alcohol consumption. Defendant also notes that the prosecutor stated in his closing argument that "sniffing gas is bad for you."

We disagree with defendant's interpretation of the evidence. A reasonable juror could have concluded that neither of the mitigating circumstances existed. The evidence was neither uncontroverted nor indisputably credible. Dr. Colucci testified to the effects produced by sniffing gasoline. He responded to a hypothetical question by stating that should the jury find that defendant had sniffed gasoline in the twenty-four hours prior to the murder and had consumed eleven and one-half beers, defendant probably would have been unconscious. Dr. Colucci also stated that he had never spoken with defendant and had spoken with his family members for the first time on the morning of his testimony. He further testified that he obtained some of defendant's history from Dr. Warren and that if such information were incorrect, his opinion would be worthless. A reasonable juror could have concluded that his testimony was not inherently credible.

Dr. Warren testified that he first examined defendant almost nine years after the murder. Based on his evaluation, he concluded that

defendant was in the borderline range for mental functioning and was continuing to inhale substances. He believed defendant had these problems at the time of the murder and that his capacity to appreciate the criminality of his conduct was impaired by substance abuse and a low I.Q. Further, if defendant was abusing alcohol and gasoline at the time of the murder, his capacity to conform his actions to the law was impaired.

On cross-examination, however, Dr. Warren admitted that in January 1985 a forensic psychiatrist evaluated defendant and found him pleasant, alert, and cooperative; oriented as to person, place, and time, with no looseness of association; functioning intellectually in the low-normal range; and making judgments within normal limits. He also testified that at the time of the 1985 evaluation, defendant showed no signs of organic brain damage.

Lay evidence conflicted with the doctors' direct testimony. Leonard testified that she saw defendant running out of the victim's house and also observed him when he was brought down from the loft. She described him as appearing to be a "very bright person" and "bright-minded," not "staggery." She stated that she had seen defendant on numerous occasions but had only seen him a few times staggering as if he were under the influence of a substance. A veterinarian who also observed defendant when he was brought down from the loft described him as appearing as "fine and as normal-looking as can be." A deputy sheriff who was present when defendant was taken into custody stated that defendant appeared to be normal, was not slurring his words, did not smell of alcohol, and seemed to understand when he was advised of his rights.

Contrary to defendant's assertion, then, the evidence presented as to mitigating circumstances (f)(2) and (f)(6) thus was controverted. Further, a reasonable juror could have found the testimony of the experts not to be inherently credible. We conclude that the failure of the jurors to find either circumstance to exist was not arbitrary and therefore did not violate either the Eighth Amendment or N.C.G.S. § 15A-2000(d)(2). This assignment of error is overruled.

In defendant's final assignment of error, he argues that the death penalty statute, N.C.G.S. § 15A-2000, violates both the United States Constitution and the North Carolina Constitution because death is a cruel and unusual punishment and because the statute is overbroad and unduly vague. We continue to uphold our prior rulings on this issue and overrule this assignment of error. *See Fullwood*, 323 N.C. at

400, 373 S.E.2d at 535; *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980).

PROPORTIONALITY REVIEW

Because we have found no error in the sentencing phase and in *Payne II* found no error in the guilt phase, we are required to review the record to determine: (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (1988).

[15] The jury found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a rape, N.C.G.S. § 15A-2000(e)(5) (1988). We hold that the evidence fully supports the aggravating circumstance and note that defendant and the State stipulated that defendant had been convicted of the first-degree rape. Nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review and "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). We use the "pool" of similar cases as defined in *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, and *Bacon*, 337 N.C. at 104-07, 446 S.E.2d at 562-64 (1994). We consider those cases "roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). After making the comparison between those cases and this case, we determine whether juries

> have consistently been returning death sentences in the similar cases, [and if so] then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we

> will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Id.

At the guilt phase of his second trial, defendant was found guilty of first-degree murder under the felony murder rule and on the basis of malice, premeditation and deliberation. At this resentencing proceeding, the jury found as an aggravating circumstance that the murder was committed while defendant was engaged in the commission of a rape, which was the only aggravating circumstance submitted. The trial court submitted four statutory mitigating circumstances: that defendant was under the influence of a mental or emotional disturbance at the time of the murder, that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, that defendant had no significant history of prior criminal activity, and the "catchall" circumstance. None of the jurors found any of these to exist. The trial court also submitted eleven non-statutory mitigating circumstances. None of the jurors found any of these to exist. The jury then recommended a sentence of death.

Distinguishing characteristics of this crime include the brutality of the attack on the victim, which consisted of sixteen hatchet strikes to her head, neck, back, arms, and hands, the rape of the victim, which occurred prior to her death, and the location of the murder, which was the victim's home. *See Brown*, 320 N.C. at 231, 358 S.E.2d at 34 (a murder in the home "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure"). Further, it is significant that defendant was found guilty of murder based on both the felony murder rule and on malice, premeditation and deliberation. Also important to our review is the complete lack of mitigating circumstances found by the jury and the sole aggravating circumstance found, that the murder was committed during the commission of a rape.

This case is distinguishable from the seven cases in which this Court has found the death penalty disproportionate. We have never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted. *Lee*, 335 N.C. at 294, 439 S.E.2d at 574.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the jury found one aggravating circumstance, that of pecuniary gain, and sev-

eral mitigating circumstances, including that the defendant had no significant history of prior criminal activity and that the defendant was under the influence of mental or emotional disturbance. Here, the jury found the aggravating circumstance that the murder was committed during the commission of a rape, and no mitigating circumstances. The murder in this case was much more brutal than the murder in *Benson*. The defendant there shot his victim in the legs, which tended to show that his intent was robbery, not murder. Here, by contrast, defendant brutally killed his victim with a hatchet and had raped her while she was still alive. In *Benson* the defendant was convicted only under the felony murder rule, and there was little evidence of premeditation and deliberation. Here, defendant was convicted both on a premeditation and deliberation theory and under the felony murder rule. We have stated that "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *Artis*, 325 N.C. at 341, 384 S.E.2d at 506.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the defendant was seventeen years old at the time of the crime. Here, defendant was twenty-eight. In *Stokes* the defendant's older co-participant received a life sentence, and there was no evidence tending to show who led the robbery. Again, the defendant there was convicted only under the felony murder rule.

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 defendant shot the victim while attempting to shoot another person with whom he previously had argued. Here, defendant broke into the victim's home and brutally killed her without provocation.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two other men entered the victim's home and robbed and murdered him. The defendant and one of the other men stabbed the victim. The jury found two aggravating circumstances: pecuniary gain and that the murder was committed during the course of a robbery or burglary. The jury "found evidence of one or more mitigating circumstances," *id.* at 674, 325 S.E.2d at 185, but did not specify the mitigating circumstance(s) it found, *id.* at 690, 325 S.E.2d at 194. Here, the jury found no mitigating circumstances. The defendant in *Young* was nineteen years old at the time of the crime. Here, defendant was twenty-eight. The victim in *Young* was not sexually assaulted and

died soon after being stabbed. Here, the victim died while or after being raped by defendant.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the defendant shot and killed a police officer. There was no clear evidence of how the crime occurred or what defendant was doing when he encountered the officer. The shooting resulted in a quick death. Here, the victim died after a vicious sexual attack and repeated blows by defendant.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the defendant shot the victim while they were in a car. He then told the driver to go to the hospital, and the defendant went into the hospital to get treatment for the victim. Defendant here did nothing to save the victim. He simply went into the barn and fell asleep. He expressed no remorse.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the victim was shot twice in the head after he gave the defendant a ride. There was no evidence of a brutal and prolonged attack as there was here.

Our review of the cases involving a sexual assault murder in which the jury has recommended a life sentence reveals that the case before us is distinguishable when compared with a majority of those cases. In three of those cases, *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985); and *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), the sole basis for the conviction was felony murder. Here, defendant was convicted based on murder by malice, premeditation and deliberation and under the felony murder rule. In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986), the jury rejected the submitted aggravating circumstance that the murder was especially heinous, atrocious or cruel. Here, though the circumstance was not submitted, the evidence tended to show that this murder was quite brutal, involving sixteen hatchet wounds to the head, neck, back, arms, and hands.

In both *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (1981), and *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425 (1980), there was strong mitigating evidence, which was not the case here. In *Temple* the jury found that the murder was especially heinous, atrocious or cruel and found the mitigating circumstances of no significant history of prior criminal activity, defendant's age at the time of the crime, and other

non-specified circumstances. The defendant was eighteen years old at the time of the crime. Defendant here was twenty-eight. Further, the jury in this case found no mitigating circumstances. In *Clark* the evidence was strong that the defendant suffered from schizophrenia. Here, neither of defendant's experts testified that he suffered from a serious mental illness or disorder at the time of the murder.

In *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991), the defendant was found guilty of common law robbery, first-degree rape, and first-degree murder under the felony murder rule and based on premeditation and deliberation. The jury found the aggravating circumstances of pecuniary gain and that the murder was committed during the course of a rape. The jury further found no mitigating circumstances, but recommended life imprisonment. The defendant received two consecutive life sentences for the murder and rape and a ten-year consecutive term for the robbery. While *Richardson* is not readily distinguishable from the case before us, we cannot conclude based on this single case that juries consistently return life sentences in cases like defendant's. *See Green*, 336 N.C. at 198, 443 S.E.2d at 47 ("[T]he 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."). Defendant's case is more comparable to those cases in which the jury recommended the death sentence.

Our review is not limited to a matching of aggravating and mitigating circumstances in this case with those of the cases in the pool. Rather, our goal is to consider "the individual defendant and the nature of the crime or crimes which he has committed," *Pinch*, 306 N.C. at 36, 292 S.E.2d at 229, in light of those cases which are comparable to the one before us. We have found several such comparable cases in which the death sentence was affirmed: *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993), *cert. denied*, — U.S. —, 126 L. Ed. 2d 707 (1994), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994); *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. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110, *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

In *Syriani* the defendant killed his estranged wife by stabbing her twenty-eight times. *Syriani*, 333 N.C. at 359, 428 S.E.2d at 121-22. He then drove to a fire station to seek medical attention for himself. *Id.* at 364, 428 S.E.2d at 124. The jury found the sole aggravating cir-

cumstance that the murder was especially heinous, atrocious, or cruel. It found eight mitigating circumstances, among them that defendant was under the influence of mental or emotional disturbance at the time of the murder; that he understood the severity of his conduct; and that he had a history of good work habits. This Court ruled that the death sentence was not disproportionate given the brutality of the murder, the defendant's lack of remorse, and his actions following the crime.

Though the aggravating circumstance of "especially heinous, atrocious or cruel" was not submitted to the jury in the case before us, the crime was of similar, if not greater, brutality to that in *Syriani*, given that the victim here suffered through a rape by defendant before she died. Further, defendant here also failed to show remorse. Like the actions of the defendant there, defendant's actions following the crime were self-oriented: he returned to the barn, changed his clothes, and slept. Finally, the jury in the case before us found no mitigating circumstances, specifically rejecting a circumstance found in *Syriani*, that of mental or emotional disturbance.

In *McDougall* the defendant injected cocaine and then gained entry into the victim's home by guile. He cut and stabbed the victim to death by twenty-two blows with a butcher knife. *McDougall*, 308 N.C. at 7, 301 S.E.2d at 312-13. The evidence also was substantial that he attempted to rape her while he killed her. The jury found the sole aggravating circumstance that the murder was part of a course of conduct. It found in mitigation that the defendant was under the influence of mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was impaired. We affirmed the death sentence.

In this case, defendant sniffed gasoline and drank beer and then broke into the victim's home. He cut the victim to death with sixteen blows from a hatchet and raped her as he killed her. The jury, like the *McDougall* jury, found a single aggravating circumstance but rejected both mitigating circumstances found in *McDougall*. The similarities between the two crimes are strong, and the jury's failure here to find any mitigating circumstances suggests that this crime was even more deserving of the death penalty.

In *Huffstetler* the defendant beat his sixty-five year-old mother-in-law with a cast iron skillet after an argument. She had wounds on her head, neck and shoulders. Many of her bones, including her spine, were fractured. Following the murder, the defendant went home to

change his bloody clothes, returned to the scene to retrieve the skillet, and then went to visit a friend. *Huffstetler*, 312 N.C. at 98-100, 322 S.E.2d at 115-16. The jury found the sole aggravating circumstance that the murder was especially heinous, atrocious or cruel. In mitigation it found three circumstances: that defendant's capacity to conform his conduct to the requirements of the law was impaired, that the murder occurred after an argument and through the use of an instrument found by the defendant at the scene, and that the defendant did not have a history of violent conduct. This Court affirmed the death sentence on the basis of the brutality of the killing, the lack of remorse by the defendant, and the defendant's cool actions after the killing.

Here, the jury similarly found a single aggravating circumstance but found no mitigating circumstances and specifically rejected the impaired capacity circumstance found by the *Huffstetler* jury. Again, though the "especially heinous, atrocious or cruel" circumstance was not submitted, this murder was particularly brutal and its nature was similar to that in *Huffstetler*, involving cuts to the head, neck, back, arms, and hands. Defendant here also showed no remorse, and his actions following the murder, including his hiding of the hatchet and the sock, changing of his clothes, and falling asleep, were similarly cool and calculated.

We find that *Syriani*, *McDougall*, and *Huffstetler* are the cases in the pool most comparable to this case. In light of all the cases discussed, we cannot conclude that the death sentence in this case was excessive or disproportionate, considering both the crime and the defendant.

We hold that defendant received a fair sentencing proceeding, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. *Robbins*, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

STATE OF NORTH CAROLINA v. ANTHONY RAY BLANKENSHIP

No. 341A92

(Filed 9 September 1994)

1. Constitutional Law § 280 (NCI4th)— first-degree murder—appearance pro se—court's refusal to reappoint counsel

The trial court in a murder and kidnapping prosecution did not abuse its discretion by denying a pro se defendant's request to reinstate his trial counsel where defendant had initially requested and received appointed counsel, Charles Poole; defendant appeared with Mr. Poole at a pretrial hearing and informed the court that he wished to represent himself; Mr. Poole was appointed as standby counsel; the court continued to urge defendant to reconsider at a subsequent hearing; the trial court questioned defendant about his decision again at the end of the first day of trial; defendant continued to represent himself until after the prosecution had rested and defendant had called two witnesses of his own; defendant then asked the court to allow Mr. Poole to take over the case; and the court refused. Although defendant contended that the court had assured him that appointed counsel would be reinstated upon his request, there is no showing in the record or transcript that defendant relied on anything the court said in choosing to represent himself; the transcript demonstrates that defendant deliberately disregarded the trial court's advice and made this decision in spite of the trial court's advice; and the statements made by the trial court did not constitute a guarantee that the court would reinstate appointed counsel at any time, but were merely an expression of the court's willingness to reinstate Mr. Poole within a reasonable time before defendant's trial began.

Am Jur 2d, Criminal Law §§ 764 et seq., 993 et seq.

Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.

2. Jury § 142 (NCI4th)— first-degree murder—jury selection—question concerning defense decision not to introduce evidence—prohibited

The trial court did not err in a murder and kidnapping prosecution by prohibiting defendant from asking potential jurors whether they would regard a defense decision not to introduce

any evidence as an indication that he "had something to hide." These questions are disapproved because they attempt to ask jurors an abstract question which no juror can properly answer before hearing the evidence against the defendant.

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. Homicide § 583 (NCI4th)— first-degree murder and kidnapping—instructions—acting in concert—premeditation and deliberation and felony murder

The trial court erred in a prosecution for first-degree murder and kidnapping in its instructions on acting in concert where the instructions were likely to be understood by the jury to permit convicting defendant of premeditated and deliberated murder, which requires a specific intent to kill, formed after premeditation and deliberation, when the only purpose shared between defendant and an accomplice was to kidnap the victims and when only the accomplice actually murdered the victims with the requisite specific intent to kill formed after premeditation and deliberation. While the instructions are not incorrect statements of the law insofar as they apply the acting in concert doctrine to defendant's criminal liability for first-degree murder under the felony-murder rule, they are erroneous insofar as they apply this doctrine to defendant's criminal liability for premeditated and deliberated murder. The instructions permit defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted. Where multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. One may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent.

Am Jur 2d, Homicide § 507.

4. Criminal Law § 856 (NCI4th)— noncapital first-degree murder—instructions—appellate review—no error

The trial court did not err in a noncapital first-degree murder and kidnapping prosecution by mentioning appellate review in the jury charge.

Am Jur 2d, Trial §§ 1441 et seq.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities. 5 ALR3d 974.

5. Constitutional Law § 231 (NCI4th)— murder and kidnapping—murder convictions vacated—felony murder upheld—kidnapping arrested—no retrial

Where defendant was charged with two first-degree murders and kidnappings and convicted of kidnapping and first-degree murder based on premeditation and deliberation and felony murder, but there was error in the instruction on first-degree murder based on premeditation and deliberation, the convictions for first-degree murder based on premeditation and deliberation were vacated; the felony murder convictions, which were not affected by the error, were upheld; and the kidnapping convictions, as the underlying felony, were arrested. Because defendant was duly convicted of the first-degree murders on a theory unaffected by the error, it was unnecessary, if not a violation of double jeopardy, to retry defendant on the theory affected by the error.

Am Jur 2d, Criminal Law §§ 309 et seq.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

Justice MITCHELL concurring in part and dissenting in part.

Justice WEBB concurring.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from two judgments entered by Rousseau, J., on 25 June 1992, in the Superior Court, Yadkin County, sentencing defendant to life imprisonment. Defendant's motion to bypass the Court of Appeals as to additional

judgments was allowed by the Supreme Court on 27 January 1993. Heard in the Supreme Court on 11 October 1993.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

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

EXUM, Chief Justice.

On 16 September 1991, a Wilkes County Grand Jury indicted defendant, Anthony Ray Blankenship, for the first-degree kidnappings and first-degree murders of Galvin Lee Sidden and Garry Patrick Sidden, Jr. Following an order changing venue to Yadkin County, defendant, because he was only 15 years old when the crimes were committed,[1] was tried noncapitally at the 22 June 1992 Criminal Session of Superior Court, Yadkin County. On 25 June 1992, the jury returned verdicts finding defendant guilty of each count of first-degree murder under both the theory of premeditation and deliberation and the theory of felony murder. The jury also found defendant guilty of both counts of first-degree kidnapping. The trial court sentenced defendant to life imprisonment for each of the two murders and imposed two forty-year sentences for the kidnapping convictions. The two life sentences were ordered to be served consecutive to each other and to a life sentence imposed in 1984. The two forty-year sentences for the kidnapping convictions, while consecutive to each other and to the 1984 life sentence, were to be concurrent with the two life sentences imposed here. Defendant appeals to this Court as of right from the judgments sentencing him to life imprisonment for each of the two murders, and the Court allowed defendant's motion to bring forward the kidnapping cases prior to consideration by the Court of Appeals.

We hold the trial court incorrectly instructed the jury on the principle of acting in concert as that principle applies to the theory of first-degree murder by premeditation and deliberation; therefore, we vacate the jury's findings that defendant committed two first-degree murders by premeditation and deliberation. Because there is no reversible error which affects the jury's verdicts that defendant is guilty of two first-degree murders under the alternative theory of

1. See N.C.G.S. § 14-17 (1993) (Persons "under 17 years of age" punishable by life imprisonment for first-degree murder.)

felony murder, the two consecutive terms of life imprisonment imposed thereon may stand. Since defendant's kidnapping convictions served as the underlying felonies for the convictions of first-degree felony murder, the kidnapping convictions merge with the convictions for first-degree murder; accordingly, judgments on the two kidnapping convictions are arrested.

I.

Evidence presented at defendant's trial tended to show the following:

Between 10:00 p.m. and 10:30 p.m. on 21 July 1982, defendant, then 15 years old, went with his stepfather, Tony Sidden, to the property of Garry Sidden, Sr. in Wilkes County, North Carolina. Garry Sidden, Sr. owned a mobile home, grocery store and nightclub about a quarter of a mile from the mobile home where defendant and Tony Sidden lived. In a statement later made to police, defendant explained that he and his stepfather had planned to rob and kill Garry Sidden but that defendant had only "really discussed" the robbery. Tony Sidden apparently sought revenge for a previous incident in which Garry Sidden, Sr. had shot Tony. Defendant sought money with which to buy a dune buggy.

Tony Sidden and defendant parked a car on a logging road two hundred yards behind Tony's mobile home and walked to the property of Garry Sidden, Sr. Each carried a 12-gauge shotgun; defendant also carried a .38-caliber pistol. They positioned themselves near a shed located about thirty yards behind Garry Sidden, Sr.'s mobile home and waited for Garry Sidden, Sr. to come home from his nightclub. After thirty minutes defendant "got tired of waiting" and walked to Garry Sidden's mobile home and looked in the window. He saw Garry Sidden asleep on the living room couch. Defendant motioned for Tony to come down to the mobile home and the two waited there. Not long after, defendant saw Garry Sidden's two sons, Garry, Jr. and Galvin, walking toward their father's mobile home, from the nightclub. Garry, Jr. was sixteen years old and Galvin was ten years old at the time. Defendant and Tony Sidden forced the boys into their father's mobile home at gunpoint.

Once inside, either defendant or Tony Sidden told the boys to go into the kitchen and lie down. Garry, Sr. then awoke and Tony Sidden and defendant pointed their guns at him and told him to reveal "where the money was." Agitated, Garry, Sr. began to raise his voice, so Tony

Sidden shot a hole in the mobile home above Garry, Sr.'s head to quiet him.

Tony Sidden and defendant eventually ordered Garry, Sr. and his two sons out of the mobile home. Once outside, Garry, Sr. grabbed for Tony's shotgun and the two began to wrestle. Defendant shot Garry, Sr. in the back, causing him to fall. Tony Sidden then shot Garry, Sr. in the neck. After placing his hand on Garry, Sr.'s chest to confirm that he was dead, defendant took Garry, Sr.'s wallet containing over $300.00.

Tony Sidden and defendant then marched the two boys to the car they had parked earlier, forced the boys into the trunk and closed the lid. After driving awhile, Tony Sidden stopped the car on a dirt road and ordered the two boys out of the trunk. Leaving his .38-caliber pistol in the car, defendant stepped away to urinate. When he returned, Tony Sidden was forcing the boys to lie face-down on the road. Defendant asked Tony Sidden, "What are we going to do?" Tony Sidden replied, "We've got to shoot them." Defendant, carrying his shotgun, turned and walked a few feet away. Tony Sidden then shot each boy in the head with defendant's .38-caliber pistol. Tony Sidden and defendant left the two bodies where they lay and drove about three hours away to Spring Lake, in Cumberland County, North Carolina.

Defendant testified at trial that he had not shot the boys and had not wanted them shot. He had thought the boys would be tied up in the woods so that he and Tony Sidden could escape. Although defendant was armed and did not intervene to attempt to spare the boys' lives, he testified "there was not a lot [he] could do" to prevent their deaths.

Tony Sidden and defendant stayed at Spring Lake for the rest of the night and the following day. At some point during the day, defendant tossed the pistol into a nearby pond. That evening Tony Sidden asked defendant to return to Wilkes County to dispose of the boys' bodies. Defendant agreed to do so and drove back alone to Wilkes County. He found the bodies undisturbed, dragged them to the car and put them in the trunk. He then drove to an abandoned well on property once rented by his family in nearby Miller's Creek, North Carolina. Defendant dumped the two bodies into the well, poured lime and drain cleaner into the well to "take care" of the bodies, and covered the well opening with logs before returning to Cumberland County.

Tony Sidden and defendant remained at Spring Lake for several days until they learned from a television report that warrants had been issued for their arrest in conjunction with Garry Sidden Sr.'s murder. They fled North Carolina and lived in several states before eventually turning themselves in to authorities in September 1983. Tony Sidden and defendant were subsequently tried together and convicted for the first-degree murder of Garry Sidden, Sr. The trial court sentenced each of them to life imprisonment for that murder and this Court found no error in the trial. *State v. Sidden*, 315 N.C. 539, 340 S.E.2d 340 (1986). The fate of the two boys remained unknown, however, until defendant, serving his life sentence for the murder of Garry Sidden, Sr., confessed to the facts set out above on 30 August 1991. In September 1991, he led the police to the bodies of the two boys. Thereafter, defendant was charged with their murders and kidnappings, which are the subject of this appeal.

Other facts will be introduced in the discussion of the assignment of error to which they are pertinent.

II.

[1] Defendant first contends the trial court erred by refusing during the trial to reappoint counsel to represent him after he earlier had waived counsel and proceeded *pro se*. Defendant bases this argument on certain statements made by the trial court before and on the first day of trial.

At his initial appearance on 18 September 1991, defendant requested and received appointed counsel, Mr. Charles Poole. On 20 April 1992, defendant appeared with Mr. Poole at a pretrial motions hearing and informed the court he wished to represent himself. The trial court inquired as to the reasons for defendant's change of heart and urged him to reconsider, but defendant was adamant and executed a written waiver of counsel. The trial court appointed Mr. Poole as standby counsel. The court informed defendant while Mr. Poole would be available to answer questions, he would not "go out and do the leg work" for defendant. Defendant indicated he understood, and the trial court reiterated, "He'll just answer your legal questions."

Defendant appeared in court again on 24 April 1992, and the trial court continued to urge defendant to reconsider his waiver of counsel. Defendant remained steadfast, and the following exchange took place:

THE COURT: Well, again, Mr. Poole will be sitting behind you during the course of the trial, or any time you are in the courtroom, to advise you if you need any advice, but, now, he cannot appear for you. He cannot answer questions. He cannot object to incompetent evidence.

DEFENDANT BLANKENSHIP: I understand that.

THE COURT: And, he's not going to be a leg man for you to run errands for you.

DEFENDANT BLANKENSHIP: I understand that.

THE COURT: He's just sitting there to advise you on any legal problem that might come up.

DEFENDANT BLANKENSHIP: (Nods head affirmatively).

After the court had set the date on which defendant's trial would begin, the following exchange occurred:

DEFENDANT BLANKENSHIP: Your Honor, the second week in June, that only allows me about a six week period to do what I have to do, it's not enough time.

THE COURT: Well, you had a lawyer for some period of time, and you just came in this week and fired your lawyer.

DEFENDANT BLANKENSHIP: I understand.

THE COURT: We're not going to continue it for that.

DEFENDANT BLANKENSHIP: All right.

THE COURT: And, if you later decide you want a lawyer, I'm not going to continue it because he says he's not ready.

DEFENDANT BLANKENSHIP: I understand.

THE COURT: But, you can use Mr. Poole any time you want him. When you tell me you want him for your lawyer, I will reinstate him as your lawyer.

DEFENDANT BLANKENSHIP: I've made up my mind.

Defendant's trial began two months later on 22 June 1992. At the end of the first day, the trial court again questioned defendant about his decision to serve as his own counsel:

THE COURT: Now, you've heard what we've done here today.

DEFENDANT BLANKENSHIP: Yes, sir.

THE COURT: You still have Mr. Poole sitting there behind you.

DEFENDANT BLANKENSHIP: (Nods head affirmatively).

THE COURT: You still don't want him to take over this case?

DEFENDANT BLANKENSHIP: No, sir.

. . . .

THE COURT: Anyway, your lawyer is there if you want him. You can have him, anytime you want him.

DEFENDANT BLANKENSHIP: All right.

Defendant continued to represent himself until after the prosecution had rested and defendant had called two witnesses of his own. At that point, defendant asked the court to allow Mr. Poole to take over the case. The trial court refused, stating:

> Well, you have elected to represent yourself. Our law says you can't appear with counsel and act as co-counsel yourself. And, at this stage of the trial, when the State's rested, I'm going to DENY your motion. I will allow you to continue to consult with Mr. Poole whenever you need to do so, but as far as him stepping in and taking over the case, in my discretion, I'm DENYING that.

Defendant contends the trial court assured him at the 24 April 1992 pretrial hearing and on the first day of trial that appointed counsel would be reinstated upon his request; therefore, the trial court "had no discretion to deny the request when it was made." Defendant does *not* argue that a trial court generally must grant a request for counsel made by a defendant who has previously exercised his right to proceed *pro se*, nor that defendant's initial exercise of his right to self-representation was premised on any assurances by the trial court that counsel could be reinstated. Rather, defendant maintains the trial court on two occasions unequivocally promised defendant it would reinstate appointed counsel upon his request and thereby lulled defendant into continuing to exercise his right to represent himself. Defendant argues that the trial court conferred a right on defendant to have counsel reinstated upon request, a right which it then had no discretion to withdraw.

It is well-settled that a defendant in a state or federal prosecution has a right of self-representation. The Sixth and Fourteenth Amend-

ments to the Constitution of the United States "guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975). Embodied in this right to counsel is the right of a criminal defendant to represent himself. *Id.* at 832, 45 L. Ed. 2d at 580. A defendant who chooses to represent himself "must be permitted to do so upon the sole condition that he make a knowing and voluntary waiver of the right to counsel." *Id.* at 835, 45 L. Ed. 2d at 581-82. Although a defendant's exercise of his or her right of self-representation must be honored, the trial court, in its discretion, may appoint standby counsel to assist defendant. N.C.G.S. § 15A-1243 (1988); *State v. Thomas*, 331 N.C. 671, 677, 417 S.E.2d 473, 478 (1992).

Defendant's argument is based on the principle that where a criminal defendant relies on a right accorded him by a court or any agency of government, he may not be prejudiced by such reliance, even if the right was erroneously granted. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 114 L. Ed. 2d 173 (1991); *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976); *Johnson v. U.S.*, 318 U.S. 189, 87 L. Ed. 2d 704 (1943); *Knox v. Collins*, 928 F. 2d 657 (5th Cir. 1991) (Per curiam). We reject the argument here for two reasons. First, there is no showing in the record or transcript that defendant relied on anything the trial court said in choosing to represent himself. Indeed, the transcript demonstrates that defendant deliberately disregarded the trial court's advice with regard to his self-representation decision. He made this decision, the transcript reveals, not because of, but in spite of, Judge Rousseau's advice. We are convinced both his initial decision to proceed *pro se* and his continuing in this mode would have occurred even if Judge Rousseau's statements concerning future availability of counsel had not been made.

Second, statements made by the trial court at the 24 April 1992 hearing ("When you tell me you want him for your lawyer, I will reinstate him as your lawyer.") did not constitute a guarantee that the court would reinstate appointed counsel at *any time*, no matter how late in the proceedings, upon defendant's request. The statements were made nearly two months before trial and were merely an expression of the court's willingness to reinstall Mr. Poole within a reasonable time *before* defendant's trial began. Indeed, immediately before making these statements, the court had refused to continue the trial to afford defendant more time to prepare and had informed

defendant that if he later decided he wanted an attorney, the court was "not going to continue it because [your attorney] says he's not ready." This indicates the trial court was contemplating a *pretrial* change of heart by defendant and making clear to defendant it would not postpone the trial to accommodate his indecisiveness. *See State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975) (defendant waited until day trial began to withdraw waiver and seek appointment of counsel, a tactic which, if "employed successfully, [would permit] defendants . . . to control the course of litigation and sidetrack the trial").

Neither did the statements made by the trial court on the first day of trial constitute a guarantee that the court would reinstate counsel at any time thereafter upon defendant's request. At the close of the first day, the trial court again questioned defendant about his desire to proceed *pro se*. When defendant insisted on continuing to represent himself, the trial court simply stated to defendant, "[Y]our lawyer is there if you want him." and "You can have him, anytime you want him." This was not a guarantee that the trial court would allow Mr. Poole to take over defendant's case as trial counsel after the trial had commenced; it was a mere reiteration that Mr. Poole, as standby counsel, would be available to advise defendant during the course of the proceedings.

Since defendant did not rely on nor did the trial court make any promises to defendant that it would reinstate Mr. Poole as trial counsel at any time during the trial, the trial court did not abuse its discretion in denying defendant's request where: (1) the request was made after the State had rested and defendant himself had called two witnesses and (2) for the majority of the trial—indeed, for *all* of the trial up to the point of defendant's request—defendant had not only the representation he wanted (himself), but also the assistance of standby counsel. Accordingly, we conclude that this assignment of error is without merit.

III.

[2] By another assignment of error, defendant maintains the trial court committed reversible error by prohibiting him from asking potential jurors whether they would regard a defense decision not to introduce any evidence as an indication that he had "something to hide." Following its initial examination of venirepersons called to the jury box, the prosecution passed twelve prospective jurors to defendant. After defendant's examination of these jurors, the trial court

excused two jurors for cause; and defendant exercised peremptory challenges against three others. The prosecution then examined five new prospective jurors and passed them to defendant. Defendant asked these five jurors whether they would presume him innocent and whether they "would weigh the evidence from both sides and come back with a verdict of not guilty if that's what the evidence shows." The following exchange then occurred:

> DEFENDANT BLANKENSHIP: If I choose not to put on a defense, would you hold that against me; would you take that as an indicator that I have something to hide or . . .
>
> MR. LYON: . . . well, OBJECTION . . .
>
> DEFENDANT BLANKENSHIP: . . . or will you put the burden of proof on the State . . .
>
> THE COURT: . . . SUSTAINED to that. I'll let you ask them about the presumption of innocence. You asked them about that.

Defendant contends that by prohibiting him from asking this question, the trial court committed reversible error in that it prevented him "from intelligently exercising his remaining peremptory challenges" and "from legitimately attempting to discover disqualifying bias." We disagree.

In *State v. Hill*, 331 N.C. 387, 403-04, 417 S.E.2d 765, 772 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993), we held the trial court properly prevented the defendant from asking prospective jurors whether they would "feel the need to hear from" defendant in order to return a verdict of not guilty. We explained that the defendant's question was an "attempt[] to 'stake out' the jurors as to their answers to legal questions before the jurors had been informed in any manner of applicable legal principles by which they should be guided" and was therefore improper. *Id.* at 404, 417 S.E.2d at 772. *See also State v. Phillips*, 300 N.C. 678, 681-82, 268 S.E.2d 452, 455 (1980) (trial court did not abuse its discretion by preventing defense counsel from asking prospective juror whether "defendant would have to prove anything to her before he would be entitled to a verdict of not guilty"). We believe the question here is sufficiently similar to those in *Hill* and *Phillips* to warrant the same result reached in those cases. These questions were disapproved in *Hill* and *Phillips* and are disapproved here because they attempt to ask jurors an abstract question which no juror can properly answer before hearing the evidence against the

defendant. Only after hearing the case against defendant can a juror reasonably determine how to view the failure of the defendant to proffer a defense. These kinds of questions are distinguishable from questions concerning a defendant's failure to testify in his own defense. *Cf.*, *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992) (error not to allow challenge for cause where juror indicated defendant's failure to testify might affect juror's ability to give defendant a fair trial). Because of the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendment in the federal constitution and Article I, Section 23 in our State constitution, it is always improper, whatever the circumstances, for a juror to consider adversely to him a defendant's failure to testify in his defense. N.C.G.S. § 8-54 (1986); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132 (1975); *State v. Roberts*, 243 N.C. 619, 91 S.E.2d 589 (1956); *State v. McLamb*, 235 N.C. 251, 69 S.E.2d 537 (1952). On the other hand, it may be proper for a juror to consider adversely to defendant, defendant's failure to proffer evidence in his defense when the State's case and other circumstances would make it reasonable for defendant to do so if a defense were in fact available. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986) (prosecution may comment on defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by State); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976). Accordingly, this assignment of error is without merit.

IV.

[3] By another assignment of error, defendant contends the trial court committed reversible error in its instructions on acting in concert. The trial court defined acting in concert as follows:

> For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If a defendant is present, with one or more persons, and acts together with a common purpose to commit murder, *or* to commit kidnapping, each of them is held responsible for the acts of the others, done in the commission of that murder *or* kidnapping, as well as any other crime committed by the other in furtherance of that common design.

(Emphasis added.) Later, after charging on kidnapping, the trial court summarized what the jury must find to convict defendant of murder on a premeditation and deliberation theory, saying in part:

Now, members of the jury, on the first degree murder, of course, he's also charged with first degree murder of each of those two boys, Garry and Galvin.

Now, members of the jury, on this murder, there are two ways you can find the defendant guilty. Of course, there's just one murder of each of the boys, but there are two ways you can find him guilty, either or both of these ways.

That is, the first way, on the basis of malice and premeditation and deliberation. That is first degree murder, which is the intentional and unlawful killing of a human being with malice, and with premeditation and deliberation.

The second way you may find this defendant guilty of murder in either or both of these cases, is under the felony murder rule, which is the killing of a human being in the perpetration of a kidnapping with a deadly weapon.

Now, I charge for you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State of North Carolina must prove five things beyond a reasonable doubt, and again, these five things apply to each one of the, of the murder cases;

First, that the defendant, *or someone acting in concert with him*, intentionally and with malice, killed Gary Sidden, and killed Galvin Sidden, with a deadly weapon.

. . . .

Third, that the defendant *or someone acting in concert with him*, intended to kill Garry Sidden and intended to kill Galvin Sidden.

. . . .

Fourth, that the defendant, *or someone acting in concert with him*, acted after premeditation, that is, that he formed the intent to kill over some period of time, however short; and

Fifth, that the defendant acted with deliberation *or someone acting in concert with him*, which means that he acted while he was in a cool state of mind.

(Emphasis added.) In its trial mandate on the Garry Sidden murder the trial court charged:

> Now, members of the jury, with respect to the murder charges, I charge if you find from the evidence beyond a reasonable doubt, that on or about that 21st day of July, 1982, the defendant or someone acting in concert with him, intentionally shot Garry Sidden, with a deadly weapon, and that this proximately caused Garry Sidden's death, and that the defendant or someone acting in concert with him, intended to kill Garry Sidden, and that he acted with malice after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, and on the basis of premeditation and deliberation.

A similar mandate was given regarding the murder of Galvin Sidden. On the felony-murder theory the trial court charged:

> So members of the jury, I charge if you find from the evidence beyond a reasonable doubt, that on or about that day, that the defendant or someone acting in concert with him, while committing kidnapping, the defendant or someone acting in concert with him, killed Garry Sidden, and that the defendant's act or someone acting in concert with him, was the proximate cause of Garry Sidden's death, it would be your duty to return a verdict of guilty of first degree murder under the felony rule.

While these instructions are not incorrect statements of the law insofar as they apply the acting in concert doctrine to defendant's criminal liability for first-degree murder under the felony-murder rule, they are erroneous insofar as they apply this doctrine to defendant's criminal liability for premeditated and deliberated murder. The vice in the instructions is that they are likely to be understood by the jury to permit convicting defendant of premeditated and deliberated murder, which requires a specific intent to kill, formed after premeditation and deliberation, when the only common purpose shared between defendant and Tony Sidden was to kidnap the boys and when only Tony Sidden actually murdered the boys with the requisite specific intent to kill formed after premeditation and deliberation. In other words, the instructions permit defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted.

The doctrine of acting in concert does not reach so far. Under this doctrine, where a single crime is involved, one may be found guilty of

committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. *State v. Jeffries*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993); *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, —— U.S. ——, 116 L. Ed. 2d 174 (1991). Under this doctrine, where multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). As a corollary to this latter principle, one may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent. *State v. Reese*, 319 N.C. 110, 141, 353 S.E.2d 352, 370 (1987). The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan. *Joyner*, 297 N.C. at 358, 255 S.E.2d at 396. Although a common plan for all crimes committed may exist at the outset of the criminal enterprise, its scope is not invariable; and it may evolve according to the course of events. Thus, where a series of crimes is involved, all of which are part of the course of criminal conduct, the common plan to commit any one of the crimes may arise at any time during the conduct of the entire criminal enterprise. *See Joyner*, 297 N.C. 349, 255 S.E.2d 390.

In *Joyner*, five men assaulted a woman in her home. During the course of several hours, the men raped the woman repeatedly, forced her to perform acts of fellatio, stole a ring from her and forced a drink bottle into her rectum. The defendant was one of the five men and admitted at trial to raping the victim. Accordingly, he was convicted of rape. He was also convicted of all the other crimes committed during the assault based on an acting-in-concert theory. This Court upheld his convictions, even though it had not been shown that the defendant personally committed any acts other than rape, saying: "the evidence is plenary that all five of these men were acting together pursuant to a common plan to assault, terrorize, sexually abuse, and steal from [the victim]." *Id.* Thus the defendant was guilty of all the crimes charged because he shared with his cohorts in a common plan to commit all the crimes, a common plan which evolved as the criminal enterprise continued so as eventually to include all crimes

committed. Because he shared in the common plan, he was guilty not only of all the general intent crimes, but also of larceny, which requires the specific intent personally to deprive the owner of personal property. In other words, his sharing in the common plan was sufficient in itself to prove the specific intent required for a larceny conviction.

The foregoing principles governing the acting-in-concert doctrine are necessary in order to insure that a defendant not be convicted of any crime for which he did not have the requisite *mens rea*. As we said in *Reese*, 319 N.C. *at* 142, 353 S.E.2d at 370:

> It is a fundamental notion of criminal law that where a crime calls for a particular *mens rea*, it must be proved by the State beyond a reasonable doubt. *See* 1 W. LaFave & A. Scott, Substantive Criminal Law, 3.4 (1986).

In *Reese*, the defendant and his codefendant planned to rob a convenience store. Upon entering the store, the codefendant stabbed the store clerk who later died as a result of the wounds. After the stabbing, the defendant entered the store, grabbed money from the cash register and fled. On appeal, we held there was insufficient evidence to find that the defendant "actually participated in the actual killing or intended that a killing take place"; therefore, he could not be convicted of premeditated and deliberated murder. *Id.* at 144, 353 S.E.2d at 371.

That a defendant charged under the theory of acting in concert for a specific intent crime must possess the requisite *mens rea* for that crime is supported by cases from other jurisdictions. *Clark v. Jago*, 676 F.2d 1099 (6th Cir. 1982) (where purpose to kill is essential element of aggravated murder, jury instruction permitting that element of culpability to be found if either the defendant or his accomplice has the purpose to kill violates due process.), *cert. denied*, *Marshall v. Clark*, 466 U.S. 977, 80 L. Ed. 2d 832 (1984); *Commonwealth v. Hartley*, 424 Pa. Super 29, 621 A.2d 1023 (1993) (accomplice to first-degree murder had to have the "willful, deliberate, and premeditated specific intent to kill at the time of the killing" in order to be convicted); *Echols v. State*, 818 P.2d 691 (Alaska 1991) (convicting accomplice of first-degree assault required showing that accomplice intended victim suffer physical injury); *State v. Bridges*, 133 N.J. 447, 628 A.2d 270 (1993) (accomplice liability requires specific intent to commit the crime), *certification dismissed*, 134 N.J. 482, 634 A.2d 528 (1993); *People v. Cabey*, 199 A.D.2d 197, 605 N.Y.S.2d 297 (1993)

(accomplice liability for second-degree murder requires proof that accomplice shared principal's specific intent to cause victim's death and that accomplice solicited, requested, commanded, importuned, or intentionally aided principal in his attempt on victim's life), *appeal granted*, 82 N.Y.2d 933, 632 N.E.2d 495, 610 N.Y.S.2d 185 (1994); *Commonwealth v. Huffman*, —— Pa.——, 638 A.2d 961 (1994) (trial court erred by instructing jury it could find accomplice guilty of first-degree murder even if accomplice did not have specific intent to kill); *Commonwealth v. Bachert*, 499 Pa. 398, 453 A.2d 931 (1982) (requisite mental state for the crime with which accomplice is charged must be proved beyond a reasonable doubt to be one which accomplice harbored and cannot depend upon proof of mental state of principal), *cert. denied*, *Bachert v. Pennsylvania*, 460 U.S. 1043, 75 L. Ed. 2d 797 (1983); *Commonwealth v. Daughtry*, 417 Mass. 136, 627 N.E.2d 928 (1994) ("joint venturer" in a crime must share principal mental state required for crime); *Oates v. State*, 97 Md. App. 180, 627 A.2d 555 (1993) (accomplice may be convicted on accomplice liability theory only for those crimes as to which he personally has requisite mental state); *State v. Polanco*, 26 Conn. App. 33, 597 A.2d 830 (1991) ("An accomplice is one who, acting with the mental state required for the commission of an offense, solicits, requests, commands, importunes or intentionally aids another person to engage in conduct that constitutes an offense."), *cert. denied*, 220 Conn. 926, 598 A.2d 367 (1991); *State v. Molano*, 253 Cal. App. 2d 841, 61 Cal. Rptr. 821 (1967) (instructing jury that one issue was whether defendants or either of them entered third party's house was improper because it may have given jury erroneous impression both defendants were guilty if either defendant had intent to steal upon entering house); *Wilson v. People*, 103 Colo. 441, 87 P.2d 5 (1939) (accomplice not guilty of larceny committed by principal in liquor store where, although accomplice helped principal into store and received liquor as principal handed it out to him from inside store, accomplice informed police while principal was in store and never intended to permanently deprive store owner of goods). *See* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 6.7, at 143-44 (1986).

We recognize there is support in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991), for the instruction given here by the trial court. In *Erlewine*, we said:

> The theory of acting in concert . . . requires a common purpose to commit a crime. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). Thus, before the jury could . . . convict the defendant of

> the crime of assault with a deadly weapon with intent to kill inflicting serious injury, it had to find that the defendant and [his confederate] had a common purpose to commit *a* crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed. Instead, the correct statement of the law is found in trial court instructions which we have held in a prior case to be without error:

Id. at 637, 403 S.E.2d at 286. For this statement in *Erlewine*, the Court relied on *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). In *Westbrook*, the Court approved without discussion the following jury instruction:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principle if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Id. at 41-42, 181 S.E.2d at 586.

We are now convinced that our reading of *Westbrook* in *Erlewine* was overly broad. When the Court's approval of the jury instruction in *Westbrook* is read in light of the facts there, it is clear that the Court did not intend to expand accomplice liability under the acting-in-concert doctrine beyond those crimes which were within the common plan of the accomplices.

In *Westbrook*, the defendant and his accomplice decided to rob a woman who had just entered her car. Driving a car he had stolen with his accomplice earlier in the day, defendant drove up next to the victim's car saying, "[t]here's a hit." At that point—and here the evidence is conflicting—either defendant or his accomplice got out of the car and entered the victim's car. A struggle ensued and the victim was shot. The two defendants then drove the stolen car and the victim's car to an isolated area where, according to the State, the defendant fired four more bullets into the victim, killing her. The two defendants then hid the body and returned to town.

These facts clearly support the inference that the defendant and his accomplice shared in a common plan which included not just the robbery, but also the murder. Faced with these facts, it is not surprising that this Court sustained the trial court's reference to other crimes

committed "in pursuance of the common purpose . . . or as a natural and probable consequence thereof." Indeed, the *Westbrook* Court probably understood the trial court's instruction as creating criminal liability in the defendant to the extent that the crimes for which he was convicted were contemplated in the common plan. A broader reading of the doctrine of concerted action would have been a departure from settled law and would have merited some discussion.

Subsequently, in any event, the Court in *Reese* laid to rest any ambiguity that may have inhered in *Westbrook*, stating:

> We note that there is language in *Westbrook* suggesting that once a defendant participates in a felony, he is held responsible for all crimes arising out of that felony. [Citation omitted]. *Westbrook*, however, does not change the rule that, for crimes requiring a specific *mens rea*, that *mens rea* must be shown as to each defendant.

319 N.C. at 141 n.8, 353 S.E.2d at 370 n.8.

Neither were our statements in *Erlewine* necessary to a decision in that case. The instructions on acting in concert complained of were well within the confines of the principle that for a defendant to be found guilty of any crime under this doctrine, the crime must have been one contemplated by the common plan. *See Erlewine*, 328 N.C. at 635-36, 403 S.E.2d at 285.

Because of the error in the trial court's instruction on acting in concert, the jury's findings of guilt of first-degree murder on the theory of premeditation and deliberation cannot stand. The evidence of defendant's guilt on this theory, unlike the evidence supporting guilt under the felony-murder theory, is close. Thus, there is a reasonable possibility that had the instructional error on acting in concert not occurred, a different result would have been reached. N.C.G.S. § 15A-1443(a) (1988). We, therefore, vacate the jury's findings of guilt insofar as they are based on a theory of premeditation and deliberation.

V.

By another assignment of error, defendant argues the evidence was insufficient to support submission of first-degree murder to the jury in both murder cases on the theory of premeditation and deliberation. Because we are vacating the jury's findings of guilt on a pre-

meditation and deliberation theory, we need not address this assignment of error.

VI.

[4] By his final assignment of error, defendant argues the trial court committed reversible error by mentioning appellate review in the jury charge. Defendant concedes, and we agree, that he cannot effectively distinguish this portion of the charge from that which we found free from error in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *sentence vacated*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 326 N.C. 592, 391 S.E.2d 815 (1990). Therefore, this assignment of error is without merit.

Conclusion

[5] Ordinarily a trial error committed in jury instructions would warrant a new trial on the issue affected by the instructions. Defendant, however, has been properly convicted of first-degree murders on a felony-murder theory. "Premeditation and deliberation is one theory by which one may be convicted of first-degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989). Because defendant has been duly convicted of first-degree murders on a theory unaffected by the instructional error, we think it unnecessary, if not a violation of constitutional double jeopardy, to retry defendant for the same murders on the theory which was affected by the instructional error.[2]

The result is that the two verdicts against defendant for first-degree murder on the theory of felony murder are without error and are left undisturbed. Because we are sustaining defendant's convictions of first-degree murder only on a felony-murder theory, with kidnapping as the underlying felony, the kidnapping convictions merge with the murder convictions; and defendant may not be separately sentenced for kidnapping. *State v. Gardner*, 315 N.C. 444, 450-60, 340 S.E.2d 701, 706-12 (1986); *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E.2d 450, 477 (1981). Accordingly, we arrest judgment on defendant's two convictions for kidnapping.

2. Defendant, we note, has not asked for a new trial on the murder charge; he asks only that the verdict of guilt on a premeditation and deliberation theory be set aside. We note further that the trial judge ordered that the kidnapping sentences run concurrently with the sentences imposed on the murder convictions. The result we reach, therefore, has little practical effect on the outcome of the trial from which this appeal is taken.

No. 92 CRS 1544, first-degree kidnapping—JUDGMENT ARRESTED.

No. 92 CRS 1545, first-degree kidnapping—JUDGMENT ARRESTED.

No. 92 CRS 1546, CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF PREMEDITATION AND DELIBERATION VACATED; NO ERROR IN CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF FELONY MURDER.

No. 92 CRS 1547, CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF PREMEDITATION AND DELIBERATION VACATED; NO ERROR IN CONVICTION OF FIRST-DEGREE MURDER ON BASIS OF FELONY MURDER.

Justice MITCHELL concurring in part and dissenting in part.

I concur only in the majority's holding that there is no error in the judgments against the defendant for each of the first-degree murders to the extent they are based on the felony-murder doctrine. I dissent from those parts of the decision of the majority arresting both judgments against the defendant for first-degree kidnapping and vacating the two judgments against the defendant for first-degree murder to the extent they are based on the theory of premeditation and deliberation.

I respectfully disagree with the majority's conclusion that the trial court committed reversible error in its jury instructions on acting in concert. The trial court instructed the jury, *inter alia*, as follows:

> For a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime. If a defendant is present, with one or more persons, and acts together with a common purpose to commit murder, or to commit kidnapping, each of them is held responsible for the acts of the others, done in the commission of that murder or kidnapping, as well as *any other crime* committed by the other *in furtherance of that common design.*

(Emphasis added.) The trial court then went on to instruct, in essence, that the jury could find the defendant Anthony Ray Blankenship guilty of the first-degree murders on the theory of premeditation and deliberation if it found that Tony Sidden, acting in furtherance of a common design with Blankenship to kidnap the boys, intentionally killed the boys with malice after premeditation and deliberation.

The majority concludes that a defendant may not be held criminally responsible under the theory of acting in concert for a crime which requires a specific intent, such as premeditated and deliberate murder, unless the defendant *himself* had the required specific intent. Although I recognize that the conclusion of the majority in this regard represents the law of a majority of American jurisdictions, I respectfully submit that it is contrary to the law of North Carolina as it has existed prior to the decision of the majority in this case.

As early as 1858, this Court found it already "a well established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, *or* in furtherance of the common purpose." *State v. Simmons*, 51 N.C. (6 Jones) 21, 24-25 (1858) (emphasis added). We held in *Simmons* that there was evidence that the defendant and his son had taken concerted action to beat the deceased or to unlawfully arrest him without a warrant and, therefore, the act of the son in killing the deceased "was clearly in furtherance of the common purpose [to beat or arrest], so as to make the [defendant father] responsible for [the killing]." *Id.* at 25 (citing Foster's Crown Law at 351-352). Indeed, this Court has always recognized that:

> If two persons are engaged in pursuit of an unlawful object, the two having the same object in view, and in pursuit of that common object one of them does an act which is the cause of death, under such circumstances that it amounts to murder in him, it amounts to murder in the other also.

State v. Finley, 118 N.C. 1162, 1171, 24 S.E. 495, 499 (1896) (quoting *Regina v. Cox*, 4 C. & P. at 538). *Accord State v. Gooch*, 94 N.C. 987, 1014 (1886).

More recently, we applied the foregoing well-established principles to a case involving a homicide occurring during the course of a robbery. *See State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761, *on remand*, 281 N.C. 748, 191 S.E.2d 68 (1972). In that case, the defendant Westbrook testified that he and a man named Frazier undertook to rob their victim. Frazier got out of the car Westbrook was driving and into the victim's car in order to carry out the robbery. While attempting to rob the victim, Frazier shot her, causing her death.

In *Westbrook*, the trial court instructed the jury that one of the theories upon which the State was proceeding against the defendant

for murder was that the defendant and Frazier were acting in concert. This Court expressly stated that it found no error in the trial court's instructions to the jury in *Westbrook* that

> if two persons are acting together, in pursuance of a common plan and common purpose to rob, and one of them actually does the robbery, both would be equally guilty within the meaning of the law and if "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of *any other crime* committed by the other in pursuance of the common purpose; that is, the *common plan to rob* or as a natural or probable consequence thereof."

Id. at 41-42, 181 S.E.2d at 586 (emphasis added). Relying upon cases such as *Westbrook* and its antecedents, we have very recently reemphasized these long-established principles. *E.g.*, *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993); *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991).

Citing *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), however, the majority concludes that the jury in the present case should have been instructed that it could convict the defendant Blankenship of premeditated and deliberate first-degree murder only if it found that at the time Tony Sidden killed the two boys, Blankenship himself intended, after premeditation and deliberation, that they be killed. To the extent that our opinion in *Reese* may be so construed, however, I believe it to represent an inadvertent misstatement of the law by this Court. Certainly, any such reading of *Reese* is contrary to our more recent and quite specific holdings on this question in *Harvell* and *Erlewine*.

I believe that until today the law of this jurisdiction has been that where two persons act in concert to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime (in the present case, kidnapping), but he is also guilty of any other crime (here, murder) committed by the other in pursuance of the common purpose (here, to commit kidnapping) *or as a natural or probable consequence thereof*. *Harvell*, 334 N.C. at 364, 432 S.E.2d at 129; *Erlewine*, 328 N.C. at 637, 403 S.E.2d at 286; *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618-19 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573 (1991); *State v. Oliver*, 309 N.C. 326, 362, 307 S.E.2d 304, 327 (1983); *Joyner*, 297 N.C. at 357-58, 255

S.E.2d at 395-96; *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586. Therefore, I would hold that the trial court did not err by instructing the jury that it could find the defendant Blankenship guilty of first-degree murder on the theory of premeditation and deliberation if it found that he acted in concert with Tony Sidden to commit a kidnapping and Tony Sidden committed premeditated and deliberate murder in pursuance of their common purpose to kidnap or as a natural or probable consequence thereof. *Westbrook*, 279 N.C. at 41-42, 181 S.E.2d at 586.

The majority is correct in its view that we have often approved instructions by trial courts where multiple crimes were involved in which the trial court instructed that when two people act together pursuant to a common plan, both are guilty of the crimes included within the common plan which are committed by either of them. *E.g.*, *State v. Jeffries*, 333 N.C. 501, 428 S.E.2d 150 (1993); *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, —— U.S.——, 116 L. Ed. 2d 174 (1991); *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). We did so in those cases because the evidence tended to support only one reasonable finding; if the crimes were committed by the defendants, all defendants shared in a common plan and intent to commit all of the crimes charged. The fact that the instructions given were correct *in light of the evidence in those cases*, however, does not compel the majority's holding that in all cases where two people are acting together in pursuit of a common plan to commit one crime but other crimes are committed by one of them in pursuance of the common plan, the other is guilty only of the one crime which he specifically intended be committed. Instead, the rule always has been, and in my view should continue to be, that:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principle if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Erlewine, 328 N.C. at 637, 403 S.E.2d at 286 (quoting *Westbrook*, 279 N.C. at 41-42, 180 S.E.2d at 586). Therefore, I respectfully disagree with the majority's conclusion that the trial court erred in its instructions on the doctrine of acting in concert in the present case. For that

reason, I dissent from those parts of the decision of the majority vacating the two judgments against the defendant for first-degree murder to the extent those judgments are based on the theory of premeditation and deliberation.

The majority also holds that because it vacates the judgments of first-degree murder against the defendant to the extent they are based upon a premeditation and deliberation theory, the judgments against him for first-degree murder must be sustained only on a felony-murder theory, with kidnapping as the underlying felony. Therefore, the majority holds that the kidnapping convictions merge with the murder convictions, and the defendant may not be separately sentenced for the kidnappings. Accordingly, the majority arrests the judgments for the defendant's two convictions for first-degree kidnapping.

As I have indicated previously herein, it is my view that the first-degree murder judgments against the defendant are properly based upon both the theory of premeditation and deliberation and the theory of felony murder. That being the case, I dissent from the majority's conclusion that the judgments against the defendant for first-degree kidnapping merged with the murder convictions and must be arrested. I concur only in those parts of the decision of the majority holding that the judgments against the defendant for first-degree murder are without error to the extent they are based on the felony-murder theory.

Justice WEBB concurring.

I concur in the result reached by the majority. I believe Justice Mitchell is correct in saying that the law in this state is that if two or more persons act in concert to commit a crime, each of them is guilty of any crime committed by the other in pursuance of the common purpose or as a natural consequence thereof. I do not believe the rule applies in this case, however.

The murders committed by Tony Sidden were not done in pursuance of a common purpose to kidnap the two victims or as a natural consequence thereof. For that reason, the defendant is not guilty of first-degree murder based on the premeditation and deliberation of Tony Sidden.

EMPIRE POWER COMPANY, AND GEORGE CLARK, PETITIONER-APPELLANT v. N. C. DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, RESPONDENT-APPELLEE, AND DUKE POWER COMPANY, INTERVENOR-RESPONDENT-APPELLEE

No. 570PA93

(Filed 9 September 1994)

1. Administrative Law and Procedure § 30 (NCI4th)— NCAPA—dispute with agency—person aggrieved—right to administrative hearing

The North Carolina Administrative Procedures Act (NCAPA) confers upon any "person aggrieved" the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges. To the extent that language in *Batten v. N.C. Dept. of Correction*, 326 N.C. 338 (1990), reiterated in *Harding v. Dept. of Correction*, 334 N.C. 414 (1993), suggests otherwise, it is disapproved. To the extent that *Citizens for Clean Industry v. Lofton*, 109 N.C. App. 229 (1993) may be viewed as inconsistent herewith, it is also disapproved.

Am Jur 2d, Administrative Law §§ 340-375.

2. Administrative Law and Procedure § 30 (NCI4th); Environmental Protection, Regulation, and Conservation § 63 (NCI4th)— pollution control permit—third party's right to administrative hearing

The administrative hearing provisions of the NCAPA apply to respondent DEHNR and to the pollution control permit proceeding where neither the agency nor the proceeding is expressly exempted from the NCAPA. Thus, under the NCAPA, N.C.G.S. § 150B-23, the third party petitioner is entitled to an administrative hearing to resolve a dispute involving his rights, duties, or privileges unless (1) he is not a "person aggrieved" by the permitting decision of the DEHNR, or (2) the organic statute, specifically N.C.G.S. § 143-215.108(e), amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder.

Am Jur 2d, Administrative Law §§ 340-375; Pollution Control § 64.

Validity of state and local air pollution administrative rules. 74 ALR4th 566.

3. Administrative Law and Procedure § 55 (NCI4th); Environmental Protection, Regulation, and Conservation § 63 (NCI4th)— NCAPA—air quality permit—person aggrieved

Petitioner is a "person aggrieved" as defined by the NCAPA within the meaning of the Air Pollution Control Act where he alleged (1) that DEHNR issued an air quality permit to respondent power company for sixteen combustion turbine electric generating units in violation of its statutory and regulatory duties to act on all permit applications so as to effectuate a legislative policy of reducing existing air pollution and preventing increased air pollution, to reduce levels of ozone pollution in the Mecklenburg County area, to assess fully the impact of emissions of air pollutants from the generating units on levels of ozone pollution in Mecklenburg County, to assess fully the impact of sulfur dioxide emissions from the units, to require air pollution control technology adequate to control the emission of harmful pollutants from the units, to require the power company to cause air quality offsets, and to address comments filed by petitioner and other members of the public, and (2) that, as the owner of property immediately adjacent to and downwind of the site of the proposed generating units, he will suffer from the adverse environmental consequences of pollutants from the generating units.

Am Jur 2d, Administrative Law §§ 575, 576; Pollution Control § 64.

4. Administrative Law and Procedure § 30 (NCI4th); Environmental Protection, Regulation, and Conservation § 63 (NCI4th)— air quality permit—third party—right to administrative hearing by OAH

The air pollution control administrative review provisions set forth in N.C.G.S. § 143-215.108(e) do not by implication amend, repeal, or make an exception to the NCAPA so as to exclude the third party petitioner from those entitled to an administrative hearing thereunder, and petitioner is entitled to commence an administrative hearing in the OAH to determine his right under the Air Pollution Control Act to have DEHNR issue or deny air quality permits to respondent power company in accordance therewith. While § 143-215.108(e) makes no express provision for an administrative appeal by aggrieved parties other then the permittee or permit applicant, it does not expressly prohibit such an appeal, and the intent of the language of the statute is that any permittee or permit applicant who fails to timely appeal from the

decision of the Environmental Management Commission has waived any right to administrative and judicial review of that decision.

Am Jur 2d, Administrative Law §§ 340-375; Pollution Control § 64.

5. Environmental Protection, Regulation, and Conservation § 63 (NCI4th)— air quality permits—appeal by third party to OAH—technical expertise—redundancy

There was no merit to respondents' contention that a third party should have no right to appeal to the OAH from the decision of the DEHNR to grant an air pollution control permit to a power company because DEHNR's review of applications for such permits is detailed, comprehensive, and highly technical, the permitting decision is properly made by technical experts, and an evidentiary hearing in the OAH would be redundant.

Am Jur 2d, Pollution Control § 64.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 112 N.C. App. 566, 436 S.E.2d 594 (1993), reversing an order entered by Barnette, J., in Superior Court, Wake County, on 22 September 1992, granting petitioner Clark's motion to dismiss respondents' Petition for Writ of Certiorari to review the order entered by Gray, Administrative Law J., denying their motions to dismiss petitioners' petitions for a contested case hearing for lack of subject matter jurisdiction. Heard in the Supreme Court 13 May 1994.

Patterson, Harkavy & Lawrence, by Donnell Van Noppen III, for petitioner-appellant George Clark.

Michael F. Easley, Attorney General, by James Holloway, Associate Attorney General, for respondent-appellee Department of Environment, Health and Natural Resources, Division of Environmental Management.

William L. Porter, Deputy General Counsel, and Garry S. Rice, Senior Attorney; and Womble Carlyle Sandridge & Rice, P.L.L.C., by Yvonne C. Bailey and Karen Estelle Carey, for intervenor-respondent-appellee Duke Power Company.

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

Ward and Smith, P.A., by I. Clark Wright, Jr., for Smithfield Packing Company, Inc., amicus curiae.

WHICHARD, Justice.

The dispositive question is whether petitioner George Clark is entitled under the North Carolina Administrative Procedures Act, N.C.G.S. § 150B-1 to -53 (1991), and the Air Pollution Control Act, N.C.G.S. § 143-215.105 to -215.114C (1993), to appeal to the Office of Administrative Hearings from the decision of the Department of Environmental Management, to grant an air pollution control permit to Duke Power Company. We hold that he is, and we thus reverse the Court of Appeals.

I.

On 4 September 1991 respondent Department of Environment, Health and Natural Resources, Division of Environmental Management ("DEHNR"), gave public notice that it had awarded a draft air quality permit to intervenor-respondent Duke Power Company ("Duke Power") for the construction and operation of sixteen combustion turbine electric generating units at the Lincoln Combustion Turbine Station ("LCTS") in Lincoln County, North Carolina. Petitioner Empire Power Company ("Empire Power") submitted written comments opposing finalization of the draft permit. Petitioner George Clark ("Clark"), who lives with his family on property immediately adjacent to the proposed LCTS, submitted written comments and spoke at a public hearing, also opposing finalization of the draft permit. On 20 December 1991 DEHNR finalized the draft permit, issuing Permit No. 7171 to Duke Power for the LCTS.

On 10 January 1992 Empire Power filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH"), alleging that DEHNR had issued a final permit to Duke Power without addressing the comments filed with the State by Empire Power, without complying with federal and state law or rules in that it had failed to properly implement certain review requirements, and without requiring an environmental impact statement as required by state law. On 21 January 1992 Clark also filed a petition for a contested case hearing with the OAH, alleging that DEHNR had issued the permit in violation of its statutory duty to act on all permit applications "so as

to effectuate the [legislative] purpose . . . by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources," N.C.G.S. § 143-215.108(b) (1993); to reduce levels of ozone pollution in Mecklenburg County; to assess fully the impact of emissions of air pollutants from the LCTS on levels of ozone pollution, and, in particular, the impact of sulfur dioxide emissions from the LCTS; to require air pollution control technology adequate to control the emission of potentially harmful pollutants from the LCTS; to require Duke Power to cause air quality offsets; and to adequately address comments filed by Clark and other members of the public during the public comment period.

The OAH consolidated the contested cases for hearing and allowed Duke Power to intervene therein. Both DEHNR and Duke Power filed motions to dismiss the contested cases in the OAH for lack of subject matter jurisdiction. On 13 August 1992 the Administrative Law Judge assigned to the case found that the OAH had subject matter jurisdiction, and accordingly denied respondents' motions to dismiss.

On 18 August 1992 respondents DEHNR and Duke Power filed a Petition for Writ of Certiorari in the Superior Court, Wake County, to review that order. On 18 August 1992 the court allowed the Petition for Writ of Certiorari *ex parte*, stayed the contested case proceedings before the OAH, and set the case for hearing. On 8 September 1992 Clark filed a motion to dismiss respondents' Petition for Writ of Certiorari. Finding that OAH has jurisdiction over petitions for review of grants of air pollution control permits by parties other than permittees or permit applicants, the court, on 22 September 1992, allowed Clark's motion to dismiss the judicial proceeding, and remanded the case to the OAH.

DEHNR and Duke Power appealed the dismissal of their Petition for Writ of Certiorari to the Court of Appeals, and, as noted, the Court of Appeals reversed the trial court's order. It held that third-party petitioners may not seek a contested case hearing to challenge DEHNR's issuance of an air pollution control permit. *Empire Power Co. and Clark v. N.C. Dept. of E.H.N.R.*, 112 N.C. App. 566, 570, 436 S.E.2d 594, 597 (1993). It reasoned that the language of the organic statute, N.C.G.S. § 143-215.108(e), provided only the permit applicant or permittee the right to commence a contested case hearing, notwithstanding the language of the North Car-

olina Administrative Procedure Act ("NCAPA"), N.C.G.S. Ch. 150B (1991). *Id.* Relying on *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 342-43, 389 S.E.2d 35, 38 (1990), the court reasoned that "the [NC]APA only 'describe[s] the procedures' for OAH review in the event the North Carolina General Assembly [in the organic statute] vests a party with the right to administrative review, such as a contested case hearing." *Empire and Clark*, 112 N.C. App. at 570, 436 S.E.2d at 597. The court also held that third-party petitioners are nonetheless entitled to judicial review of DEHNR's decision to issue an air pollution control permit to Duke Power under Article 4 of the NCAPA. *Id.* at 573, 436 S.E.2d at 599. We allowed Clark's petition for discretionary review on 3 March 1994.

On this appeal, Clark contends that respondents' reliance upon *Batten* is misplaced, and that he is an aggrieved person entitled to an administrative hearing under the NCAPA to appeal from the decision of DEHNR to issue a permit to Duke Power to construct the LCTS. For the following reasons, we conclude that respondents' reliance upon *Batten* is misplaced, and that construing the relevant statutes *in pari materia*, as we must, Clark is an "aggrieved person" entitled to appeal the decision to the OAH. Accordingly, we reverse the decision of the Court of Appeals, and remand the case to the Superior Court, Wake County, for reinstatement of its order.

II.

We stated in *Batten*:

> The jurisdiction of the OAH over the appeals of state employee grievances derives not from Chapter 150B, but from Chapter 126. *The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures for such review.*

Batten, 326 N.C. at 342-43, 389 S.E.2d at 38 (emphasis added). Relying on this language, respondents contend that the NCAPA cannot confer upon petitioners the right to an administrative hearing in the OAH. Rather, they contend, the right to an administrative hearing must be expressly set forth in the organic statute, N.C.G.S. ch. 143, art. 21B ("Air Pollution Control").

Batten involved the grievance of an employee of the Department of Correction, an agency expressly exempted from application of the administrative hearing provisions of the NCAPA. *See* N.C.G.S.

§ 150B-1(e)(4) (1987, superseded). While the excerpted language—out of context—can be interpreted as respondents propose, the language of the statute as this Court interpreted and applied it prior to *Batten* does not sustain respondents' proposed interpretation. We now clarify that the excerpted language applies only in the *Batten* context, *i.e.*, of appeals of grievances of employees of agencies expressly exempted from the NCAPA.

When we decided *Batten*, the NCAPA read, in pertinent part:

§ 150B-1. Policy and scope.

(a) The policy of the State is that the three powers of government, legislative, executive, and judicial, are, and should remain, separate. The intent of this Chapter is to prevent the commingling of those powers in any administrative agency and to ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

(b) The purpose of this Chapter is to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies.

(c) This Chapter shall apply to every agency, as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary.

(d) (1) The following are specifically exempted from the provisions of this Chapter:

a. The Administrative Rules Review Commission;

b. The Employment Security Commission;

c. The Industrial Commission;

d. The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers; and

e. The Utilities Commission.

(2) The North Carolina National Guard is exempt from the provisions of this Chapter in exercising its court-martial jurisdiction.

(3) The Department of Human Resources is exempt from this Chapter in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes. The Department of Human Resources is also exempt from Article 3 of this Chapter in complying with the procedural safeguards mandated by . . . Section 680 of Part H of P.L. 99-457 as amended (Education of the Handicapped Act Amendments of 1986).

(4) The Department of Correction is exempt from the provisions of this Chapter, except for Article 5 of this Chapter and G.S. 150B-13 which shall apply.

(5) Articles 2 and 3 of this Chapter shall not apply to the Department of Revenue.

(6) Except as provided in Chapter 136 of the General Statutes, Articles 2 and 3 of this Chapter do not apply to the Department of Transportation.

(7) Article 4 of this Chapter, governing judicial review of final administrative decisions, shall apply to The University of North Carolina and its constituent or affiliated boards, agencies, and institutions, but The University of North Carolina and its constituent or affiliated boards, agencies, and institutions are specifically exempted from the remaining provisions of this Chapter.

(8) Article 4 of this Chapter shall not apply to the State Banking Commission, the Commissioner of Banks, the Savings Institutions Division of the Department of Economic and Community Development, and the Credit Union Division of the Department of Economic and Community Development.

(9) Article 3 of this Chapter shall not apply to agencies governed by the provisions of Article 3A of this Chapter, as set out in G.S. 150B-38(a).

(10) Articles 3 and 3A of this Chapter shall not apply to the Governor's Waste Management Board in administering the provisions of G.S. 104E-6.2 and G.S. 130A-293.

(11) Article 2 of this Chapter shall not apply to the North Carolina Low-Level Radioactive Waste Management

Authority in administering the provisions of G.S. 104G-10 and G.S. 104G-11. Articles 3 and 3A of this Chapter shall not apply to the North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11.

(12) Article 2 of this Chapter shall not apply to the North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14. Articles 3 and 3A of this Chapter shall not apply to the North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13 and 130B-14.

(13) Article 3 and G.S. 150B-51(a) of this Chapter shall not apply to hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder.

N.C.G.S. § 150B-1 (1987 & Supp. 1989, superseded). One year prior to *Batten*, we had interpreted this statute in *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 324 N.C. 402, 379 S.E.2d 26 (1989). The plaintiff there was a State employee whose health was insured through the Teachers' and State Employees' Comprehensive Major Medical Plan ("Medical Plan"). He filed a claim under the Medical Plan to recover his costs for surgery, but his claim was denied by the agency and, upon appeal, by the supervisory Board of Trustees of the Medical Plan ("Board"). *Vass*, 324 N.C. at 403-04, 379 S.E.2d at 27. He then instituted an action for breach of contract against the Board. The trial court granted summary judgment in favor of the Board; the Court of Appeals remanded the case to the trial court to be dismissed for lack of subject matter jurisdiction, concluding that the Board is an administrative agency covered by the NCAPA and that plaintiff had failed to exhaust administrative remedies provided by the NCAPA—*i.e.*, plaintiff had failed to file a petition for a contested case hearing in the OAH and therefore was not entitled to judicial review of the administrative decision. *Id.* at 404-05, 379 S.E.2d at 27-28.

On discretionary review, we concluded that because the Board is an "agency" as that term is defined under the NCAPA, the NCAPA applies to the Board except to the extent and in the particulars that any statute makes specific provisions to the contrary. The Board had

contended that the organic statute creating the Medical Plan made such specific exemptions:

> If, after exhaustion of internal appeal handling as outlined in the contract with the Claims Processor any person is aggrieved, the Claims Processor shall bring the matter to the attention of the Executive Administrator and Board of Trustees, which may make a binding decision on the matter in accordance with procedures established by the Executive Administrator and Board of Trustees.

N.C.G.S. § 135-39.7 (1988) ("Administrative Review"). The Board, like respondents here, argued that the language of the organic statute exempted it from application of the NCAPA because the language revealed the General Assembly's intent that any review of the Board's decisions be limited to judicial review. *Id.* at 406-07, 379 S.E.2d at 28-29. We held that plaintiff was entitled under the NCAPA to an administrative hearing to have his rights under the Medical Plan determined, stating:

> It is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly. Therefore, we conclude that N.C.G.S. § 135-39.7 is not a statute which makes "specific provisions to the contrary" as that phrase is used in . . . N.C.G.S. § 150B-1(c). The language in N.C.G.S. § 135-39.7 . . . is not an express and unequivocal exemption of the Board from the requirements of the Administrative Procedure Act. . . .
>
> . . . [T]he General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act and has clearly specified the extent of each such exemption. *E.g.*, N.C.G.S. § 150B-1(d) (1987) (totally exempting certain named agencies by stating that the Act "shall not apply" to them, and partially exempting certain other named agencies by specifying the extent to which the Act shall apply or the agency shall be exempt) . . . . Applying the maxim *inclusio unius est exclusio alterius*, we conclude that the Board's decisions are subject to administrative review under the Act, since the Board has never been specifically exempted by any statute from the Act's requirements. Had the

> General Assembly intended that the defendant-appellant Board be excluded from the requirements of the Act, we must assume that it would have inserted a specific provision in some statute expressly stating this intent. As the General Assembly has not done so, we will not infer any such intent on its part.

Id. at 407-08, 379 S.E.2d at 29 (emphasis added) (citations omitted).

Respondents contend that we made it clear in *Batten* that the administrative hearing provisions of the NCAPA "do not establish the right of a person 'aggrieved' by agency action to administrative review of that action by the OAH, but only describe procedures for such review." That interpretation is contrary to the language of the statute as interpreted and applied in *Vass*. Under that interpretation, the plaintiff there would not have been entitled to an administrative hearing under the NCAPA to determine his rights under the Medical Plan because the organic statute did not set forth his right thereto. In *Batten* we neither mentioned nor overruled the interpretation of the administrative hearing provisions applied in *Vass*. *Batten* involved the appeal of a grievance of an employee of an agency expressly exempted from the administrative hearing provisions of the NCAPA; thus, under the plain meaning of the NCAPA, that employee can be entitled to an administrative hearing to appeal his grievance to the OAH only by virtue of another statute. For these reasons, we reject respondents' interpretation of the language excerpted from *Batten*.

Subsequent amendments to the NCAPA bolster our interpretation of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) ("Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of the prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve."). Effective 1 October 1991, the NCAPA was amended, 1991 N.C. Sess. Laws ch. 418, § 2, and now reads, in pertinent part:

> **§ 150B-1. Policy and scope.**
>
> (a) Purpose.—This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.
>
> (b) Rights.—This Chapter confers procedural rights.

(c) Full Exemptions.—This Chapter applies to every agency except:

(1) The North Carolina National Guard in exercising its court-martial jurisdiction.

(2) The Department of Human Resources in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.

(3) The Utilities Commission.

(4) The Industrial Commission.

(5) The Employment Security Commission.

(d) Exemptions from Rule Making.—Article 2A of this Chapter does not apply to the following:

(1) The Commission.

(2) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-10 and G.S. 104G-11.

(3) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-13 and G.S. 130B-14.

(4) The Department of Revenue, except that Parts 3 and 4 of Article 2A apply to the Department.

(5) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(e) Exemptions From Contested Case Provisions.—The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:

(1) The Department of Human Resources and the Department of Environment, Health, and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).

(2) The Governor's Waste Management Board in administering the provisions of G.S. 104E-6.2 and G.S. 130A-293.

(3) The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9, 104G-10, and 104G-11.

(4) The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, 130B-13, and 130B-14.

(5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. G.S. 150B-51(a) is considered a contested case hearing provision that does not apply to these hearings.

(6) The Department of Revenue.

(7) The Department of Correction.

(8) The Department of Transportation, except as provided in G.S. 136-29.

(9) The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers.

(10) The North Carolina Air Cargo Airport Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.

(f) Exemption from All But Judicial Review.—No Article in this Chapter except Article 4 applies to The University of North Carolina.

N.C.G.S. § 150B-1 (1991). The equivocal language of purpose and applicability construed in *Vass* was deleted: "The purpose of this Chapter is to establish *as nearly as possible* a uniform system of administrative rule making and adjudicatory procedures for State agencies." N.C.G.S. § 150B-1(b) (1987, superseded) (emphasis added). "This Chapter shall apply to every agency, as defined in G.S. 150B-2(1), *except to the extent and in the particulars that any statute, including subsection (d) of this section, makes specific provisions to the contrary.*" N.C.G.S. § 150B-1(c) (1987, superseded) (emphasis added). Language was added which clearly, unambiguous-

ly, and in accordance with our interpretation in *Vass*, declares the purpose and applicability of the statute: "This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies." N.C.G.S. § 150B-1(a) (1991). "This Chapter confers procedural rights." N.C.G.S. § 150B-1(b) (1991). "The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter." N.C.G.S. § 150B-1(e) (1991).

Thus, the General Assembly clarified that which previously was doubtful. *See Town of Hazelwood v. Town of Waynesville*, 320 N.C. 89, 95, 357 S.E.2d 686, 689, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 106 (1987) ("When the legislature amends an ambiguous statute, the presumption is not that its intent was to change the original act, but 'merely to '. . . clarify that which was previously doubtful.' ' " (quoting *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985) (quoting *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968))). The language now is clear and provides that the NCAPA confers procedural rights to, *inter alia*, administrative hearings. *See* N.C.G.S. ch. 150B, art. 3. Therefore, we cannot hold, as respondents urge, that, apart from the context of agencies or proceedings expressly excepted therefrom, the NCAPA does not confer such a right. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 276-77, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.").

The NCAPA provides, further:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties or privileges, . . . should be settled though informal procedures. . . . If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

N.C.G.S. § 150B-22 (1991).

> A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and . . . shall be conducted by that Office. . . . The parties in a contested case shall be given an

> opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

N.C.G.S. § 150B-23(a) (1991).

Interpretation of these provisions, a matter for this Court, will clarify the range of situations in which the NCAPA entitles a person to commence an administrative hearing. In contrast,

> [u]nder the vast majority of state APA's [sic] and the Federal APA, the *right* to invoke the adjudication procedures is not provided by the APA's [sic] themselves. Instead, the right under most APA's [sic] arises only when rights, duties or privileges "are required by law to be determined by an agency after an opportunity for hearing" or like formulation. Unlike this majority, the NC APA does not limit the procedural protections governing adjudications to instances when the constitution or statutes require a right to an evidentiary hearing.

Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. Rev. 833, 869 (1975) [hereinafter Daye, *Administrative Procedure*].

Respondents misconstrue the relation of the organic statute to the NCAPA. The NCAPA confers procedural rights and imposes procedural duties, including the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties, or privileges. The organic statute may confer procedural rights and impose procedural duties in addition to those conferred and imposed by the NCAPA, but more importantly, it defines those rights, duties, or privileges, abrogation of which provides the grounds for an administrative hearing pursuant to the NCAPA.[1]

1. For example, permanent state employees of agencies not expressly exempted from the administrative hearing provisions of the NCAPA, as was the case in *Batten*, and subject to the State Personnel Act, are entitled to an administrative hearing by virtue of the NCAPA as well as the State Personnel Act. In turn, it is only because the latter act, N.C.G.S. § 126-35, creates a right in public employment, *i.e.*, the right not to be discharged, suspended or reduced in pay or position except for just cause, *see Batten*, 326 N.C. at 343, 389 S.E. 2d at 38-39, that the employee is entitled to a hearing by virtue of the NCAPA also. But for N.C.G.S. § 126-35, those employees can have no dispute involving their *rights, duties, or privileges*, within the meaning of N.C.G.S. § 150B-22. *See Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E.2d 340 (1976) (plaintiff's employment was terminated prior to effective date of the NCAPA and the amendments to the State Personnel System making provisions for employee appeals of grievances and disciplinary actions; the Court reiterated that "[e]mployment

[1] For these reasons also, we decline to adopt respondents' interpretation of the NCAPA, and instead reaffirm that the NCAPA confers upon any "person aggrieved" the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges. To the extent that the language in *Batten*, reiterated in *Harding v. Dept. of Correction*, 334 N.C. 414, 417-18, 432 S.E.2d 298, 300 (1993), suggests otherwise, it is disapproved. To the extent that *Citizens for Clean Industry v. Lofton*, 109 N.C. App. 229, 427 S.E.2d 120 (1993) may be viewed as inconsistent herewith, it is also disapproved.

III.

We turn, then, to whether petitioner Clark is entitled to an administrative hearing under the relevant statutes. The General Assembly enacted the air pollution control section of Chapter 143 in 1973 "to provide for the conservation of [the State's] . . . air resources." N.C.G.S. § 143-211 ("Declaration of public policy") (1993). It further declared:

> [I]t is the intent of the General Assembly . . . to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare. It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environment, Health, and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to pre-

by the State . . . does not *ipso facto* confer tenure or a property right in the position," and, at the time plaintiff was terminated, no statute of this State conferred upon State employees . . . tenure or the right to judicial review of an administrative action terminating the employment"). And clearly, the state employee is directly affected substantially in his person, property or employment by a decision to terminate him. *See* N.C.G.S. § 150B-2(6) (definition of "person aggrieved").

> vent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

Id.

To implement the program developed by the Environmental Management Commission ("Commission")[2] for the prevention of significant deterioration and the attainment of air quality standards established pursuant to the act, in areas of non-attainment such as that here, the General Assembly mandated that "no person shall . . . [e]stablish or operate any air contaminant source[, or b]uild, erect, use or operate any equipment which may result in the emission of air contaminants or which is likely to cause air pollution[,]" unless that person has obtained a permit therefor. N.C.G.S. § 143-215.108(a) (1993). Thus, the General Assembly empowered the Commission "[t]o grant and renew a permit with such conditions attached as the Commission believes necessary to achieve the purposes of this section or the requirements of the Clean Air Act," N.C.G.S. § 143-215.108(c)(1), "[t]o request such information from an applicant and to conduct such inquiry or investigation as it may deem necessary and to require the submission of plans and specifications prior to acting on any application for a permit," N.C.G.S. § 143-215.108(c)(5), and "[t]o require that an applicant satisfy the Department that the applicant . . . [h]as substantially complied with the air quality and emission control standards applicable to any activity in which the applicant has previously engaged, and has been in substantial compliance with federal and state laws, regulations, and rules for the protection of the environment." N.C.G.S. § 143-215.108(c)(5a). "The Commission shall act upon all applications for permits so as to effectuate the purpose of this section, by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources." N.C.G.S. § 143-215.108(b). With regard to administrative review of a decision of the Commission regarding a permit application, the section provides:

> A permit applicant or permittee who is dissatisfied with a decision of the Commission may commence a contested case by filing

2. The Commission is a commission of respondent DEHNR created in N.C.G.S. § 143B-282 (1993).

> a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision on the application is final and is not subject to review.

N.C.G.S. § 143-215.108(e) (1993). The section makes no express provision for an administrative appeal by aggrieved parties other than the permittee or permit applicant, nor does it expressly prohibit such an appeal.

In 1974 the General Assembly enacted the North Carolina Administrative Procedure Act to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies" and "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C.G.S. § 150B-1(a). "When the Act [became] effective on February 1, 1976, North Carolina for the first time [had] a comprehensive statute governing major parts of the procedures by which most agencies of the State execute their functions. The Act also sets out procedures that . . . govern the relationship between the agencies and citizens affected by agency action and the relationship between agencies and the courts." Daye, *Administrative Procedure* 835. "The basic purpose of a comprehensive administrative procedure act (APA) is to provide minimum uniform standards to govern administrative action." *Id.* at 837. The NCAPA confers procedural rights to, and establishes uniform procedures for, *inter alia*, such administrative hearings. The NCAPA provides that "[a]ny person aggrieved may commence a contested case hearing hereunder." N.C.G.S. § 150B-23(a). The contested case hearing provisions "apply to all agencies [, broadly defined, with specific exceptions by category, *see* N.C.G.S. § 150B-2(1) (1991),] and all proceedings not expressly exempted from the Chapter." N.C.G.S. § 150B-1(e).

There is no inherent right of appeal from an administrative decision to either the OAH or the courts. "No appeal lies from an order or decision of an administrative agency of the State or from judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute." *In re Assessment of Sales Tax*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963). Petitioner Clark has no right to appeal to the OAH from the decision of the Commission pursuant to any provision of the organic statute. If he has such a right, it is by virtue of the NCAPA.

[2] Neither the agency nor the proceeding are expressly exempted from the NCAPA. Thus, nothing else appearing, the administrative hearing provisions of the NCAPA clearly apply to the respondent agency, DEHNR, and to the air pollution control permit proceeding. Respondent DEHNR is an agency of the executive branch of state government within the purview of the NCAPA, and its decisions are not subject to review under any statute other than the NCAPA. N.C.G.S. § 143-215.108(e) provides that the permit applicant or permittee may commence an administrative hearing only "under N.C.G.S. § 150B-23." "[T]he General Assembly has shown itself to be quite capable of specifically and expressly naming the particular agencies to be exempt from the provisions of the Act and has clearly specified the extent of each such exemption." *Vass*, 324 N.C. at 407, 379 S.E.2d at 29; *cf.*, *e.g.*, N.C.G.S. § 150B-1(c) (1991) (fully exempting enumerated agencies by stating that "[t]his Chapter applies to every agency except [the enumerated agencies]"); 150B-1(d) (1991) (exempting enumerated agencies from rulemaking by stating "Article 2A of this Chapter does not apply to the following"); 150B-1(e) (1991) (exempting enumerated agencies from contested case provisions of the APA by stating that "[t]he contested case provisions of this Chapter do not apply to the following [enumerated agencies and proceedings]"); and 150B-1(f) (1991) (exempting The University of North Carolina "from [a]ll [b]ut [j]udicial [r]eview"); 130B-8(8) (1993) ("Article 2 of Chapter 150B shall not apply to contractor selection or technology selection pursuant to G.S. 130B-13 and G.S. 130B-14. Articles 3 and 3A of Chapter 150B shall not apply to final decisions regarding site selection, contractor selection or technology selection pursuant to G.S. 130B-11, 130B-13, and 130B-14."). The General Assembly expressly provided that the contested case provisions do not apply to DEHNR "in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986)." N.C.G.S. § 150B-1(e)(1). Had it also intended that DEHNR, in undertaking air pollution control permit-letting, be excluded from the administrative hearings provisions of the NCAPA, we assume it would have inserted a similarly specific provision in either the NCAPA or Chapter 143 expressly stating this intent. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988) ("By setting out these specific exceptions . . ., the General Assembly implicitly excluded all other exceptions.").

Thus, under the NCAPA, N.C.G.S. § 150B-23, petitioner Clark is entitled to an administrative hearing to resolve a dispute involving his rights, duties, or privileges, unless (1) he is not a "person aggrieved," *id.*, by the decision of the Commission, or (2) the organic statute, specifically N.C.G.S. § 143-215.108(e), amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder.

A.

[3] Under the NCAPA, any "person aggrieved" within the meaning of the organic statute is entitled to an administrative hearing to determine the person's rights, duties, or privileges. N.C.G.S. § 150B-23(a). " 'Person aggrieved' means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment, by an administrative decision." N.C.G.S. § 150B-2(6). Under the predecessor judicial review statute, which did not define the term, the Court gave it an expansive interpretation:

> The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: "Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights."

In re Assessment of Sales Tax, 259 N.C. at 595, 131 S.E.2d at 446 (quoting 3 C.J.S. *Aggrieved*, at 509 (1973)). For the following reasons, we conclude that Clark is a "person aggrieved" as defined by the NCAPA within the meaning of the organic statute.

Clark alleged that DEHNR issued the permit allowing construction and operation of air emission sources at the LCTS in violation of its statutory and regulatory duties: to act on all permit applications "so as to effectuate the [legislative] purpose . . . by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources," N.C.G.S. § 143-215.108(b); to reduce levels of ozone pollution in the Mecklenburg County area; to assess fully the impact of emissions of air pollutants from the LCTS on levels of ozone pollution in Mecklenburg County; to assess fully the impact of sulfur dioxide

emissions from the LCTS; to require air pollution control technology adequate to control the emission of potentially harmful pollutants from the LCTS; and to require Duke Power to cause air quality offsets. Clark also alleged that DEHNR issued the permit in violation of its statutory duty to adequately address comments filed by Clark and other members of the public during the public comment period.

Clark further alleged that, as the owner of property immediately adjacent to and downwind of the site of the proposed LCTS—which will emit tons of harmful air pollutants if constructed and operated in accordance with its air quality permit—he and his family will suffer injury to their health, the value of their property, and the quality of life in their home and their community.

In enacting the air pollution control provisions, the General Assembly, as noted above, declared its intent

> to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirm[ed] the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declare[d] the prudent utilization of these resources to be essential to the general welfare.

N.C.G.S. § 143-211. To further that intent, the General Assembly mandated that standards of water and air purity be designed, and programs implemented to achieve those standards,

> *to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property,* to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.

Id. (emphasis added).

Clearly, Clark alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit. As an adjacent property owner downwind of the LCTS, Clark may be expected to suffer from whatever adverse

environmental consequences the LCTS might have. In addition, a judgment in favor of Clark would substantially eliminate or redress the injury likely to be caused by the decision to permit Duke Power to build the LCTS. Clark therefore is a "person aggrieved" within the meaning and intent of the air pollution control act. *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 360-62, 265 S.E.2d 890, 898-99, *disc. rev. denied*, 301 N.C. 94 (1980) (plaintiffs were all "aggrieved," within the meaning of the NCAPA provision, by a decision of the State Board of Transportation on the location of an interstate highway where the individual plaintiffs were property owners within the proposed corridor of the highway, the members of plaintiff non-profit corporation were citizens and taxpayers who lived in or near the proposed highway corridor, plaintiff county's tax base and planning jurisdiction would be affected, and individual plaintiffs would be affected as taxpayers; further, the "procedural injury" implicit in the failure of an agency to prepare an environmental impact statement was itself a sufficient "injury in fact" to support standing as an "aggrieved party" under former N.C.G.S. § 150A-43, as long as such injury was alleged by a plaintiff having sufficient geographical nexus to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project might have); *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 766-67, 338 S.E.2d 781, 783 (1986) (a consent special order issued by respondent agency to a corporation allowing it to discharge effluents into a river was issued without a hearing and by its own terms purported to take precedence over the terms of a proposed National Pollutant Discharge Elimination System permit to the corporation, so that the right of petitioner to be heard was impaired; petitioner therefore qualified as an "aggrieved person" for purposes of judicial review; further, petitioner alleged that its property rights in the river were affected, and these allegations also established petitioner's "aggrieved person" status); *see generally* 2 Am. Jur. 2d *Administrative Law* §§ 443-50 (1994) ("Persons Adversely Affected or Aggrieved").

B.

[4] Having concluded that petitioner Clark is clearly a "person aggrieved" under the NCAPA, we turn to the question of whether the organic statute amends, repeals, or makes an exception to the NCAPA so as to exclude him from those entitled to an administrative hearing thereunder.

> 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." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). . . .
>
> 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. 381, 399-400, 269 S.E.2d 547, 561, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980) (citation omitted). " '[B]ut, to the extent of any necessary repugnancy between them, 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*, 326 N.C. at 344, 389 S.E.2d at 39 (quoting *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)).

> "Ordinarily, [however,] the enactment of a law will not be held to have changed a statute that the legislature did not have under consideration at the time of enacting such law; and implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be. *An intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation; and an amendment by implication, or a modification of, or exception to, existing law by a later act, can occur only where the terms of a later statute are so repugnant to an earlier statute that they cannot stand together.*"

In re Assessment of Sales Tax, 259 N.C. at 594, 131 S.E.2d at 445 (quoting 82 C.J.S. *Statutes*, § 252, at 419-20 (1953)) (emphasis added).

The NCAPA entitles petitioner to an administrative hearing; the organic statute, respondents contend, denies him that right.[3] The question thus is whether the legislature intended, in enacting the air pollution control administrative review provisions, to deprive petitioner of the right it expressly conferred upon him in the NCAPA. Applying the foregoing rules of statutory construction, we conclude that because the organic statute did not expressly provide otherwise, the legislature did not intend to deprive petitioner of his right to an administrative hearing.

The organic statute states:

> A permit applicant or permittee who is dissatisfied with the decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant or permittee does not file a petition within the required time, the Commission's decision on the application is final and is not subject to review.

N.C.G.S. § 143-215.108(e). This statute makes no provision for petitioner to commence a contested case hearing, nor does it expressly deny him that right. Respondents, however, would have us apply to it the maxim *expressio unius est exclusio alterius*, *see*, *e.g.*, *Campbell v. Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1969) (mention of specific circumstances *implies* the exclusion of others), and con-

3. The organic statute, N.C.G.S. § 143-215.108(e), has been amended subsequently to any amendments to N.C.G.S. §§ 150B-22 or -23. N.C.G.S. § 143-215.108(e) was amended under an act entitled "An Act Making Conforming and Technical Amendments to the General Statutes Concerning Administrative Procedure." 1987 N.C. Sess. Laws ch. 827, s. 206. The amendments generally changed references from Chapter 150A, which had been repealed, to Chapter 150B. Prior to the 1987 amendments, N.C.G.S. § 143-215.108, in pertinent part, read:

> Any person whose application for a permit or renewal thereof is denied or is granted subject to conditions which are unacceptable to such person or whose permit is modified or revoked shall have the right to a hearing before the Environmental Management Commission upon making demand therefor within 30 days following the giving of notice by the Environmental Management Commission as to its decision upon such application. Unless such a demand for a hearing is made, the decision of the Environmental Management Commission on the application shall be final and binding. If demand for a hearing is made, the procedure with respect thereto and with respect to all further proceedings shall be as specified in G.S. 143-215.4 and in any applicable rules of procedure of the Environmental Management Commission.

N.C.G.S. § 143-215.108 (1983, superseded).

clude that the legislature intended, albeit by implication, to exclude persons aggrieved, other than the permit applicant or permittee, from those entitled to a contested case hearing under the NCAPA.

N.C.G.S. § 143-215.108(e) and N.C.G.S. § 150B-23, however, are *in pari materia*, and we must give effect to both if possible. Respondents basically contend that the organic statute amends, repeals, or makes exception to the NCAPA *by implication*. "The presumption is always against an intention to repeal an earlier statute." *In re Assessment of Sales Tax*, 259 N.C. at 595, 131 S.E.2d at 445. We thus should not construe the silence of N.C.G.S. § 143-215.108(e) as to the rights of petitioner to commence an administrative hearing as a repeal of any such rights expressly conferred upon him under the NCAPA. The legislature has not expressed or otherwise made manifestly clear an intent to deprive petitioner of any right of appeal he might have by virtue of the NCAPA; moreover, there is not such repugnancy between the statutes as to create an implication of amendment or repeal "to which we can consistently give effect under the rules of construction of statutes." *Id.*

There is, instead, a fair and reasonable construction of the organic statute that harmonizes it with the provisions of the NCAPA, and it is our duty to adopt that construction. *See In re Miller*, 243 N.C. 509, 514, 91 S.E.2d 241, 245 (1956) ("[T]here is a presumption against inconsistency, and when there are two or more statutes on the same subject, in the absence of an express repealing clause, they are to be harmonized and every part allowed significance, if it can be done by fair and reasonable interpretation."). The first sentence of N.C.G.S. § 143-215.108(e) plainly establishes a deadline of thirty days for the filing of a petition to commence a contested case by the permit applicant or permittee, which differs from the general limitation of sixty days specified in N.C.G.S. § 150B-23(f); it thus constitutes an exception to the specific hearing procedures established by the NCAPA *and expressly contemplated therein*. *See* N.C.G.S. § 150B-23(e) ("Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute."); N.C.G.S. § 150B-23(f) ("Unless another statute . . . sets a time limitation for the filing of a petition in contested cases against a specified agency the general limitation for the filing of a petition in a contested case is 60 days.").

Respondents urge us to attach a technical meaning to the term "final" in the second sentence of N.C.G.S. § 143-215.108(e) and inter-

pret that sentence to mean that, in the event the permit applicant or permittee does not timely file a petition for a contested case hearing, the Commission's decision on the permit application is a "final agency decision," subject only to judicial review on behalf of a permit applicant, permittee, or other aggrieved person. That interpretation, however, renders the statute inconsistent with well-established statutory and common-law prerequisites to administrative and judicial review of administrative decisions. An aggrieved person may commence an administrative hearing only by timely filing a petition therefor in the OAH, N.C.G.S. § 150B-23; failure to timely file constitutes waiver of any right to that administrative remedy. Judicial review, in turn, is generally available only to aggrieved persons who have exhausted all administrative remedies made available by statute or agency rule. N.C.G.S. § 150B-43; *see, e.g., Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (when the legislature has provided by statute an effective administrative remedy, that remedy is exclusive, and a party must pursue and exhaust such remedy before resorting to the courts, especially where the statute establishes a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose). Therefore, we conclude that the intent of the language is that any permittee or permit applicant who fails to timely appeal from the decision of the Commission has waived any right to administrative and judicial review of that decision. *See State v. Koberlein*, 309 N.C. 601, 605, 308 S.E.2d 442, 446 (1983) ("Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or clearly indicated by the context in which they are used.").

The primary purpose of the NCAPA is to confer procedural rights, including the right to an administrative hearing, upon any person aggrieved by an agency decision; the statutes should be liberally construed together to preserve and effectuate that right. In *In re Appeal of Harris*, 273 N.C. 20, 27, 159 S.E.2d 539, 545 (1968) (construing predecessor statute to N.G.G.S. ch. 150B, art. 4 ("Judicial Review"), we stated, "[t]he primary purpose of this statute is to confer such right to judicial review; and, in our opinion, the statute should be liberally construed *to preserve and effectuate such right.*"); *see generally Land Co. v. Lange*, 150 N.C. 26, 30, 63 S.E. 164, 166 (1908) (A remedial statute should be liberally construed to advance the remedy.).

Considering the unequivocal "language of the statute [the NCAPA], the spirit of the act, and what the act seeks to accomplish,"

Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972), we conclude that the legislature intended that the NCAPA should control unless the organic statute *expressly* provides otherwise. *Cf. Vass*, 324 N.C. at 407, 379 S.E.2d at 29 ("It is clear that the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the [NCAPA] be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly."). We hold, therefore, that the organic statute, N.C.G.S. § 143-215.108(e), does not amend, repeal, or make exception to the NCAPA so as to deprive petitioner of his right to an administrative hearing thereunder, and that petitioner is entitled to commence an administrative hearing in the OAH to determine his right under the air pollution control act to have DEHNR issue or deny the air quality permits in question in accordance therewith. *Accord Vass*, 324 N.C. 402, 379 S.E.2d 26 (although the organic statute granted petitioner the right to a hearing before the Medical Plan Board and provided that the Board's decision would be "final and binding," the Court concluded that it was not a statute which exempted the Board from the requirements of the NCAPA because the language was not "an express and unequivocal exemption" therefrom; therefore, plaintiff was entitled to an administrative hearing in the OAH to determine his rights under the Medical Plan); *In re Assessment of Sales Tax*, 259 N.C. at 594-95, 131 S.E.2d at 445 (although the organic act only provided that taxpayers could appeal from the decision of the Tax Review Board to the superior court, the Commissioner of Revenue could appeal by virtue of N.C.G.S. Chapter 143, Article 33, predecessor to Chapter 150B, Article 4 ("Judicial Review"); the Court held that "the silence of [the organic statute] as to the rights of the Commissioner to appeal may not be construed as a repeal of any such rights which may have been granted to him under G.S. 143-307. G.S. 105-241.3 and G.S. 143-307 are *in pari materia* and it is our duty to give effect to both if possible. The presumption is always against an intention to repeal an earlier statute.").

C.

[5] Finally, respondents contend that because DEHNR's review of applications for air pollution control permits is detailed, comprehensive and highly technical, the permitting decision is properly made by technical experts, as opposed to administrative law judges. Once the public has had the opportunity to comment on whether the permit should be granted, any review of that decision for a third party, such

as petitioner Clark, should be made in superior court on the record; there should not be a new evidentiary hearing in the OAH. At best, they argue, such a hearing would be duplicative of the process already completed by DEHNR over a lengthy period of time and would be redundant; at worst, it would allow third parties to use the OAH to undermine the integrity of the permitting process and result in the delay of important public projects such as the LCTS and in the waste of limited State resources.

We recognize that

> [t]he reasons for creating administrative agencies include efficiency, speed, volume, flexibility and informality. Weighed against these are fairness considerations—equitable treatment of persons in like circumstances, notice, opportunity to participate, regularized process, articulated reasons for agency action and overall "rationality" in agency process. The inherent clash of such objectives can only be minimized by careful balancing in particular instances.

Daye, *Administrative Procedure* 845. We must assume that the General Assembly carefully balanced these policy considerations prior to adoption of the NCAPA and amendments thereto. Having carefully balanced such considerations, the General Assembly clearly stated, in N.C.G.S. § 150B-1(e), that the administrative hearing provisions of the NCAPA apply to all agencies and all proceedings except those expressly exempted therefrom, and it expressly named the particular agencies exempted therefrom, specifying the extent of each such exemption. The General Assembly did not expressly exempt DEHNR or the air pollution control permit proceeding therefrom, nor did it expressly provide that aggrieved persons thereunder are not entitled to an administrative hearing pursuant thereto.

IV.

For these reasons, we hold that the trial court correctly concluded that the OAH had subject matter jurisdiction, and that the Court of Appeals erred in reversing the trial court. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Wake County, for reinstatement of that court's order allowing petitioner Clark's motion to dismiss the judicial proceedings, and remanding the case to the OAH for further proceedings.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. GREGORY FLINT TAYLOR

No. 482A93

(Filed 9 September 1994)

1. Homicide § 230 (NCI4th)— noncapital first-degree murder—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence that defendant was the perpetrator of the offense where the evidence would permit the jury to find that the defendant took Johnny Beck and the victim in his Pathfinder to a cul-de-sac; the jury could reasonably infer that these three individuals smoked cocaine there from defendant's statement and the dry matches and plastic bags found in the cul-de-sac; the evidence tended to show that defendant became upset when the victim refused to have sex and that he hit her; the jury could reasonably infer from the evidence that the defendant was out of the Pathfinder and participating when the blows, stabs, and cuts were inflicted on the victim; and the jury could reasonably infer that two assailants attacked the victim at the same time and that the defendant was one of the assailants from evidence tending to show that two weapons were involved and that wounds were inflicted by different weapons on opposite sides of the victim's body.

Am Jur 2d, Homicide §§ 425 et seq.

2. Homicide § 244 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence

There was sufficient evidence in a noncapital first-degree murder prosecution where premeditation and deliberation could be inferred from the number of wounds and the brutal manner in which they were inflicted, as well as from defendant's attempt to cover up his actions in his statements to the police.

Am Jur 2d, Homicide §§ 437 et seq.

3. Criminal Law § 794 (NCI4th)— noncapital first-degree murder—instructions—acting in concert

There was sufficient evidence to support the trial court's instructions on acting in concert in a noncapital prosecution for first-degree murder where the evidence in the case would support a reasonable finding that the defendant was present and acting in

concert with Johnny Beck as they picked up the victim to "party" with them and that the defendant and Beck formed a common purpose to murder Thomas after she had "partied" for some time at the defendant's expense and would not proceed with bargained-for sex acts.

Am Jur 2d, Trial §§ 1255, 1256.

4. Evidence and Witnesses § 1912 (NCI4th)— noncapital first-degree murder—bloodhound's actions—admissible

There was no error in a noncapital first-degree murder prosecution in the admission of evidence of a bloodhound's actions in tracking the victim where defendant contended that the testimony failed the test for admissibility in *State v. McLeod*, 196 N.C. 542, as to the bloodhound's pedigree, training, reliability, and the way in which she was keyed to the scent.

Am Jur 2d, Evidence §§ 575, 576.

Evidence of trailing by dogs in criminal cases. 18 ALR3d 1221.

5. Criminal Law § 427 (NCI4th)— noncapital first-degree murder—prosecutor's closing arguments—defendant's failure to testify

There was no plain error in a noncapital first-degree murder prosecution where the prosecutor stated in his closing argument that "Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything" and later said, when arguing that there was no logical explanation as to why the defendant's vehicle was found near a ravine, "The defendant has got to explain something to you. But what he has explained is absurd." The first comment did not mention the defendant or his failure to testify; the prosecutor was simply contending that the absence of eyewitness testimony is common in homicide cases and merely stated that the frequent lack of eyewitness testimony was one of the reasons for the recognition of the legal theory of acting in concert. The second portion of the argument merely attacked the story the defendant had given authorities. Taken in context, this portion of the prosecutor's argument was a comment on the lack of credibility of the defendant's statements to the police and the defendant's failure to produce evidence to corroborate or explain those statements. Moreover, the prosecutor argued to the jury for one and one-half

hours; the two brief portions of that argument complained of by defendant did not, taken in context, encourage the jury to infer guilt from the defendant's silence and did not amount to gross impropriety.

Am Jur 2d, Trial §§ 577 et seq.

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.

6. Constitutional Law § 161 (NCI4th); Criminal Law § 47 (NCI4th)— noncapital first-degree murder—defendant convicted, charges against accomplice dismissed—no violation of due process and equal protection

Defendant's argument that dismissal of murder charges against an accomplice required that his conviction be vacated on due process and equal protection grounds was rejected.

Am Jur 2d, Criminal Law §§ 166, 167, 632 et seq., 831 et seq.; Constitutional Law §§ 735 et seq.

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 4 April 1993, by Allen (J.B., Jr.), J., in the Superior Court, Wake County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 9 May 1994.

Michael F. Easley, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, and James P. Longest, Jr., Associate Attorney General, for the State.

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

MITCHELL, Justice.

The defendant, Gregory Flint Taylor, was tried upon proper indictments charging him with first-degree murder and with accessory after the fact to the felony of murder. The defendant was tried noncapitally at the 12 April 1993 Mixed Session of Superior Court, Wake County. The jury found the defendant guilty of first-degree murder and not guilty of accessory after the fact. The trial court entered judg-

ment on 20 April 1993 sentencing the defendant to the mandatory sentence of life imprisonment. The defendant appeals to this Court as a matter of right. *See* N.C.G.S. § 7A-27(a) (1989).

The State's evidence tended to show the following. Officer Brad Kenan drove to a cul-de-sac at the south end of Blount Street in Raleigh on the morning of 26 September 1991. Beyond the cul-de-sac the land slopes up to a crest covered with weeds and grass and then slopes down into a ravine and a creek and to woods beyond. There is a dirt and gravel service road going south from the cul-de-sac. The cul-de-sac is not lighted by street lights and is located many yards south of the closest business.

Officer Kenan arrived at the cul-de-sac around 7:30 a.m. and saw a woman's body lying in the street. The dead woman had short hair and her clothing was in disarray. Her pants were turned inside-out and were down around her ankles. Her shirt was torn open and pulled up to the neck. Officer Kenan observed two holes in the victim's head, several cuts between her breasts and blood on the pavement and caked on the victim's neck. Fingerprint identification later determined that the victim was Jacquetta Thomas. Dry matches and several small blue zip-lock bags in which cocaine and crack cocaine are commonly sold were found in the cul-de-sac near the victim's body. Over the crest of the hill and not visible from the cul-de-sac, a white Nissan Pathfinder truck was stuck in a washed-out gully about one hundred and fifty feet from the body.

Detective Johnny Howard testified that he was at the murder scene in the cul-de-sac when the defendant appeared with his wife and a co-worker at about 8:30 a.m. on 26 September 1991. The defendant told the police that he needed to get the Pathfinder and that he would get out of their way. Detective Howard asked the defendant to go to the police station for questioning, to which the defendant agreed. Detective Howard and another officer questioned the defendant at the police station for over an hour and recorded the questions and answers. The recording and a transcript of the recording were introduced as evidence. The recording was played for the jury.

The defendant said that he left his home in his Pathfinder around 6:00 p.m. on 25 September 1991. He went to a friend's house and stayed until about 9:30 p.m. He then went to another friend's house, drank beer, and became "pretty intoxicated." Around 11:30 p.m., he went to Johnny Beck's house where he smoked cocaine and drank beer. Around 1:00 a.m. on 26 September 1991, he and Beck went to

Beck's brother's house and stayed there until about 2:30 a.m. He and Beck bought some cocaine, then drove into the cul-de-sac, where the victim's body was found. He did not see the victim's body and did not think it was in the cul-de-sac when they arrived. He and Beck saw the service road and decided to go "four-wheeling" in the Pathfinder. They drove down the service road and became stuck in the ravine, where they smoked more cocaine. They then walked up to the cul-de-sac and started walking north on South Blount Street. Beck said that he saw a body in the cul-de-sac. The defendant then turned around and saw something that looked like a body or a roll of carpet. After they had walked further up the street, Beck turned around and said that he saw a person standing in the cul-de-sac. The defendant then looked and saw the person. Beck and the defendant walked to a busier street where they were picked up by a woman who drove them to a "rock" house. They stayed there using drugs until about 6:00 a.m. The woman then drove Beck home and left the defendant at a gas station. The defendant's wife came and picked him up there. The defendant repeatedly said that he did not know the victim, that he had never seen her before and that she had never been in his vehicle.

Eva Kelly testified that she was a prostitute living at 419 East Street in southeast Raleigh on 25 September 1991. On the night of 25 September 1991 and into the early morning hours of 26 September 1991, she saw the defendant driving a Pathfinder with a black male passenger in her neighborhood. In the evening the Pathfinder stopped in front of her house, and she went up to the passenger door and spoke to the black man in the passenger seat. The black man asked if she wanted to get high and party with them. He displayed money and cocaine rocks in his hand. The man had more cocaine in little plastic bags. She declined and the vehicle departed.

Later in the evening Kelly came home with a date. A black female with short hair and "on the hippy side" named Jackie and one named Whoopie were in the kitchen with the same two men in the Pathfinder who had tried to pick her up earlier. Syringes were on the table and the group was smoking crack. Kelly went to another house with her date. Upon returning, she saw Jackie leaving by the kitchen door with Beck and the defendant. She next saw the Pathfinder traveling on Cabarrus Street and recognized it as the one she had seen earlier. She identified the defendant as the man she saw with Jackie in the kitchen and leaving that night in September 1991. She further stated that the defendant was the man she had seen driving the Pathfinder earlier that night.

Ernest Andrews testified that he was in the Wake County Jail awaiting transfer to a state prison when the defendant was placed in the cell with him. While the two men were together in the jail cell they had several conversations. The defendant told Andrews he was charged with murder. Another prisoner asked the defendant how the victim had died. The defendant said that she had died "with a smile on her face." The defendant later added that she was "cut from ear to ear, throat cut."

In a subsequent conversation the defendant explained to Andrews that they were partying, drinking and fondling when the girl got upset and he hit her. She jumped out of his vehicle, and the other man with them jumped out and ran after her. When the other man returned, he said "she wouldn't be partying anymore." The defendant said the other man was black and the victim was a black prostitute.

William E. Hensley of the City-County Bureau of Identification testified that he tested stains on the pavement in the cul-de-sac where the victim's body was found for the presence of blood with positive results. Over the course of the day and night of 26 September 1991, technicians determined that a vehicle had been driven through the pool of blood found beside the body. The vehicle had traveled in a northerly direction and circled around to the southwest before going over the curb and south up the gravel service road. Traces of blood were found on the passenger side front fender, passenger side A-frame and on the passenger side front wheel-well liner of the defendant's Pathfinder. There were no injuries to the victim's arm that would indicate that a vehicle had driven over it.

The victim's left hand lay directly over a bloodstain on the pavement and there was a large defensive cut between two fingers. Bloodstains were observed in an arc on the west side of the body with a radius the length of the left arm. Hensley testified that the arc of bloodstains resulted from the movement of the victim's arm and hand and indicated that she was alive as she lay in the street. Blood from the head and neck wounds had moved in a southerly direction in accord with the slope of the pavement surface.

The trial court conducted a *voir dire* hearing regarding the admissibility of evidence that a purebred bloodhound had indicated that the scent of the murder victim was in, on, or about the defendant's Pathfinder while it was stuck in the ravine approximately one hundred and fifty feet from the victim's body. After entering findings and conclusions, the trial court concluded that the evidence was admissible.

Before the jury, the State's evidence tended to show that Officer Andy Currin took the bloodhound Sadie to the cul-de-sac and prepared a scent directly from the victim's body. After Currin presented the scent to Sadie and commanded her to "find", the bloodhound headed southeast in a "zig-zag" manner to the gravel service road leading away from the cul-de-sac and toward the Pathfinder. Sadie returned to Officer Currin indicating that the scent had stopped prior to or at the bottom of the embankment. Sadie was taken to the top of the ridge, about thirty feet from the Pathfinder and given the command to "find." She worked in a circle searching for the victim's scent. When she was fifteen or twenty feet from the Pathfinder, she went directly to the driver's door and around to the passenger's side door. She jumped on both doors. Officer Currin testified that Sadie's actions indicated the victim's scent was in, on, or around the vehicle.

Dr. Deborah L. Radisch, Associate Chief Medical Examiner, testified that she performed an autopsy on the body of the victim, Jacquetta Thomas, on 27 September 1991 and observed two large tears of the scalp on the right side of the head over a depressed fracture of the skull. Some bone fragments were driven into the brain. Four ribs on the left side were fractured. There were lacerations on the chin and neck. One neck laceration exposed organs in the neck. There was a shallow stab wound on the right shoulder and one over the right breast. In the middle of the chest were three shallow skin cuts that appeared to have been made by a cutting instrument. The cause of death was blunt force injuries to the head and neck. The injuries to the chest and right breast were consistent with a sharp force instrument with a cutting edge, such as a knife. Those injuries were in contrast to the head and neck injuries which were consistent with wounds inflicted by a heavy object with a dull edge. There was no evidence that the victim had been struck by a vehicle. Drug testing revealed a very high concentration of cocaine in the body. The wounds were inflicted while the victim was alive, and the significant amount of bleeding indicated that she had been alive while at the cul-de-sac and had been killed there.

At the close of the State's evidence, and again at the close of all of the evidence, the defendant moved to dismiss the murder charge against him on the ground that there was insufficient evidence that he committed the crime. The trial court denied the defendant's motions.

[1] By his first assignment of error, the defendant contends that the trial court erred in denying his motions to dismiss the murder charge.

The defendant asserts *inter alia* that the evidence was insufficient to support a reasonable finding that he was the perpetrator of the offense. 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. —, 128 L. Ed. 2d 42 (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.*

The test of the sufficiency of the evidence to withstand the defendant's motion to dismiss "is the same whether the evidence is direct, circumstantial, or both." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61. "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). The evidence need only permit a reasonable inference of the defendant's guilt of the crime charged in order for that charge to be properly submitted to the jury. *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981). Once the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965). Courts making such determinations may resort to circumstantial evidence of motive, opportunity and capability to identify the accused as the perpetrator of the crime. *See State v. Pridgen*, 313 N.C. 80, 95, 326 S.E.2d 618, 628 (1985). "Defendant's evidence rebutting the inference of guilt may be considered only insofar as it explains or clarifies evidence offered by the State or is not inconsistent with the State's evidence." *State v. Lane*, 328 N.C.

598, 606, 403 S.E.2d 267, 272, *cert. denied*, — U.S. —, 116 L. Ed. 2d 261 (1991) (quoting *State v. Furr*, 292 N.C. 711, 715, 235 S.E.2d 193, 196, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977)).

Applying the foregoing rules to the present case, we conclude that there was sufficient evidence from which a rational trier of fact could find that the defendant killed Jacquetta Thomas. The evidence tended to show that the defendant was present at the cul-de-sac on Blount Street near the time of the death of Jacquetta Thomas. This could reasonably be inferred from the location of the defendant's Pathfinder near the body, the testimony of Eva Kelly that the defendant had been seen with the victim on the night of the killing only a few blocks from the cul-de-sac, and statements made by the defendant to the police and to Ernest Andrews. Evidence of the actions of the bloodhound was sufficient to allow the jury to reasonably infer that the victim had been in or around the defendant's Pathfinder which was found near the victim's body. Additionally, the defendant appeared and attempted to retrieve his Pathfinder from the area of the cul-de-sac at about 8:30 a.m. on 26 September 1991, shortly after the victim's body had been discovered.

From the evidence concerning the location of the body and the location of the patches and pools of blood, the jury could reasonably infer that the victim was slain in the cul-de-sac and left to die by her attacker. Evidence concerning the tire tracks at the scene of the murder tended to show that the defendant's vehicle passed so close to Jacquetta Thomas as to run through a pool of blood next to her body while she lay dying in the cul-de-sac. Such evidence would support a reasonable finding that, contrary to the defendant's statements to the police, Thomas had been attacked and left to die in the cul-de-sac at the time the defendant drove his Pathfinder past her and onto the gravel drive. Furthermore, the traces of blood found on the right front fender, right side A-frame and on the right front wheel-well liner of the defendant's Pathfinder, lent support to the inference that it had made the tire tracks at the murder scene. From the tire track location, the traces of blood on the outer fender and in the wheel-well of the defendant's Pathfinder, and the fact that the Pathfinder was stuck in the gully near the body, the jury could reasonably infer that defendant drove away from the victim's body and became stuck while attempting to flee.

Other evidence tended to show that the victim's wounds were caused by two different implements, one being a heavy blunt force

instrument and the other an instrument with a sharp cutting edge. The evidence tended to show that the wounds consistent with a blunt force instrument were inflicted to a different area of the body than those which were consistent with an instrument with a sharp cutting edge. This evidence would support a reasonable inference that the two implements were wielded by two different assailants, one of whom was the defendant.

The evidence also tended to show that defendant knew before the autopsy had been performed that the victim's throat had been cut. During the original questioning of the defendant by Detective Howard, the defendant looked at a small polaroid photograph of the body and asked, "Was her throat cut?" Testimony of Detective Howard tended to show that the photograph did not reveal any laceration to the throat. There was additional testimony that by looking at the body, one "could not tell there was a hole [in the neck] because the blood had dried on it, was coagulated over it. These wounds were very hard to see."

The evidence tended to show that the defendant also told Ernest Andrews that "she died with a smile on her face" and had been "cut from ear to ear." Given the evidence tending to show the attack took place in a dark cul-de-sac, the jury reasonably could have inferred that the defendant must have inflicted the wound himself or watched as it was inflicted in order to have known how the victim's throat had been cut.

The foregoing evidence would permit the jury to find that the defendant took Johnny Beck and the victim in his Pathfinder to the cul-de-sac at the south end of Blount Street, about ten blocks from the home of Eva Kelly, after 2:30 a.m. on 26 September 1991. From the defendant's statement and the dry matches and plastic bags found in the cul-de-sac, the jury could reasonably infer that these three individuals smoked cocaine there. Evidence tended to show that the defendant became upset when the victim refused to have sex and that he hit her. The jury could reasonably infer from the evidence that the defendant was out of the Pathfinder and participating when the blows, stabs, and cuts were inflicted on Jacquetta Thomas. From evidence tending to show that two weapons were involved and that wounds were inflicted by different weapons on opposite sides of the victim's body, the jury could reasonably infer that two assailants attacked the victim at the same time and that the defendant was one of the assailants.

We 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 killed Jacquetta Thomas. Thus, the defendant's argument to the contrary is without merit. This assignment of error is overruled.

[2] By another assignment of error the defendant contends that his conviction for first-degree murder must be vacated because there was insufficient evidence of premeditation and deliberation to support that conviction. 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). "Premeditation" means that the killer "formed the specific intent to kill the victim some period of time, however short, before the actual killing." *Id.* "Deliberation" means "an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* Premeditation and deliberation "are not ordinarily subject to proof by direct evidence, but must generally be proved . . . by circumstantial evidence." *State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). Circumstances tending to prove that the killing was premeditated and deliberate include, but are not limited to:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. at 69, 301 S.E.2d at 349.

Viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could find in the present case that the defendant killed the victim after premeditation and deliberation. Premeditation and deliberation properly could be

inferred from the number of wounds and the brutal manner in which they were inflicted, as well as from the defendant's attempt to cover up his actions in his statements to the police. *State v. Hunt*, 330 N.C. 425, 410 S.E.2d 478 (1991). From the vicious assault and from the multiple wounds, many of which must have been inflicted after the victim had been felled and rendered helpless, the jury could reasonably infer that the defendant acted with premeditation and deliberation. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992). We therefore conclude that the evidence in this case was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that the defendant, maliciously and after premeditation and deliberation, murdered Jacquetta Thomas. This assignment of error is overruled.

[3] By another assignment of error, the defendant contends that he is entitled to a new trial because the trial court erroneously instructed the jury on the theory of acting in concert, which the defendant contends was not supported by the evidence. We disagree.

Under the doctrine of acting in concert, it is not necessary that the defendant do any particular act constituting a part of the crime charged, if he is present at the scene and acting together with another or others pursuant to a common plan or purpose to commit the crime. *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 155 (1993); *State v. Gonzalez*, 311 N.C. 80, 89, 316 S.E.2d 229, 234 (1984). Taken in the light most favorable to the State on this issue, the evidence in the present case tended to show that two people killed the victim and that one of those people was the defendant. The defendant's statement that the victim's throat had been cut from ear to ear supports a reasonable inference that he was present and participating in the cutting and stabbing of Thomas. The defendant's statement to Andrews in the Wake County Jail attempting to portray Johnny Beck as the lone killer was contradicted by the defendant's detailed knowledge of the victim's mortal wounds prior to being informed about them by the investigators.

Further, evidence tended to show that the defendant was in control of the vehicle, drove it to the cul-de-sac, physically attacked the victim, and was present when the murder occurred. His own statement to Andrews tended to show that he did not protest the murder of the victim, which he attributed to Johnny Beck, but instead admitted that he struck the victim just before she tried to flee from the vehicle. The evidence also tended to show that the victim was still alive when the defendant drove his Pathfinder away from the cul-de-

sac leaving her to die. Such evidence clearly would support a reasonable finding that the defendant and Beck were acting pursuant to a common plan or purpose to ensure that the victim died and to escape detection for her murder.

The evidence in the present case would support a reasonable finding that the defendant was present and acting in concert with Johnny Beck as they picked up the victim to "party" with them. The jury could reasonably find from the evidence presented that the defendant and Beck formed a common purpose to murder Thomas after she had "partied" for some time at the defendant's expense and would not proceed with bargained-for sex acts. Therefore, there was sufficient evidence to support the trial court's instructions on acting in concert. This assignment of error is overruled.

[4] By another assignment of error, the defendant contends that he is entitled to a new trial because the trial court erroneously admitted into evidence Officer Currin's testimony about the bloodhound's actions on 26 September 1991. We disagree.

After *voir dire*, the trial court allowed Currin's testimony. We have held that evidence of bloodhounds' actions is admissible when it is shown:

> (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

State v. McLeod, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929). *See also State v. Porter*, 303 N.C. 680, 689, 281 S.E.2d 377, 384 (1981); *State v. Irick*, 291 N.C. 480, 495, 231 S.E.2d 833, 843 (1977); *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1964). The defendant contends that Currin's testimony failed parts 2, 3 and 4 of the *McLeod* test. We disagree.

The defendant first argues that the evidence did not tend to show that the bloodhound Sadie was trained to pursue a trail of human scent and therefore fails part 2 of the *McLeod* test. The defendant claims that no evidence tended to show that Sadie was trained to find

or connect a scent from one object to another or that Sadie had performed this task more than once before. We conclude, however, that the testimony as to Sadie's pedigree and training satisfied part 2 of the test.

Evidence tended to show that at the time of the investigation, Sadie was a three-year-old pedigreed bloodhound. In any event, we have concluded that a dog identified as a bloodhound has "pedigreed himself" if he trails human scent. *Rowland*, 263 N.C. at 359-60, 139 S.E.2d at 665. Prior to the investigation in the present case, Sadie, along with Currin, had attended a canine school in Fayetteville, North Carolina, for two months of bloodhound basic training. They also had attended another canine school in Meriden, Connecticut, for advanced training. There, they were trained to work together to track one specific scent and to discriminate between individual human scents. The final test at the Connecticut school was to track a person by following a one and one-half mile trail of that person's scent that had been left twenty-four hours earlier. Sadie passed this test.

The defendant further argues that the bloodhound Sadie's actions were not "reliable" in this case, and therefore Currin's testimony does not pass part 3 of the *McLeod* test. The defendant argues that Sadie did not follow a scent trail as she had been trained to do at the canine schools. We conclude, however, that evidence tended to show that Sadie was trained to find a trail of human scent which had been broken and that her behavior indicated that she was following such a broken trail of the victim's scent. Sadie had been used by the Raleigh Police Department to find and follow individual human scents well over one hundred and fifty times. *See Irick*, 291 N.C. at 495, 231 S.E.2d at 843 (1976) (holding evidence admissible where dog had trailed human scents approximately twenty-four times and had been trained to do so). She had found articles and trails by their scents in criminal and missing-persons cases. Evidence tended to show that Sadie was a winder, which meant that she detected scents that were transmitted to the air from objects that had been in contact with a specific individual. Currin testified that Sadie could detect a particular scent in the air from any direction within a reasonable area. Evidence tended to show that by jumping up on the windows and circling the Pathfinder before returning to Currin's side, Sadie had indicated that the trail ended in or around the vehicle. This evidence was sufficient to meet the requirements of part 3 of the *McLeod* test.

The defendant also contends that Sadie was not put on the trail of the victim in such a way as to "afford substantial assurance of iden-

tification." Therefore, the defendant says that Currin's testimony fails part 4 of the *McLeod* test. We disagree.

Evidence tended to show that Sadie was keyed to the victim's scent in a way that isolated it and thereby provided "substantial assurance of identification" of that scent, as distinct from any other scents. Currin used a hemostat and gauze to obtain a scent from the victim's body. The gauze was placed in a plastic bag that then was placed around Sadie's nose to "key" her to the scent of the victim's body. After being given a "find" command, Sadie worked the area near the cul-de-sac and discovered the scent trail. She followed the scent until she lost it at the bottom of the embankment. After again being keyed to the scent, she headed straight for the Pathfinder. To insure that the scent was limited to the area where the dog had worked, Sadie was again keyed to the victim's scent away from the vehicle. She found the scent nowhere else in or around the cul-de-sac. *See Irick*, 291 at 496, 231 S.E.2d at 844 (holding evidence admissible even though bloodhound was not first exposed to an article carrying a human's scent before being put on a trail). Such evidence was sufficient to "afford substantial assurance of identification" and satisfied part 4 of the *McLeod* test.

We conclude that each element of the *McLeod* test was met and that the trial court was correct in admitting evidence concerning the bloodhound Sadie's actions. Accordingly, this assignment of error is overruled.

[5] By another assignment of error, the defendant contends that the trial court erred by failing to intervene *ex mero motu* during the prosecutor's closing argument to the jury, which he contends included improper comments regarding his decision not to testify. We disagree.

In this case, the prosecutor had explained to the jury that many cases are similar to the present case in that there is no eyewitness to link a defendant to the crime. He stated: "*Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything.* That's the reason that the law allows the theory of acting in concert." (Emphasis added). The prosecutor later argued that there was no logical explanation as to why the defendant's vehicle was found near the ravine and stated:

> You have to drive over the curb to get up there. This is somebody leaving the scene of this murder in a manner so that they are not seen by folks in the business down here and in a panic, you know,

> they have been drinking beer and smoking crack cocaine or injecting it into their arms. That's what this is. That's why that truck is back there. They thought they could got [sic] away that way without taking a chance on having anybody down here see the vehicle leave. That's what we learn from the very fact that the car is there and what it is doing back there. No reason to go back there and smoke crack cocaine. They've accomplished that already at Johnny Beck's brother's house, at the crack house and at this very location without any feeling of any sense of necessity to move. *The defendant has got to explain something to you. But what he has explained is absurd.* He's already accomplished what he tells you is the reason for him moving that vehicle back there.

(Emphasis added).

The defendant chose not to testify in this case. His counsel did not object at any time to the prosecutor's comments that he now challenges. The general rule is that an objection to the prosecutor's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal. *E.g., State v. Williams*, 276 N.C. 703, 174 S.E.2d 503 (1970), *judgment rev'd on other grounds*, 403 U.S. 948, 29 L. Ed. 2d 860 (1971). Failure to object in a timely manner constitutes a waiver of the alleged error. *Id.* We have long held, however, that in capital cases we will review a prosecutor's jury argument, but such review is limited to a review for "gross impropriety." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 40 (1994); *State v. Young*, 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986); *State v. King*, 299 N.C. 707, 713, 264 S.E.2d 40, 44 (1980); *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979); *State v. Smith*, 294 N.C. 365, 378, 241 S.E.2d 674, 681-82 (1978); *State v. McKenna*, 289 N.C. 668, 686, 224 S.E.2d 537, 549-50, *death sentence vacated*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976); *State v. Alford*, 289 N.C. 372, 384-85, 222 S.E.2d 222, 330, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976); *State v. Dockery*, 238 N.C. 222, 228, 77 S.E.2d 664, 668 (1953).

Additionally, our recent decisions indicate that appellate review for gross impropriety of a prosecutor's argument that was not objected to is not limited to capital cases, but also applies to noncapital cases. *E.g., State v. Jones*, 317 N.C. 487, 500, 346 S.E.2d 657, 664 (1986); *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986); *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983); *State v. Williams*, 295 N.C. 655, 249 S.E.2d 709 (1978); *State v. Woods*, 56 N.C. App. 193, 287 S.E.2d 431, *cert. denied*, 305 N.C. 592, 292 S.E.2d 13 (1982). Accord-

ingly, to the extent that cases such as *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982), and *State v. Williams*, 276 N.C. 703, 174 S.E.2d 503 (1970), may be read as indicating that such appellate review is limited to capital cases, they are no longer authoritative and are disapproved.

As we have indicated, the defendant in the present case never objected to the argument of the prosecutor. We have made it clear that absent such objection, "we will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error." *State v. Allen*, 323 N.C. 208, 226, 372 S.E.2d 855, 865 (1988), *judgment vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 775 (1993).

It is well established that although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument. *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993); *Young*, 317 N.C. at 415, 346 S.E.2d at 637; *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986); *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977). Our review of the challenged portions of the prosecutor's argument in this case convinces us that they did not amount to an impermissible comment on the defendant's failure to testify. The first comment complained of did not mention the defendant or his failure to testify. The prosecutor was simply contending that the absence of eyewitness testimony is common in homicide cases, as evidenced by his use of the words "[g]enerally in a homicide . . . ." In the next sentence he merely stated that the frequent lack of eyewitness testimony was one of the reasons for the recognition of the legal theory of acting in concert. Thus these comments were not improper.

The second portion of the argument which the defendant contends was improper merely attacked the story the defendant had given to authorities concerning the reason he drove over the curb and out of the cul-de-sac, rather than leaving by the paved road. The prosecutor argued that Beck, the victim and the defendant had been smoking crack cocaine in the cul-de-sac, so the defendant's statement that they left the cul-de-sac and went down the unpaved path to smoke crack did not ring true. The prosecutor contended, based upon competent evidence, that there was:

> No reason to go back there and smoke cocaine. They've accomplished that already at Johnny Beck's brother's house. At the crack house and at this very location without . . . feeling any sense of necessity to move. The defendant has got to explain something to you. But what he has explained is absurd. He's already accomplished what he tells you is the reason for moving that vehicle back there.

Taken in context, this portion of the prosecutor's argument was a comment on the lack of credibility of the defendant's statements to the police and the defendant's failure to produce evidence to corroborate or explain those statements. This portion of the prosecutor's argument, therefore, did not amount to gross impropriety, and the trial court did not err by failing to intervene *ex mero motu*. *See State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982).

Additionally, the record reveals that the prosecutor argued to the jury for one and one-half hours. The two brief portions of that argument complained of by the defendant did not, taken in context, encourage the jury to infer guilt from the defendant's silence. *See State v. Randolph*, 312 N.C. 198, 206, 321 S.E.2d 864, 869-70 (1984). Certainly, they did not amount to gross impropriety requiring the trial court to intervene *ex mero motu*. This assignment of error is without merit and is overruled.

[6] By another assignment of error, the defendant contends that his murder conviction must be vacated "because the simultaneous existence of it and co-defendant Beck's voluntary dismissal violates the law of the land and due process of law" as embodied in Article 1, section 19 of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. More than three months after the defendant was convicted for the murder of Jacquetta Thomas, the State dismissed the murder charge it had brought against Johnny Beck for the same murder. The defendant argues, based upon principles of due process and equal protection, that the dismissal of the murder charge against Beck requires that the defendant's conviction for murder now be vacated. The defendant has cited no authority in support of this proposition, and we have found none. We reject this argument. *Cf. State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994) (acquittal of one coprincipal does not bar convictions of the other); *State v. Whitt*, 113 N.C. 716, 18 S.E. 715 (1893) (same). This assignment of error is without merit and is overruled.

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

No error.

STATE OF NORTH CAROLINA v. ERVIN LOUIS TERRY, JR.

No. 364A92

(Filed 9 September 1994)

1. **Homicide § 262 (NCI4th)— felony murder—connection between murder and underlying felony**

The trial court did not err in submitting first-degree felony murder to the jury where defendant argued that there was an insufficient connection between the murder and the underlying felony of felonious assault, but an interrelationship clearly existed between this felonious assault and the homicide in that the assault of one victim and the killing of another were part of an unbroken chain of events all of which occurred within two seconds. The law does not require that the homicide be committed to escape or to complete the underlying felony in order to apply the felony-murder principle, there need not be a "causal relationship" between the underlying felony and the homicide, only an "interrelationship," and, as a result of the 1977 Amendment to N.C.G.S. § 14-17, the requirement that the underlying felony must create "a substantial, foreseeable risk to human life" is no longer applicable.

Am Jur 2d, Homicide § 442.

2. **Homicide § 651 (NCI4th)— murder and assault—defense of others—instructions**

There was no error in a prosecution for first-degree murder, second-degree murder, and assault in the trial court's instruction that "one may only do in defense of a third person what that other person might do in his own defense" where defendant contended that the instruction implied that the jury should judge the reasonableness of defendant's actions in defending his friend from the circumstances as they appeared to the friend and not as they appeared to defendant, but the full jury instructions, as they were

likely to have been understood by the jury, convey a correct version of the law of defense of another.

Am Jur 2d, Homicide §§ 519 et seq.

3. Evidence and Witnesses § 757 (NCI4th)— murder and assault—defendant's statement to investigators—constitutional rights—defendant's testimony repeating and recanting statement

Any error the trial court may have made in a prosecution for first-degree murder, second-degree murder, and assault by denying defendant's motion to suppress a statement he had made to investigators was harmless where the State introduced the statement; defendant testified on direct examination that he had made this statement, that the statement was not true, and that he had made it because he was afraid of going to jail; and defendant did not claim that he was impelled to give this testimony as a direct result of the trial court's earlier admission of his statement into evidence. This testimony waived defendant's objection and renders harmless any error in denying the motion to suppress.

Am Jur 2d, Appeal and Error § 806.

4. Criminal Law § 434 (NCI4th)— murder and assault—prosecutor's argument—stolen gun

There was no prejudice in the prosecutor's argument regarding the serial number of the gun used by defendant in a prosecution for first-degree murder, second-degree murder, and assault where the prosecutor's comment clearly implies that defendant knowingly purchased a stolen handgun. Even if this was an improper argument, as there was no evidence to support it, there was no prejudice because prosecutor's implication had slight, if any, effect on the jury's rejection of the defenses proffered by defendant and the outcome of the trial would have been the same had the prosecutor's summation not carried this implication.

Am Jur 2d, Trial § 626.

5. Criminal Law § 463 (NCI4th)— murder and assault—self-defense—prosecutor's argument—victim shot in back

The trial court did not err in a prosecution for first-degree murder, second-degree murder, and assault in which defendant claimed self-defense by overruling defendant's objection to the prosecutor's closing argument that one victim could not have

been a threat where the medical examiner had testified that the victim was shot once in the abdomen and twice in the back. There was sufficient evidence to support an inference that the victim was either standing with his back to defendant or attempting to flee when he was shot.

Am Jur 2d, Trial § 611.

6. Criminal Law § 1125 (NCI4th)— second-degree murder—nonstatutory aggravating factors—course of conduct—joined offenses

The trial court erred in a prosecution for first-degree murder, second-degree murder, and assault by finding as a nonstatutory aggravating factor for the second-degree murder that the murder was part of a course of conduct and that that course of conduct included other crimes of violence where defendant was convicted contemporaneously for the joined offenses of first-degree murder and assault with a deadly weapon, which the trial judge found to have established a course of conduct.

Am Jur 2d, Criminal Law §§ 598, 599.

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.

Appeal pursuant to N.C.G.S. § 7A-27(a) from judgments entered by Hobgood, J., at the 24 February 1992 Criminal Session of Superior Court for Vance County, imposing a sentence of life imprisonment upon a verdict of guilty of first-degree murder and the jury's recommendation of a sentence of life imprisonment. Defendant's motion to bypass the Court of Appeals in two cases, one involving a conviction of second-degree murder and a sentence of life in prison and the other involving a conviction for assault with a deadly weapon with intent to kill inflicting serious injury, allowed 12 April 1993. Heard in the Supreme Court 13 October 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Mark Galloway for defendant-appellant.

EXUM, Chief Justice.

Defendant raises five assignments of error from the guilt determination proceeding and two from the sentencing proceeding in the second-degree murder case (91 CRS 6412). We find one of the assignments of error from the sentencing phase meritorious and order that defendant be resentenced in the second-degree murder case.

I.

Defendant was convicted of first-degree murder of Timothy Pernell (91 CRS 6413) under the felony-murder rule, of second-degree murder of David Talley (91 CRS 6412) and of assault with a deadly weapon with intent to kill inflicting serious injury upon Shelton Peoples, Jr. (91 CRS 6414). After a capital sentencing proceeding in No. 91 CRS 6413, the jury recommended and the trial court imposed a sentence of life imprisonment. In the Talley second-degree murder case, defendant was sentenced to life imprisonment. The trial court arrested judgment in the assault case because the assault was used as the underlying felony in the felony-murder conviction.

On the night of 23 August 1991, defendant and his friend Thomas Perry encountered an altercation between two groups of people at the Variety Pick-Up in Kittrell, North Carolina. Defendant and Perry intervened, and defendant ultimately shot three men, killing two of them, David Talley and Timothy Pernell, and wounding the third, Shelton Peoples. At trial defendant did not deny firing the shots but claimed he acted in self-defense and in defense of others.

The State's evidence tended to show that on the night in question, Shelton Peoples was drinking beer and hanging sheetrock with his friends David Talley and Timothy Pernell at Pernell's house. Informed that his daughter was sick, Peoples drove to see her at his mother-in-law's home. Upon finding her healthy, Peoples drove back toward Pernell's house. He stopped at the Variety Pick-Up along the way to make a phone call, parking his pickup truck in front of the phone outside the store.

While on the phone, Peoples told Harvey Bolden and Jimmy Alston, who were standing nearby, to "shut up." Some words were exchanged, but the situation calmed down when Talley and Pernell drove up and parked their pickup truck behind Peoples' truck. Peoples, Talley and Pernell then entered the store to purchase cigarettes and beer.

Upon returning to his truck, Peoples was accosted by Bolden, who struck a boxer's pose and said, "I'll kick your ass." When Bolden tried to hit Peoples, Peoples pushed him to the ground. By this time, defendant and Perry had arrived at the Variety Pick-Up, parking their car near the gas pumps. Noticing the fight, these two men walked over, and Perry kicked Peoples from behind. Pernell attempted to separate Peoples from Bolden and Alston. One of the store owners came outside and threatened to call 911 unless everyone left. Peoples, Talley and Pernell began to return to their trucks.

Peoples was unable to back up his truck until Talley moved the other truck. While Peoples waited, Bolden punched Peoples through the open window of Peoples' truck, and another fight ensued. Talley began to struggle with Perry and another man. Defendant ran over and hit Talley in the back of the head. Talley then got a stick from his truck, and Peoples saw defendant "run from the area."

Defendant soon returned with a pistol tucked into the waistband of his shorts, stopped roughly 15 feet from Peoples, pointed the gun at his head, and said, "Now what you gonna do, white boy?" Defendant then shot Peoples twice, once in the wrist and once in the abdomen. Moving a couple of feet closer to the other men, defendant next shot Talley once in the abdomen and twice in the back. Defendant then shot Pernell once in the chest. Defendant fired all six shots in less than two seconds.

After felling his victims, defendant called to Perry: "Come on, man. Let's get out of here." The two then jumped in their car and sped away. In the car defendant told Perry, "I shot three white guys."

The next day defendant presented himself at the sheriff's department and asked if there were any warrants outstanding for his arrest. When the Sheriff arrived, defendant was led to the sheriff's office where he was questioned. In response to questioning, defendant stated he had been at his girlfriend's house the previous night. He was then arrested, advised of the charges against him and advised of his rights. He had no further contact with the arresting officers and made no further statements until he testified at trial.

Defendant's evidence tended to show a quite different version of the events:

From a blood sample taken at the hospital following the altercation, Peoples' blood alcohol content was found to be .14. Talley and Pernell were similarly intoxicated. Peoples was also angry that a

friend had told him his daughter was sick when, in fact, she was not. Peoples was emotionally agitated when he got out of his truck to use the phone.

Harvey Bolden and Jimmy Alston were standing outside the store near the phone. Bolden threw a cigarette on the ground, and Peoples walked up and called Bolden a "nigger litter bug." The two began arguing, and Peoples pushed Bolden to the ground. Defendant and Perry came over to break up the fight as did Talley and Pernell. Perry pulled Bolden away and Talley and Pernell put Peoples into his pickup truck.

Bolden went to Peoples' truck, pointed his finger at Peoples and said he was going to "get him." Peoples got out of the truck and said, "I'll shoot and kill all of you all niggers." Peoples then began to swing wildly at Bolden and Perry, striking Perry in the face. Bolden, Alston, and their friend Tommy Fogg fled the scene. Either Talley or Pernell said, "Yeah, we will kill them." One of these men retrieved a stick from Talley's truck and struck Perry, knocking him to the ground. Peoples then obtained a stick and hit defendant with it three times across the shoulders and back.

Defendant was on his knees, trying to protect himself. He managed to get up, back towards his car and draw the pistol which had been in his shorts throughout the incident. Peoples continued after defendant, and defendant warned him twice to "Get back; get back off me." Peoples rushed defendant with the stick, and defendant shot him when he was six or seven feet away. The first shot did not stop Peoples so defendant shot him again, causing Peoples to fall. Defendant knew Talley and Pernell were behind Peoples but was not thinking about them and did not know where he was shooting: "I was just shooting. I was just shooting." After Peoples fell, defendant realized he was still pulling the trigger but the gun had stopped firing. Defendant told Perry, "Let's go," and the two drove away. Defendant did not see Talley or Pernell fall; he did not say anything to Perry once in the car.

The next day, defendant voluntarily went to the sheriff's department after his mother told him the police had been by her house looking for him. Several law enforcement officials escorted defendant to the sheriff's office at which point they surrounded him and began asking him questions. When defendant stated he had been at his girlfriend's house the night before, he had not yet been read his rights nor did he believe he was free to leave.

Defendant testified he purchased the gun in question only the day before the incident for the protection of his girlfriend and their two children. He had the gun on his person the night of the shooting because he was taking it to his girlfriend's apartment. Defendant threw the gun away after the shooting.

II.

Guilt/Innocence Phase

A.

[1] In the Pernell murder case defendant assigns error to the trial court's submission of first-degree felony murder to the jury on the ground that there was an insufficient connection between the murder and the underlying felony of felonious assault. Defendant argues "the homicide was not done to escape or to complete the assault and there was no causal relationship between the assault and the homicide." Defendant also contends that because the underlying felony failed to create "a substantial foreseeable risk" to others it cannot be the basis for felony murder. None of these conditions are required by law; and because we conclude there was sufficient evidence of the necessary interrelationship between the felonious assault and the murder, we find no error in the submission of this murder on a felony-murder theory.

First-degree felony murder is any killing "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17 (1993). In 1977 the General Assembly substituted the phrase "or other felony committed or attempted with the use of a deadly weapon" for the phrase "or other felony." 1977 N.C. Sess. Laws ch. 406.

Under the statute as amended the underlying felony must be either enumerated in the statute or "committed or attempted with the use of a deadly weapon," and some interrelationship must exist between the underlying felony and the homicide. *State v. Barlowe*, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994) ("Application of the felony-murder rule requires that there be an interrelationship between the felony and the homicide."). In *State v. Fields*, 315 N.C. 191, 197, 337 S.E.2d 518, 522 (1985), we stated:

> A killing is committed in the perpetration or attempted perpetration for the purposes of the felony murder rule where there is no

break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

The law does not require that the homicide be committed to escape or to complete the underlying felony in order to apply the felony-murder principle. We have said that "escape is ordinarily within the *res gestae* of the felony and that a killing committed during escape or flight is ordinarily within the felony-murder rule." *State v. Squire*, 292 N.C. 494, 512, 234 S.E.2d 563, 573 (1977), *cert. denied*, *Brown v. North Carolina*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977) (citing Erwin S. Barbre, Annotation, *What Constitutes Termination of Felony for Purpose of Felony-Murder Rule*, 58 A.L.R. 3d 851, 876); *see People v. Salas*, 7 Cal.3d 812, 103 Cal. Rptr. 431, 500 P.2d 7 (1972), *cert. denied*, 410 U.S. 939, 35 L. Ed. 2d 605 (1973). This does not mean that the killing *must* be committed to effect an escape from the underlying felony. Furthermore, under *Barlowe* and *Fields* there need not be a "causal relationship" between the underlying felony and the homicide, only an "interrelationship." Finally, as a result of the 1977 Amendment to N.C.G.S. § 14-17, the requirement that the underlying felony must create "a substantial, foreseeable risk to human life" is no longer applicable. *State v. Davis*, 305 N.C. 400, 423-24, 290 S.E.2d 574, 588 (1982).

Here defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury, N.C.G.S. § 14-32 (1993), a felony involving use of a deadly weapon and thus within the purview of the felony-murder statute, N.C.G.S. § 14-17. An interrelationship clearly existed between this felonious assault and the homicide in that the assault of Peoples and the killing of Pernell were part of an unbroken chain of events all of which occurred within two seconds.

B.

[2] Defendant next assigns error to the trial court's instruction to the jury that "one may only do in defense of a third person what that other person might do in his own defense." Defendant contends this instruction is prejudicial in that it implies the jury should judge the reasonableness of defendant's actions in defending Perry from the circumstances as they appeared to Perry and not as they appeared to defendant. Since Perry was in a better position to know that Talley was only wielding a yardstick, defendant argues that his, defendant's, actions might well appear unreasonable if considered from Perry's perspective. We conclude, for the reasons which follow, that the chal-

lenged instructions, when considered in context, were not likely to have conveyed to the jury this erroneous version of the law of defense of another.

In general one may kill in defense of himself or another if one believes it to be necessary to prevent death or great bodily harm to himself or the other and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing. *See State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24 (1968); *State v. McLawhorn*, 270 N.C. 622, 155 S.E.2d 198 (1967); *State v. Hornbuckle*, 265 N.C. 312, 144 S.E.2d 12 (1965). The challenged instruction is taken from *McLawhorn* and means simply that the right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to defendant.

A jury instruction must be such that a reasonable juror can understand the law arising on the evidence in the case; "the jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable." *Stern Fish Co. v. Snowden*, 233 N.C. 269, 271, 63 S.E.2d 557, 559 (1951). In meeting this standard, a trial court has some leeway:

> This Court has repeatedly held that a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal . . . . The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred.

State v. Tilley, 292 N.C. 132, 145-46, 232 S.E.2d 433, 442-43 (1977) (citations omitted).

Applying *Stern Fish Co.* and *Tilley* to the instant case, we believe the contested instruction, "construed contextually," enabled the jury to see the issue in "as clear a light as practicable." The full jury instructions, including the challenged portion, as they were likely to have been understood by the jury, convey a correct version of the law of defense of another. The challenged portion of the instruction directly follows the jury charge "to determine the reasonableness of

the defendant's belief from the circumstances as they appeared *to him* at the time." At several other junctures throughout the jury charge on self-defense and defense of others, the trial judge emphasized "that the defendant had the right to use only such force as *reasonably appeared to him* to be necessary under the circumstances to protect himself or a third person from death or great bodily harm." Rational jurors, construing the contested instruction in context with the "to him" language, could only conclude that they must view the reasonableness of defendant's actions from defendant's own perspective and not from the defended person's perspective.

C.

[3] Defendant further assigns error to the trial court's denial of his motion to suppress his out-of-court statement made to investigators in the sheriff's office that he had been at his girlfriend's house the night of the murder. Defendant contends this statement was taken in violation of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant argues that he was in custody when the statement was made and had not been advised of his rights according to *Miranda* when he made his statement. Defendant contends the admission of this statement was prejudicial in that it contradicted his defense of self-defense and defense of others. We need not determine whether the trial court erred by admitting defendant's statement because defendant waived his objection to its admission when he testified on direct examination that he had made this statement, that the statement was not true, and that he made it because he was afraid of going to jail.

"[W]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984); 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 22 (4th ed. 1993). While the Constitutions of the United States and North Carolina protect a defendant's privilege against compulsory self-incrimination, a defendant who testifies to the same facts that he alleges to be inadmissible and then fails "to claim that his in-court testimony was compelled or impelled by the trial court's errors . . . [has] cured the errors of the trial judge and rendered them harmless." *State v. McDaniel*, 274 N.C. 574, 584, 164 S.E.2d 469, 475 (1968). In *McDaniel* we stated:

> To hold that a defendant in a criminal action, once evidence has been erroneously admitted over his objection, may then take the

> stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State to compel him to testify against himself.

Id. at 584, 164 S.E.2d at 475.

After conducting a *voir dire* hearing in response to defendant's motion to suppress, the trial court permitted the State to introduce defendant's statement through the testimony of Special Agent Steven Jones, a State Bureau of Investigation specialist present when defendant made the statement. Defendant subsequently testified on direct examination that he did make the statement, explaining that he did so because he was afraid of going to jail. Because defendant has not claimed that he was impelled to give this testimony as a direct result of the trial court's earlier admission of his statement into evidence, this testimony waives defendant's objection to and renders harmless any error the trial court may have made in denying defendant's motion to suppress.

D.

[4] Defendant next assigns error to the trial court's "permitting the State to argue in summation that defendant knew the pistol used to shoot the victims had a serial number." Defendant maintains that such an argument implies he knowingly purchased a stolen gun, stole the gun himself, or removed its serial number, and that such implications are prejudicial and in violation of N.C.G.S. § 8C-1, Rule 404(b) (1992) ("Evidence of other crimes, wrongs or acts is not admissible . . . to show that [defendant] acted in conformity therewith."). We find no reversible error.

The challenged argument, placed in context, is as follows:

> Members of the jury, when he threw that gun away, he threw away all possibility of tracing that gun. I would argue that the defendant is intelligent enough to know he had no business buying a .357 magnum from a man strolling down the street here in Henderson. It could be a common occurrence, but he knew he had no business doing that. *If he had that gun in his possession for any length of time at all he would have known that the gun had a serial number on it, and that gun came from somewhere—*

Alston: Objection.

Court: Overruled.

By Ellis:

—*and he didn't ask where it came from because he didn't want to know.* When he threw that gun in the trash, he did it so that we . . . would not have the whole truth.

The prosecutor's comment clearly infers that defendant knowingly purchased a stolen handgun.

Even if the implication that defendant knowingly purchased a stolen handgun was improper argument, there being no evidence to support it, the defendant has been unable to sustain the burden of showing prejudice. *See* N.C.G.S. § 15A-1443(a) (1988) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). This inference was not prejudicial to the defendant given the state of the evidence of defendant's guilt: Defendant admitted shooting Peoples; Peoples identified defendant as the assailant; defendant's friend, Perry, testified defendant admitted to shooting three men. The defense was self-defense and defense of others. The thrust of the prosecutor's argument was that defendant threw the weapon away so that its ownership could not be traced and the full evidence against him could not be shown. The persuasiveness of this argument stands undiminished and only slightly enhanced by the suggestion that the weapon might have been stolen. We are confident that the implication made by the prosecutor's summation that defendant might have knowingly purchased a stolen weapon had slight, if any, effect on the jury's rejection of the defenses proffered by defendant and that the outcome of the trial would have been the same had the prosecutor's summation not carried this implication. This assignment of error is, therefore, overruled.

E.

[5] Defendant further argues the trial court committed error when it overruled his objection to the prosecutor's closing argument in opposition to the defense of self-defense in which the prosecutor stated, "With my back to you, how can I threaten you with a deadly force?" Defendant says this statement by the prosecutor misrepresented the evidence. We disagree.

Argument of counsel must be left to the discretion of the trial judge, and counsel are allowed wide latitude in their summations to the jury; counsel may argue the law, the evidence and all reasonable inferences which may be drawn from the evidence. *See State v. Riddle*, 311 N.C. 234, 319 S.E.2d 250 (1984); *State v. Paul*, 58 N.C. App. 723, 294 S.E.2d 762, *review denied*, 307 N.C. 128, 297 S.E.2d 402 (1982). An attorney may, during a closing argument, "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).

In the case at bar, there was sufficient evidence adduced to support an inference that the victim Talley was either standing with his back turned to defendant or was attempting to flee when he was shot. Medical Examiner Dr. Deborah Radisch testified that Talley was shot three times, once in the abdomen and twice in the back. The State acted properly in arguing permissible inferences from this evidence.

III.

Sentencing Phase

[6] Defendant assigns error to the trial court's finding as a non-statutory aggravating factor in the second-degree murder case that "this murder was part of a course of conduct in which the defendant engaged and that course of conduct included the commission by the defendant of other crimes of violence against person or persons." Defendant argues such finding in aggravation is prohibited by our decision in *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985). We agree.

In *Westmoreland* we stated:

> [A] conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense. In the case before us the trial judge did not explicitly use defendant's convictions as aggravating factors. Rather, he relied on defendant's murderous course of conduct in committing the offenses that support the convictions . . . . Whatever name is given to it, the effect of the trial judge's action was to use defendant's contemporaneous convictions of joined offenses as an aggravating factor in violation of the rule of *Lattimore*.

Id. at 449, 334 S.E.2d at 228; *State v. Hayes*, 323 N.C. 306, 314-15, 372 S.E.2d 704, 709 (1988); *see State v. Lattimore*, 310 N.C. 295, 311

S.E.2d 876 (1984). In *Lattimore* the trial judge found contemporaneous attempted robbery and second-degree murder charges as aggravating factors for each other; as a result, we decided that to "permit the trial judge to find as a non-statutory aggravating factor that the defendant committed the joinable offense would virtually eviscerate the purpose and policy of [the sentencing statute]." *Id.* at 299, 311 S.E.2d at 879.

Here, the offenses of first-degree murder and assault with a deadly weapon are joined offenses for which defendant was convicted contemporaneously with his conviction for second-degree murder, a Class C felony covered by the Fair Sentencing Act. See N.C.G.S. §§ 14-17 and 15A-1340.4. The trial judge, in finding these offenses to have established a "course of conduct" in aggravation of second-degree murder, violated our prohibition of such factors in *Westmoreland.*

Defendant, therefore, is entitled to resentencing in the second-degree murder case, in which the "course of conduct" aggravating factor will not be considered.

Since defendant makes no argument challenging specifically his felonious assault conviction and judgment was arrested by the trial court, this assault conviction is not properly before us for review. The result is:

No. 91CRS6413, First-Degree Murder, NO ERROR.

No. 91CRS6412, Second-Degree Murder, NO ERROR in guilt determination, REMANDED FOR RESENTENCING.

IN THE MATTER OF: BASIL RAY LEGG, JR., APPLICANT TO THE FEBRUARY 1987 NORTH CAROLINA BAR EXAMINATION

No. 489A93

(Filed 9 September 1994)

1. Attorneys at Law § 2 (NCI4th)— Bar applicant—current moral character—consideration of past behavior

The past behavior of a Bar applicant may be considered by the Board of Law Examiners in determining the applicant's current moral character.

Am Jur 2d, Attorneys at Law §§ 12, 15.

2. Attorneys at Law § 2 (NCI4th)— Bar applicant—new hearing—notice of consideration of past application

A Bar applicant was given sufficient notice that the Board of Law Examiners would consider not only his "current" moral character but also his 1986 application containing certain omissions in a hearing on the applicant's petition for reconsideration of his application based on newly discovered evidence, although a letter from the Board to the applicant stated that its inquiry would "necessarily focus on the current status of [his] character and fitness" and that a new application would be required, where the Board's letter also stated that the applicant was required to "be of good moral character both at the time of standing the written bar examination and at the time a license to practice law is issued," and the applicant was allowed to take the February 1987 examination; a notice to the applicant stated that the Board would inquire into his "rehabilitation since entry of the Board's order on June 16, 1988" and listed specific events which would be considered at the hearing, including the applicant's representation of a client which was considered at a May 1987 hearing; the notice also stated that all matters that were before the Board at two prior hearings would be considered, and that the manner in which the applicant closed his West Virginia law practice would be examined; and the applicant responded affirmatively when asked during the hearing whether he understood that all matters before the Board at his 15 May 1987 and 10 June 1988 hearings would still be in evidence before the Board.

Am Jur 2d, Attorneys at Law §§ 15, 20.

Procedural due process requirements in proceedings involving applications for admission to bar. 2 ALR3d 1266.

3. Attorneys at Law § 2 (NCI4th)— Bar applicant—findings of misconduct—supporting evidence

Substantial evidence before the Board of Law Examiners supported the Board's findings that a Bar applicant (1) converted to his own use funds received from the State of West Virginia that he owed to an investigator for services rendered in two indigent defendant criminal cases; (2) attempted to conceal from the executor of his mother-in-law's estate the existence of a $10,000

loan which had been made to him by his mother-in-law; and (3) neglected to return legal papers to a client after a written request for such papers.

Am Jur 2d, Attorneys at Law § 15.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar. 30 ALR4th 1020.

4. Attorneys at Law § 2 (NCI4th)— Bar applicant—notice of protest rule not violated—confrontation of witness—due process

The Board of Law Examiners did not violate the rule requiring that Bar applicants be notified of protests to their application because a witness had *ex parte* communications with the Board about the applicant's attempt to conceal a loan made to him by his mother-in-law prior to her death and testified at hearings about the loan, since the communications and testimony did not constitute a protest as defined by the rules. Furthermore, defendant's right to due process was not violated by the witness's testimony where, prior to the hearings, the applicant was given notice of the matters to be discussed, including his indebtedness to his mother-in-law's estate for which the witness was the executor; the loan was discussed at the hearings and the applicant was given the opportunity to respond personally in support of his position; and the applicant was able to confront and cross-examine the witness at the last hearing.

Am Jur 2d, Attorneys at Law § 20.

Procedural due process requirements in proceedings involving applications for admission to bar. 2 ALR3d 1266.

Justice Webb concurs.

Justice Mitchell joins in this concurring opinion.

On appeal as of right pursuant to § .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order of Weeks, J., entered 1 July 1993, in Superior Court, Wake County, which affirmed the 13 December 1991 order of the Board of Law Examiners denying the applicant's application for admission to the 1987 North Carolina Bar Examination. Pursuant to Rule 30(f) of the Rules of Appellate Procedure, no oral arguments were heard before the Supreme Court.

IN RE LEGG

[337 N.C. 628 (1994)]

Basil Ray Legg, Jr., pro se, for applicant-appellant.

Michael F. Easley, Attorney General, by John F. Maddrey, Assistant Attorney General, for the Board of Law Examiners of the State of North Carolina, respondent-appellee.

FRYE, Justice.

In this appeal we review, for the second time, the denial of appellant's application for admission to the practice of law in North Carolina. Because we conclude that the Board of Law Examiners [hereinafter the Board] properly considered the application and there was substantial evidence to support the findings and conclusions of the Board, we affirm the superior court which affirmed the order of the Board.

The Board permitted Basil Ray Legg, Jr., applicant, to take the February 1987 North Carolina Bar Examination and ordered the results sealed pending determination of his fitness to practice law. On 30 July 1987, the Board issued an order affirming the order of a two-member hearing panel dated 17 April 1987 which denied Legg's application to stand the 1987 Bar Examination. After the Board denied his request to reopen or reconsider the case based on newly discovered evidence, applicant appealed to the Superior Court, Wake County, pursuant to §§ .1401 and .1404 of the Rules Governing Admission to the Practice of Law in the State of North Carolina [hereinafter the Rules]. On 24 March 1988, Superior Court Judge D. Marsh McLelland entered an order remanding the case to the Board with instructions to make more specific findings and conclusions.

On remand, the Board made specific findings and conclusions and issued its second order, dated 16 June 1988, which again denied the application. Applicant appealed the Board's order to the Superior Court, Wake County, and Judge Coy E. Brewer entered an order affirming the Board's decision. Pursuant to § .1405 of the Rules, applicant appealed to this Court and we affirmed the superior court. *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989) (*Legg I*), *cert. denied*, 496 U.S. 906, 110 L. Ed. 2d 270 (1990).

On 8 November 1990, the Board granted applicant's petition to reopen or reconsider his application pursuant to § .1207 of the Rules. A hearing was held on 16 October 1991 to consider newly discovered evidence. After considering new evidence presented by both the applicant and the Board, the Board found that applicant had "failed to present any newly discovered, persuasive evidence that the findings

and conclusions in [the] previous Order of June 16, 1988, were erroneous or incorrect" and again denied his application. The Board's third order was entered 13 December 1991.

Applicant appealed the 13 December 1991 order to the Superior Court, Wake County, and Judge Gregory A. Weeks entered an order affirming the Board's decision. Applicant appeals Judge Weeks' order to this Court, asserting three assignments of error. For the reasons stated herein, we affirm the order of the superior court.

The Board's 16 June 1988 order denying applicant's request to stand the 1987 Bar Examination was reviewed by this Court in *In re Legg*, 325 N.C. 658, 386 S.E.2d 174. In the 16 June 1988 order, the Board made several findings of fact including, in part: that applicant had failed to list, in response to questions in the application for the bar examination, certain past residences, a past employer, and certain debts over $200; that applicant amended his application after being notified by the Board that it wished to question him about the omissions at a panel hearing; and that applicant failed to disclose a lawsuit which had been filed against him. The Board found that these events "[were] not merely inadvertent error[s]; instead, [they] evidenced a lack of fairness and candor in dealing with the Board."

The Board also found that applicant, who was a practicing attorney in West Virginia, was appointed to represent two indigent defendants in criminal cases and that applicant received payment for his services and reimbursement for expenses from the State of West Virginia. The Board found that applicant failed to pay Tom Moses, an investigator hired by the applicant, for his work on the two cases from the reimbursement money, and that this failure to pay constituted a willful conversion of the funds owed to Moses. The Board made further findings that applicant had failed to tender a client's (Linda White) legal papers to her upon written request and that applicant had attempted to conceal from the executor of his mother-in-law's estate the fact that a $10,000 loan had been made to him by his mother-in-law prior to her death.

Following our affirmance of Judge Brewer's order which affirmed the Board's 16 June 1988 order, applicant's petition to reopen the case was granted by the Board. Pursuant to notice, a new hearing was held on 16 October 1991 at which both applicant and the Board presented additional evidence. Four witnesses testified, including applicant. After considering the evidence from the hearing, the Board, on 13

December 1991, issued its third order denying applicant's request to stand the February 1987 Bar Examination.

In the 13 December 1991 order, the Board repeated its findings from the 16 June 1988 order to the effect that applicant had omitted certain information from his application for the bar examination. The Board made other findings of fact consistent with its prior order which are, in pertinent part, as follows: that applicant attempted to conceal from the executor of his mother-in-law's estate the existence of a $10,000 loan made to him; that applicant willfully converted funds owed to Tom Moses, an investigator hired by applicant; and that applicant failed to return legal papers upon the request of his client. The Board concluded that applicant had purposefully and willfully failed to disclose matters which had a significant bearing upon his character and fitness. The Board further concluded that

> the applicant has failed to satisfy the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counselor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public.

Additional facts will be discussed as they become necessary for a proper understanding of the issues involved.

[1] In his first assignment of error, applicant argues that the Board is required to inquire only into his "current" good moral character in reaching its decision. Additionally, applicant argues that the Board intentionally misled him to believe that it would focus only on the "current" status of his moral character and he relied on this misrepresentation. Applicant contends that because of his reliance on the representations of the Board, the Board should have reviewed his new application *de novo*, without considering the numerous omissions in his 1986 application.

Applicant argues that:

> In other jurisdictions which have addressed this issue, the Courts are unanimously in support of the proposition that the appropriate standard for review of the general fitness and good moral character of a Bar applicant is one concurrent with the date of the Applicant's admission to the Bar.

However, two of the cases cited by applicant involved an initial denial of an applicant's admission to the bar by the respective Boards and

not, as in this case, a denial based on a hearing from a petition to reopen a prior Board decision. *Application of Davis*, 38 Ohio St. 2d 273, 313 N.E.2d 363 (1974); *Florida Bd. of Law Examiners Re: L.K.D.*, 397 So. 2d 673 (Sup. Ct. Fla. 1981). In the third case cited by applicant, the Supreme Court of Arizona stated that a prior incident of improper fee splitting with an attorney "standing alone . . . could not now be sufficient to show a present lack of good moral character." *Application of Guberman*, 90 Ariz. 27, 30, 363 P.2d 617, 618 (1961). The court stated that the question was "[w]hat does the record show about the intervening period of ten years which, *when considered in conjunction with his prior conduct*, shows either a present presence or absence of good moral character?" *Id.* at 30, 363 P.2d at 619 (emphasis added). Therefore, the court did not reject consideration of prior conduct in determining current moral character.

Applicant contends that the issue of whether the Board is bound to consider only applicant's current character is one of first impression for this Court. Although we have not specifically addressed this issue, in a prior opinion this Court stated that "[w]hether a person is of good moral character is seldom subject to proof by reference to one or two incidents." *In re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979). "Character thus encompasses . . . a person's past behavior . . . ." *Id.* Therefore, in making a proper determination regarding an individual's current moral character, the past behavior of that individual is an appropriate inquiry. To disallow consideration of past behavior would limit the Board's discretion and hinder the effectiveness of a system which exists to ensure the integrity of the legal profession and to protect the public at large. *In re Legg*, 325 N.C. at 673, 386 S.E.2d at 182. We disagree with applicant's argument that the Board's inquiry must be limited to his "current" moral character without consideration of his past behavior.

[2] Applicant further argues that the Board misled him to believe that only his "current" moral character would be considered. Applicant presented a letter addressed to him and dated 24 April 1991 in which the Board stated that its inquiry would "necessarily focus on the current status of [his] character and fitness," and that a new application would be required. Applicant contends that this letter "expressly and unequivocally informed [him] that he would be required to submit a new application in order to initiate a de novo hearing regarding [his] current status." Applicant further contends that when the Board indicated in this same letter that it would "undertake a current investigation into [his] character and fitness," it again implied that the inquiry

would focus only on his "current" character. Based on these representations by the Board, applicant argues that only the new application should have been considered by the Board in making its assessment of his character and not the 1986 application containing the omissions.

However, in the 24 April 1991 letter to applicant, the Board also stated that "§ .0501(1) of the Rules requires that an applicant be of good moral character both at the time of standing the written bar examination and at the time a license to practice law is issued." Since applicant was allowed to take the bar examination in February 1987, this statement was sufficient notice to him that anything relating to his character at that time would be considered by the Board, including the 1986 application.

The record also reveals a notice addressed to applicant and dated 27 September 1991 in which the Board indicated that it would inquire into his "rehabilitation since entry of the Board's order on June 16, 1988" and listed specific events which would be considered at the hearing, including: applicant's indebtedness to Moses, the ten thousand dollar cashiers check which was received by applicant from his mother-in-law, and applicant's representation of Linda White that "was *the subject of inquiry at the May, 1987 hearing*" (emphasis added). The Board also stated in the notice that "all of the matters that were before the Board on your hearings on May 15, 1987 and June 10, 1988 will be considered by the Board." Further, the Board indicated that the "manner in which [applicant] closed [his] law practice in West Virginia" would be examined. Of additional importance is the fact that during the hearing applicant was specifically asked whether he understood that "all matters . . . before the Board at your hearings of May 15, 1987 and June 10, 1988, would still be in evidence before [the] Board." Applicant replied "yes" to this question, contrary to his assertion on appeal that he understood that his 1986 application would not be considered.

Based on the foregoing, we conclude that the Board properly considered the 1986 application in making its findings and conclusions and did not mislead applicant to believe that the 1986 application would not be considered. This assignment of error is rejected.

[3] In his second assignment of error, applicant argues that the Board erred in finding that he had committed certain acts of misconduct in 1986 and that those acts reasonably reflected on his moral character and general fitness in 1991. Specifically, applicant contends that the

Board erred in finding: (1) that he converted to his own use funds received from the State of West Virginia that he owed an investigator, Tom Moses, for services Moses provided; (2) that he attempted to conceal from the executor of his mother-in-law's estate the existence of a $10,000 loan which had been made to him by his mother-in-law; and (3) that he neglected to return legal papers to a client after a written request for such papers.

Applicant argues that in light of new evidence submitted at the 16 October 1991 hearing, the findings by the Board were erroneous and not supported by substantial evidence. The new evidence which was presented included an affidavit from Patti Brown, applicant's former secretary, regarding the Moses matter; a letter from Tom Moses (now deceased) stating that he fully supported applicant's admission to the Bar and had been fully paid for services rendered; and testimony by the applicant, his wife, Randall Veneri (applicant's brother-in-law and the executor of Mrs. Veneri's estate), and Fred Parker (Executive Secretary of the North Carolina Board of Law Examiners) regarding the $10,000 loan from applicant's mother-in-law.

In considering applicant's prior appeal to this Court, we took note of the appropriate standard of review.

> This Court employs the whole record test when reviewing decisions of the Board of Law Examiners. Under this test, there must be substantial evidence that supports the Board's findings of fact and conclusions of law. Substantial evidence means that relevant evidence which a reasonable mind could accept as adequate to support a conclusion. *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 815-816 (1983). Under the 'whole record' test we must review all the evidence, that which supports as well as that which detracts from the Board's findings, and determine whether a reasonable mind, not necessarily our own, could reach the same conclusions and make the same findings as did the Board." *Id.* at 779, 303 S.E.2d at 816. The initial burden of showing good character rests with the applicant. "If the Board relies on specific acts of misconduct to rebut this *prima facie* showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence." *In re Elkins*, 308 N.C. 317, 321, 302 S.E.2d 215, 217, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983).

In re Legg, 325 N.C. at 669, 384 S.E.2d at 180.

The first finding of fact by the Board which applicant contends was not supported by substantial evidence is that he converted funds owed to Moses. Applicant presented an affidavit from his former secretary, Patti Brown, in which she stated that "unknown to Mr. Legg, [she] had not included in the check to Tom Moses, payment for two cases, in which [she] had invariably overlooked when writing the check." Applicant admits that the amount due to Moses was not immediately paid out of his reimbursement from the State of West Virginia, but argues his only error was that he had "mistakenly (but in good faith) believed that he had pre-paid Mr. Moses."

We found in *Legg I* that "there is uncontroverted evidence in the record before us to support the Board's finding that Legg willfully converted funds owed investigator Moses." *In re Legg*, 325 N.C. at 669, 386 S.E.2d at 180. In his testimony at the initial hearing in 1987, applicant argued that he did not pay Moses because the reimbursement check "did not call to [his] attention" the fact that the money was owed. Therefore, the question of applicant's knowledge of the outstanding bill was clearly before the Board in its earlier consideration of the application when it concluded conversion had occurred. Brown's affidavit is merely additional support for applicant's contention that his failure to pay Moses was inadvertent and does not alter the fact that there is substantial evidence supporting the Board's finding of conversion.

Additionally, applicant argues that there was no conversion because Moses' funds were never spent by applicant, but remained in applicant's bank account until paid to Moses. The record shows, however, that Moses was ultimately paid in three separate installments instead of one lump sum, implying that at least a portion of the money had in fact been spent. Further, conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *In re Legg*, 325 N.C. at 669, 386 S.E.2d at 180 (citation omitted). By depositing the check into his personal account in Raleigh, applicant exercised his right of ownership over the funds owed to Moses, thus satisfying the definition of conversion, even without evidence that he actually spent the money. Therefore, we hold that there was substantial evidence to support the Board's finding of fact that applicant converted the funds owed to Moses.

The second finding of fact that applicant contends was not supported by substantial evidence is that he attempted to conceal from

the executor of his mother-in-law's (Mrs. Veneri) estate the fact that a $10,000.00 loan had been made to him. Testimony regarding the loan constituted the majority of the new evidence presented at the 16 October 1991 hearing. After Mrs. Veneri's death on 9 September 1986, her son Randall Veneri (Randall), the executor of the estate, discovered evidence of a $10,000 cashiers check dated 5 September 1986, four days prior to Mrs. Veneri's death. Bank personnel confirmed that the check had been deposited into an account under applicant's name. The evidence showed that Mrs. Veneri had loaned the money for a down payment on applicant's new home. Applicant argues that "he cannot be found morally deficient for failing to disclose to his wife's relatives his (and his wife's) private financial dealings with her mother." Applicant further contends that when questioned directly by Randall, he admitted receiving the loan.

At the 16 October 1991 hearing, Randall testified that

> [he] asked all members of [his] family, and specifically [he] asked Mr. Legg and his wife, because they were residing in [his] mother's home . . . if they had any knowledge about . . . [the $10,000 cashiers check,] and every member of the family, including Mr. Legg and his wife denied any knowledge of this check.

Randall further testified that he later discovered from the bank that the check had been deposited into an account under applicant's name. Randall next testified that he called applicant to confront him with this information, and at that point, applicant admitted receiving the money.

Applicant argues that the Board's earlier finding that he attempted to conceal the existence of the loan from the "executor of the estate" was incorrect because no conversation regarding the money had taken place while Randall was acting as the executor of the estate. Applicant contends that the Board, realizing that it had made a mistake in its earlier order, corrected itself in finding in its 13 December 1991 order that applicant attempted to conceal the existence of a $10,000 loan "from other members of the Veneri family." Applicant further alleges that if a conversation with Randall took place, it occurred before Randall was appointed executor, which contradicts the finding by the Board in the 16 June 1988 order. At the hearing Randall was unable to specifically state on what day his conversation with applicant took place.

Applicant concedes that "the Board may accept or reject in whole or in part the testimony of any witness." There was sufficient evi-

dence before the Board when it issued the 16 June 1988 order from which it could have found that even if the conversation had taken place before Randall was appointed executor, applicant continued to fail to disclose the existence of the loan after Randall qualified as executor. After carefully reviewing the evidence from both hearings, we are convinced that there is substantial evidence to support the Board's findings that applicant attempted to conceal the existence of the loan from Randall as executor and from other members of the Veneri family.

The third finding of fact which applicant contends was not supported by substantial evidence is that his failure to return legal papers to a client upon her written request was evidence of neglect. At the hearing, the Board submitted a letter written by applicant's client dated 10 June 1986 requesting the return of her legal papers since she had terminated applicant's representation. The client's materials were not completely returned until 28 April 1987, which was after the Board had notified the applicant that this matter would be investigated.

Applicant relies on *Capehart v. Church*, 136 W. Va. 929, 69 S.E.2d 127 (1952), for the proposition that an attorney may have a retaining lien over a client's documents until a general balance due the attorney is paid. *Id.* However, at the 16 October 1991 hearing, applicant never asserted that he was holding the papers in lieu of payment, but rather stated that he "discovered pursuant to the hearing before [the] board that when [he] opened Miss White's file [he] had neglected to send her all her papers." Therefore, there was no evidence that applicant was, in fact, withholding the documents in lieu of payment. We conclude that there was substantial evidence upon which the Board could find that applicant did in fact act with carelessness and neglect with regard to the return of his client's legal papers.

Upon a proper review of the whole record, we conclude that there is substantial evidence to support each of the Board's findings discussed on appeal, and the second assignment of error is therefore rejected.

[4] In his final assignment of error, applicant argues that the Board erred by violating § .0803 of the Rules which requires that applicants be notified of protests to their application. Applicant contends that Randall Veneri protested his 1987 application through *ex parte* communications with the Board, and his 1991 application through testimony at the 16 October 1991 hearing. These communications and

testimony do not constitute a protest as defined by the rules. *See Rules Governing Admission to the Practice of Law in the State of North Carolina* § .0802 (1988).

We note that the Board is free "to make or cause to be made such examinations and investigations as may be deemed necessary," and therefore, it was not improper for the Board to question Randall before the 1987 hearing in the course of its investigation without first notifying applicant. N.C.G.S. § 84-24 (1985). We find no evidence that Randall was acting in any capacity other than that of a witness for the Board regarding the matter of the loan. Further, Randall's adverse testimony at the hearing regarding the events surrounding the loan does not itself constitute a protest.

Citing *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. Ed. 2d 224 (1963), applicant contends that he must be afforded an opportunity to be confronted with, and cross-examine, witnesses who are adverse to him. However, *Willner* dealt with the denial of an applicant's admission to the Bar without the applicant having an opportunity to be heard prior to the adverse decision. *Id.* at 106, 10 L. Ed. 2d at 231. Justice Goldberg, in his concurrence, with Justices Brennan and Stewart joining, stated: "As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required . . . . The circumstances will determine the necessary limits and incidents implicit in the concept of a 'fair' hearing." *Id.* at 107, 10 L. Ed. 2d at 232 (Goldberg, J., concurring).

In this case, prior to the hearings, applicant was given notice of the matters to be discussed, including his indebtedness to the estate of his mother-in-law for which Randall was the executor. At the hearings, the matter of the loan was in fact discussed and applicant was afforded an opportunity to respond personally in support of his position. More specifically, at the 16 October 1991 hearing, applicant was able to confront and cross-examine Randall. Therefore, we hold that the Board did not violate the Rules or applicant's due process rights, and this assignment of error is rejected.

Upon examination of the whole record, we conclude that applicant has been afforded a careful consideration of his application and that there was substantial evidence to support the Board's findings and conclusions. Accordingly, the order of the Wake County Superior Court, which affirmed the 13 December 1991 order of the Board of

Law Examiners denying applicant's application for admission to the 1987 North Carolina Bar Examination, is affirmed.

AFFIRMED.

Justice WEBB concurring.

I continue to believe, as I stated in a dissenting opinion in the first appeal of this case, *In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989), that it was error for the Board of Law Examiners to deny the appellant the right to take the 1987 bar examination. However, our decision in that appeal is now the law for this case. I agree with the majority that there was nothing in the most recent hearing which would require the Board to change its order. For that reason, I concur in the result reached by the majority.

Justice MITCHELL joins in the concurring opinion.

STATE OF NORTH CAROLINA v. SAMUEL JAMES SHUFORD

No. 327A93

(Filed 9 September 1994)

1. Criminal Law § 732 (NCI4th)— instructions—admission of facts by defendant—no expression of opinion

The trial court did not express an opinion on the evidence by instructing the jury in a first-degree murder case that "[t]here is evidence in this case which tends to show the defendant has admitted facts relating to the crime charged in this case," even though defendant maintained that the killing was in self-defense, where defendant testified on direct examination that he pulled out his gun and shot the victim, and the court's further instructions made it clear that it was solely for the jury to determine whether the defendant had in fact made any admission and the weight to be accorded thereto.

Am Jur 2d, Trial §§ 1077 et seq.

2. Evidence and Witnesses § 2859 (NCI4th)— writing used to refresh memory—admission into evidence

Rule 612 does not provide for the admission into evidence of writings used to refresh a witness's memory but entitles defend-

ant only to have such writings produced at trial. The admissibility of these writings is subject to the same rules of admissibility that apply to any evidence. N.C.G.S. § 8C-1, Rule 612.

Am Jur 2d, Witnesses §§ 459 et seq.

3. Evidence and Witnesses § 2124 (NCI4th)— opinion testimony about gunshot wound—failure to qualify as lay witness or expert

The trial court did not abuse its discretion by refusing to admit opinion testimony of an emergency medical technician concerning the distance from which the victim was shot without some showing by defendant that the witness was qualified to testify about gunshot wounds, either as a lay witness or as an expert, where defense counsel stated that the technician's notation on the ambulance report, "burns to shirt/close distance," was the substance of his testimony; defense counsel admitted to the court that he knew nothing about the qualifications of the witness except his place of employment and that he had signed the ambulance call report; and defendant declined an invitation by the trial court to locate the witness and obtain some information that would support his qualification to testify about guns and gunshot wounds. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 53, 54, 70.

4. Homicide § 445 (NCI4th)— instructions—intentional use of deadly weapon—proof by State or by admission—inference of malice and unlawfulness

The trial court did not err by instructing the jury in a murder trial that it could infer malice and unlawfulness "if the State proved" or "if it is admitted" that defendant intentionally used a deadly weapon where defendant testified at trial that he pulled out his gun and shot the victim.

Am Jur 2d, Homicide §§ 508 et seq.; Trial §§ 1293 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Griffin, J., at the 13 October 1992 Criminal Session of Superior Court, New Hanover County. Heard in the Supreme Court 14 April 1994.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

Nora Henry Hargrove, for defendant-appellant.

FRYE, Justice.

Defendant was indicted for the first-degree murder of Kenneth Lee Hill. He was tried noncapitally by a jury, found guilty as charged, and sentenced to a mandatory term of life imprisonment. Defendant appealed to this Court asserting four assignments of error. We find no reversible error.

The evidence at trial tended to show the following: At about 2:00 a.m. on 9 July 1992, Officer William Caulk of the Wilmington Police Department responded to a call at the Jervay Housing Project in Wilmington. When the officer arrived, he observed the body of the victim, Kenneth Lee Hill, lying in the street. There was a two-foot-long stick lying beside the body and a fired 20-gauge shotgun shell about forty feet from the victim on the sidewalk.

Investigator Brian Pettus testified that he arrived at the crime scene at about 2:15 a.m. He observed the victim's body lying in the street and began to talk to some of the people gathered in the area. Pettus then went to defendant's home, took defendant into custody, and transported him to the police department. Pettus then went to the morgue and observed the body of the victim. He examined the victim's clothing and discovered a rock of crack cocaine in his pocket. The victim had no weapons on him at that time.

At the police department, Pettus observed other officers advising defendant of his Miranda rights. Defendant then gave a statement to the officers. In his statement, defendant said that he left his mother's house about 1:15 to 1:30 a.m. and walked to the playground area of the housing project. Defendant stated that he was approached by the victim, Michael Ellis, and two other young black males whom he did not know. The victim told defendant that he wanted his money. Defendant said he did not know what the victim was talking about. The victim hit defendant in the jaw, and defendant gave him twelve dollars and walked away. Defendant stated that the four men approached him again later and beat him up. Defendant ran away and went to get his gun, a 20-gauge shotgun. Defendant saw the victim and his companions on Wright Street and waited for them to approach him. Defendant said the victim had a stick in his hand and the other three had bottles. The victim asked defendant about the rest of his money. Defendant then pulled the shotgun out in front of him and said, "I got your money." Defendant stated that the victim turned and told the others to give defendant back his money. The others started running away, and when the victim turned back around, defendant

shot him. Defendant stated that he ran and threw the gun behind a house. Defendant then walked to a gas station, purchased two buns and a cigarette and then walked to his mother's house.

Pettus testified that during the time that defendant was giving his statement, defendant was calm and did not have any injuries. Pettus asked defendant if he had any injuries, and defendant said he did not. Pettus returned to the crime scene and searched for weapons but did not find any.

Autopsy results revealed that the cause of death was a shotgun wound to the chest. There were physical indications that the gunshot occurred at close range.

Michael Ellis testified for defendant. Ellis testified that he and the victim approached defendant to get fifteen dollars defendant owed them. After defendant refused to give them any money, the victim hit defendant in the jaw, and defendant then gave them five dollars. The three men started walking down the street together, and defendant and the victim continued arguing over the money. At one point, the victim hit defendant in the back of the head, and defendant left. Ellis testified that he and the victim approached defendant about an hour later, and the victim asked defendant if he had the rest of the money. Defendant said, "I don't have no money, . . . but I got this," and then pulled the shotgun out and shot the victim. Ellis testified that the victim had a stick in his hand, but did not use it as a weapon.

Defendant testified in his own behalf. Defendant's testimony regarding the events leading up to the shooting was substantially the same as the statements police officers testified that he gave after his arrest. Defendant's version of the shooting differed from the earlier statements. Defendant testified that as he was walking down the street he saw the other men approach him. Defendant saw the victim pick up a stick, and he saw Ellis with a bottle in his hand. When the victim asked where the rest of the money was, defendant said he did not have any money and pulled out the shotgun. The victim then told Ellis to give defendant his money. Defendant looked towards Ellis, and when he turned back, the victim was threatening him with a stick. Therefore, he shot the victim to keep the victim from hurting him with the stick.

Defendant testified that his mother called the police after she learned what had happened and told defendant that he must turn himself in. Defendant testified that he told Investigator Pettus that he did

not have any other choice but to shoot the victim. Defendant denied ever telling the police that the victim could not have hit him with the stick.

[1] Defendant first assigns error to the trial court's instruction to the jury that defendant admitted facts in the case, despite the fact that defendant repeatedly maintained that the killing was in self-defense. The trial court instructed the jury in accord with the North Carolina Pattern Jury Instructions as follows:

> There is evidence in this case which tends to show the defendant has admitted facts relating to the crime charged in this case. If you find that the defendant made that admission, you should treat—or you should consider all of the circumstances under which it was made, in determining whether it was a truthful admission and the weight that you will give to it.

See N.C.P.I.—Crim. 104.60 (1970). During the portion of the instruction on first-degree murder addressing the issue of intent and malice, the trial court, again following the pattern jury instructions, instructed the jury as follows:

> If the State proves beyond a reasonable doubt, or if it is admitted that the defendant intentionally killed the victim with a deadly weapon, or the defendant intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful; and second, that it was done with malice. You are not compelled, however, to do so. You may consider this, along with all other facts and circumstances, in determining whether the killing was unlawful and whether it was done with malice.

See N.C.P.I.—Crim. 206.30 (1994). Defendant contends that these instructions were "plainly erroneous, were not warranted by the evidence, lightened the state's burden of proof and seriously undermined the defense." Defendant argues specifically that the evidence did not support the trial court's characterization of defendant's statements as "admissions" and that this statement was an expression of the judge's opinion. According to defendant, the jury was allowed to conclude from this instruction that defendant had already "admitted" the crime and, therefore, the State was not required to prove each of the elements of the offense beyond a reasonable doubt.

Defendant did not object to these instructions, therefore this assignment of error must be considered under the plain error rule.

"Under the plain error rule, a new trial will be granted for an error to which no objection was made at trial only if a defendant meets a heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict." *State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992) (citing *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

We considered this issue in *State v. McKoy*, 331 N.C. 731, 417 S.E.2d 244 (1992), where defendant argued that an essentially identical instruction on admitted facts was erroneous. As in the present case, defendant in *McKoy* argued that the trial judge expressed an opinion on the evidence when he used this instruction. In *McKoy*, we concluded that "[a] trial court's use of the words 'tends to show' in reviewing the evidence does not constitute an expression of opinion on the evidence." *McKoy*, 331 N.C. at 733, 417 S.E.2d at 246 (citing *State v. Young*, 324 N.C. 489, 495, 380 S.E.2d 94, 97 (1989)). We further concluded that there was evidence "tending to show" that defendant had admitted shooting into the victim's car. Likewise, in the present case, there was evidence tending to show that defendant admitted facts relating to the crime charged. On direct examination, defendant testified that he pulled out his gun and shot the victim.

We also note that in the present case, as in *McKoy*, the court's statement that there was evidence tending to show that defendant had admitted facts relating to the crime charged was followed by the instruction, "If you find that the defendant made that admission, you should treat—or you should consider all the circumstances under which it was made, in determining whether it was a truthful admission and the weight that you will give to it." The court thus made it clear that "it was solely for the jury to determine whether the defendant had in fact made any admission." *McKoy*, 331 N.C. at 734, 417 S.E.2d at 247.

This Court has also previously considered when it is appropriate to instruct on admissions in the pattern instruction on murder. *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981); *State v. Wilkins*, 297 N.C. 237, 254 S.E.2d 598 (1979). We concluded in both those cases that the instruction (N.C.P.I—Crim. 206.30) was not prejudicial and, in *McCoy* stated, "[w]e are satisfied the jury understood the instruction to be, as it was intended to be, simply a statement of an abstract legal principle, not the trial judge's expression of an opinion regarding defendant's testimony." *McCoy*, 303 N.C. at 29, 417 S.E.2d at 535. We did caution that "[t]he instruction, 'or it is admitted,' should not be given

in a case where the defendant does not in open court admit to an intentional shooting." *Id.* As we have already stated, defendant testified at trial that he pulled out his gun and shot the victim. It was therefore not improper for the trial court to give this instruction.

We find no error in the above instructions and, consequently, no plain error. This assignment of error is rejected.

[2] In his second assignment of error, defendant contends that the trial court erred in denying the admission into evidence of defendant's exculpatory statements to police officers. Officer Pettus testified on direct examination that defendant made certain voluntary statements to him at the police department several hours after the shooting. On cross-examination, defendant attempted to question Pettus regarding prior statements defendant had made at his home. The State objected on the basis of hearsay, and the objection was sustained. Defendant contends that he was attempting to elicit from Pettus that defendant had told him that "he had to shoot Hill, he had no other choice." Defendant argues that the statement was included in notes and reports used by Officer Pettus while he was testifying. Defendant contends that under Rule 612 of the North Carolina Rules of Evidence, he should have been able to introduce parts of the notes and reports into evidence. We disagree.

Rule 612 provides:

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

N.C.G.S. § 8C-1, Rule 612 (1992). Rule 612 does not provide for the admission into evidence of writings used to refresh a witness' memory. Under Rule 612, defendant was only entitled to have such writings *produced* at trial. The *admissibility* of these writings is subject to the same rules of admissibility that apply to any evidence. Here, the trial court excluded the evidence as inadmissible hearsay. Defendant does not contest the trial court's ruling based on the hearsay objection and poses no arguments in support of admissibility under any exception to the hearsay rule. In fact, defendant makes no argument in his brief for the admissibility of the statement other than the argument based on Rule 612. Since the statement was not admissible under Rule 612, we cannot conclude that the trial court erred by excluding it. This assignment of error is therefore rejected.

[3] In his third assignment of error, defendant contends that the trial court erred in requiring the defense to tender a witness as an expert before allowing the witness to testify. As his final witness at trial, defendant offered the testimony of Joe Grisetti, an emergency medical technician, who had signed a report regarding the transfer of the victim's body to the morgue. On voir dire, defendant stated that he planned to offer Grisetti as a lay witness with an opinion on the distance from which the victim was shot, based on Grisetti's observation of the wound and powder burns around the wound. The State objected to Grisetti's lay opinion testimony on this issue. The trial court inquired as to whether defendant would qualify Grisetti as a firearms expert, a medical expert, or "any other kind of expert." Defendant replied that he would tender him simply as a lay witness. Defendant's attorney acknowledged to the court that he had not spoken to Grisetti and did not know what training he had; only that he was employed with the New Hanover County Emergency Medical Services. The court indicated that it would give defendant an opportunity to locate Grisetti, talk with him and question him on the stand to attempt to have him qualified as an expert. Defendant declined this offer. Defendant now argues that the trial court erred by not allowing Grisetti to testify as a lay witness regarding the distance from which the victim was shot.

The State argues that this issue has not been preserved for appellate review because defendant failed to make an adequate offer of proof. We have previously stated that "an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citations omitted). We noted in *Simpson* that, "[t]he practice of permitting counsel to insert answers rather than have the witness give them in the presence of the court should not be encouraged. The words of the witness, and not the words counsel thinks the witness might have used, should go in the record." *Id.* (quoting *State v. Willis*, 285 N.C. 195, 200, 204 S.E.2d 33, 36 (1974)).

In the present case, not only was counsel attempting to insert answers into the record rather than having the witness give them, but counsel was attempting to do this without having had any contact or discussion with the witness. On voir dire, counsel for defendant stated that he was making an offer of proof in the form of the ambulance call report which was signed by Joe Grisetti, and the report was placed in the record as a voir dire exhibit. Defendant argued that the

notation on the report, "burns to shirt/close distance," was the substance of the testimony that would allow the jury to determine the distance from which the gunshot was fired.

Assuming that this notation in the report sufficed as an offer of proof on the substance of Grisetti's testimony, there remained the question of Grisetti's qualification as a witness on this issue. Rule 104(a) of the North Carolina Rules of Evidence provides that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." N.C.G.S. § 8C-1, Rule 104(a) (1992). Decisions made under Rule 104(a) are addressed to the sound discretion of the trial court. *See State v. Fearing*, 315 N.C. 167, 337 S.E.2d 551 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its 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).

Rule 701 addresses opinion testimony by lay witnesses as follows:

> If a witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (1992). Defendant made no showing that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the issue of the distance from which the victim was shot. In fact, as noted above, defense counsel candidly admitted to the court that he knew nothing about the witness' qualifications, except the witness' place of employment and that he signed the ambulance call report.

At oral argument, defendant acknowledged that a layperson could provide this type of opinion testimony "if he was familiar with guns and gunshot wounds." Yet, no such information regarding the qualifications of the witness to provide this opinion testimony was presented to the trial court. Further, defendant declined an invitation by the trial court to locate the witness and obtain some information that would support his qualification to testify on this subject. Although the trial court questioned defense counsel regarding the witness' qualification as an expert and ultimately ruled that it was "inclined to sustain the state's objection to testimony from a lay wit-

ness as to that kind of thing," defendant certainly had the opportunity to provide support for the witness testifying as a lay witness or as an expert. Defendant has failed to demonstrate that the trial court abused its discretion by refusing to admit this testimony without some showing that the witness was qualified to testify, either as a lay witness or as an expert. This assignment of error is rejected.

[4] In his final assignment of error, defendant contends that the trial court erred in its instruction on the inference of malice and unlawfulness from the use of a deadly weapon and thereby lightened the State's burden of proof on each element of the crime. Defendant relies primarily on his discussion under the first assignment of error regarding the reference to "admissions" in the instruction on the elements of murder. Defendant argues that the trial court's instruction that the jury could use an admission to infer that the killing was unlawful and that it was done with malice, impermissibly lightened the State's burden of proving these elements beyond a reasonable doubt. As noted above, defendant's assignments of error regarding this instruction must be considered under the plain error rule, since defendant did not object to the instruction at trial.

A careful reading of this instruction shows that the jury was told that it could infer malice and unlawfulness "if the State proved" or "if it is admitted" that defendant used a deadly weapon. Thus, the jury could only make these inferences if it first determined that there was an admission or proof beyond a reasonable doubt. We have already stated that the "admission" instruction was not improper in this case, since defendant testified at trial that he pulled out his gun and shot the victim. Further, it is well established that malice and unlawfulness may be inferred from the intentional use of a deadly weapon which proximately results in a death. *See State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 907-08 (1988) (citing *State v. Reynolds*, 307 N.C. 184, 190, 297 S.E.2d 532, 536 (1982)). We conclude that the trial court did not err in instructing the jury that these inferences could be drawn from defendant's use of a deadly weapon.

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

NO ERROR.

HARGETT v. HOLLAND

[337 N.C. 651 (1994)]

VANN DALE HARGETT, CECIL GLENN HARGETT, GERALD KEITH HARGETT, AND FRANCES HARGETT DEASON v. ROBERT L. HOLLAND

No. 377PA93

(Filed 9 September 1994)

Limitations, Repose, and Laches § 26 (NCI4th)— attorney malpractice—negligent will drafting—last act giving rise to claim—statute of repose

Where defendant attorney contracted to prepare and supervise the execution of a will, the attorney had no continuing duty thereafter to review or correct the will or to prepare another will, and the attorney's last act giving rise to a claim for professional malpractice for alleged negligence in drafting the will occurred when he supervised the execution of the will. Therefore, plaintiffs' malpractice claim against the attorney was barred by the four-year statute of repose contained in the professional malpractice statute of limitations, N.C.G.S. § 1-15(c), where the claim was filed more than 13 years after the attorney prepared the will and supervised its execution.

Am Jur 2d, Attorneys at Law §§ 219-221.

When statute of limitations begins to run upon action against attorney for malpractice. 32 ALR4th 260.

On defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals reversing an order dismissing complaint for failure to state a claim entered at the 23 March 1992 Civil Session of Superior Court, Union County, Helms, J., presiding. Heard in the Supreme Court 12 May 1994.

Brown, Hogin & Montgomery, by R. Kent Brown, for plaintiff-appellees.

Dean & Gibson, by Rodney Dean and J. Bruce McDonald, for defendant-appellant.

Dameron & Burgin, by Charles E. Burgin; Smith Helms Mulliss & Moore, L.L.P., by Jo Ann T. Harllee, amicus curiae, on behalf of the N.C. Bar Association.

EXUM, Chief Justice.

This appeal presents the question whether a claim for professional malpractice against an attorney for alleged negligence in drafting a will is barred by the four-year statute of repose contained in our professional malpractice statute of limitations, N.C.G.S. § 1-15(c)(1983), when the claim is filed more than 13 years after the attorney prepared the will and supervised its execution. Section 1-15(c) provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that *in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action*: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Id. (emphasis added).

Concluding that the attorney had a continuing duty to correct the will up until the testator died, the Court of Appeals held that the attorney's last act giving rise to the claim, from which the four-year statute of repose began to run, occurred immediately before the testator's death, which was within four years of the filing of the complaint; therefore, the statute of repose was not a bar to plaintiffs' claim. We

hold that under the circumstances alleged in the complaint there was no continuing duty on the part of the attorney to correct the will; therefore, the attorney's last act giving rise to the claim was his supervision of the will's execution. Since this was more than four years preceding the filing of the complaint, we hold the four-year statute of repose bars the claim. Thus, we reverse.

Since the question is presented on a Rule 12(b)(6) motion to dismiss, we decide the case on the basis of the factual allegations in the complaint, taking them as true. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986); *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). Defendant's answer denies that he prepared the will or supervised its execution. The parties have stipulated that for purposes of deciding whether the claim is barred by the professional malpractice statute of limitations, we may treat the will "as having been prepared by the Defendant on or before September 1, 1978."

A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Oates v. JAG, Inc.*, 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).

The complaint's factual allegations are these: "[I]n or about 1978 Vann W. Hargett, father of plaintiffs, contracted with Defendant Holland to prepare a Last Will and Testament for Vann W. Hargett which would provide upon his death a life estate in the family farm consisting of 79.65 acres to his then wife, Elizabeth H. Hargett, with remainder over to Plaintiffs herein, his children from his first marriage." Defendant prepared the will, which was executed by Vann W. Hargett and witnessed by defendant on 1 September 1978. Sometime after executing the will, Vann W. Hargett advised plaintiffs that he had provided in his will for a life estate in the family farm to Elizabeth H. Hargett with remainder to plaintiffs. Vann W. Hargett died on 7 November 1988. On 21 November 1988 plaintiffs learned that Elizabeth H. Hargett claimed the will entitled her not only to a life estate in the farm but also to the remainder interest provided she survived the testator by more than six months. Thereafter on several occasions defendant assured plaintiffs that he had prepared the will in accord with the testator's instructions that Elizabeth H. Hargett

would have a life estate in the farm and plaintiffs the remainder. Later litigation over the interpretation of Vann W. Hargett's will resulted in an unpublished Court of Appeals decision that Elizabeth H. Hargett took a life estate in the farm and the remainder interest was to be shared by plaintiffs and two children of Elizabeth H. Hargett by a former marriage.

Plaintiffs then filed this action on 6 November 1991 alleging that defendant negligently drafted Vann H. Hargett's will by "failing to use the appropriate verbiage so as to effectuate the intent of the testator." Plaintiffs claim they were damaged to the extent they did not receive all of the remainder interest in the family farm.

Defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim was allowed by Judge Helms on the ground that "the applicable statute of limitations expired prior to commencement of this action . . . ." The Court of Appeals concluded that plaintiff's cause of action did not accrue under the professional malpractice statute of limitations until the testator's death; therefore it was not barred by the three-year limitations provision. It also concluded that defendant's last act giving rise to the claim did not occur until immediately before the testator's death; therefore the claim was not barred by the four-year statute of repose provision. The Court of Appeals reversed the trial court's allowance of the motion to dismiss and remanded for further proceedings.

We conclude defendant's last act giving rise to the claim occurred when he supervised the execution of the will on 1 September 1978; therefore plaintiffs' claim, being brought more than four years after that date, is barred by the four-year statute of repose provision contained in the professional malpractice statute of limitations.

Unlike statutes of limitations, which run from the time a cause of action accrues, "[s]tatutes of repose . . . create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985). A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained. *Bolick v. Amercian Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

> Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for a cause of action to be recognized. If the action is not brought within the specified period, the plaintiff "literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972).

Boudreau v. Baughman, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (emphasis original). In *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985), this Court held:

> [T]he period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether an injury has resulted. . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Id. at 633, 325 S.E.2d at 474-75 (citations omitted).

Regardless of when plaintiffs' claim might have accrued, or when plaintiffs might have discovered their injury, because of the four-year statute of repose, their claim is not maintainable unless it was brought within four years of the last act of defendant giving rise to the claim. *Flippen v. Jarrell*, 301 N.C. 108, 112, 270 S.E.2d 482, 485 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981); *Trustees of Rowan Tech.*, 313 N.C. 230, 328 S.E.2d 274.

The Court of Appeals held that defendant's last act occurred immediately before testator's death, the last act being defendant's failure to fulfill a continuing duty to prepare a will properly reflecting the testator's testamentary intent.

Under the circumstances here we conclude defendant had no such continuing duty. We hold that under the arrangement alleged in the complaint, which was a contract to prepare a will after which defendant was an attesting witness to the will, defendant's duty was simply to prepare and supervise the execution of the will. This arrangement did not impose on defendant a continuing duty thereafter to review or correct the will or to prepare another will. Absent allegations of an ongoing attorney-client relationship between testator and defendant with regard to the will from which such a continu-

ing duty might arise, or allegations of facts from which such a relationship may be inferred, the allegations which are contained in the complaint are insufficient to place any continuing duty on defendant to review or correct the prepared will, or to draft another will.

The concept of a continuing professional duty has arisen in the context of medical malpractice claims where there was a continuous course of treatment of the patient by the physician. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

> [W]here the injurious consequences arise from a continuing course of negligent treatment . . . the statute does not ordinarily begin to run until the injurious treatment is terminated. . . . The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician or surgeon in continuing and repeating the wrongful treatment.

Id. at 58, 247 S.E.2d at 293 (quoting *Tortorello v. Reinfeld*, 6 N.J. 58, 77 A.2d 240 (1950)) (citations omitted). Even in the medical malpractice context, absent a continuing course of treatment provided by the physician, the physician's last act occurs when he completes the treatment for which he was engaged. *Mathis v. May*, 86 N.C. App. 436, 358 S.E.2d 94 (act for which defendant was hired, diagnosis of a breast mass, was completed upon rendering of a negative diagnosis), *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987). *See also Harvey v. Ritchey*, 582 N.E.2d 792 (Ind. 1991) (for claim of medical malpractice based on a failure to diagnose, omission cannot extend beyond time physician last rendered a diagnosis).

Just as a physician's duty to the patient is determined by the particular medical undertaking for which he was engaged, an attorney's duty to a client is likewise determined by the nature of the services he agreed to perform. An attorney who is employed to draft a will and supervise its execution and who has no further contractual relationship with the testator with regard to the will has no continuing duty to the testator regarding the will after the will has been executed. Here plaintiffs' complaint alleges a contractual relationship between defendant and testator to draft a will and that defendant supervised execution of the will. After defendant completed these acts, he had performed his professional obligations; and his professional duty to testator was at an end.

This conclusion is supported by our decision in *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 328 S.E.2d 274. In

Rowan, the Court held that N.C.G.S. § 1-15(c) did not apply to architects and engineers because such claims were governed by N.C.G.S. § 1-50, a statute dealing with claims against persons who design and supervise construction of buildings. However, the Court noted that were § 1-15(c) to apply, the plaintiff's claim, which was brought on 26 April 1982, would have been barred by the four-year statute of repose running from the defendant's last act giving rise to the claim. There the last act of the defendant was on 1 October 1976, the date the defendant certified the general contractor had completed construction. *Id.* at 234, 328 S.E.2d at 277. No continuing duty to inspect or repair the completed construction was imputed to the defendant.

Both the Court of Appeals and plaintiffs mistakenly rely on *Sunbow Industries, Inc. v. London*, 58 N.C. App. 751, 294 S.E.2d 409 (1982), *disc. rev. denied*, 307 N.C. 272, 299 S.E.2d 219 (1982). In *Sunbow* plaintiff sued defendant attorney for professional malpractice arising out of defendant's failure to perfect plaintiff's security interest in certain collateral by failing to file a financing statement prior to a petition for bankruptcy filed by the debtor, DBE, Inc. Plaintiff had retained defendant to represent it in the sale of certain assets to DBE on 27 May 1976, at which time plaintiff entered into a security agreement with DBE. Because defendant did not perfect plaintiff's security interest before DBE's petition for bankruptcy on 25 September 1978, the plaintiff was subordinated as a creditor. Plaintiff's lawsuit was filed more than three years after the date of closing of the sale but less than three years after the filing of the bankruptcy petition. The Court of Appeals held the three-year statute of limitations did not begin to run until the filing of DBE's petition for bankruptcy, before which, the court concluded, plaintiff had not been harmed. *Id.* at 753, 294 S.E.2d at 410.

Sunbow is distinguishable. First, *Sunbow* involved the three-year statute of limitations provision in the professional malpractice limitations statute, rather than the statute of repose provision. More pertinently, defendant in *Sunbow* was retained for the purpose of representing the plaintiff during the closing and for perfecting plaintiff's security interest in the assets. Therefore, it was reasonable to conclude defendant had a continuing duty to file the financing statement up until the time of the bankruptcy petition, and that his failure to do so immediately prior to that time was defendant's last act giving rise to plaintiff's claim.

In *Sunbow* as here it was the contractual arrangement between attorney and client that determined the extent of the attorney's duty to the client and the end of the attorney's professional obligation. Because of the contractual arrangement between testator and defendant here, defendant's professional obligations concluded with his preparation of the will and the supervision of its execution, the latter act becoming his last act giving rise to the claim.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. CHARLES RAY SMITH

No. 174A93

(Filed 9 September 1994)

1. Constitutional Law § 248 (NCI4th)— discovery—inability of witness to identify knife—failure to disclose—absence of prejudice—no due process violation

The State's failure to specifically disclose, pursuant to defendant's discovery request, a witness's failure to identify a knife found on a murder victim's body as belonging to defendant three hours after the murder by shooting did not constitute prejudicial error and thus did not violate defendant's due process rights since there was no reasonable probability that disclosure would have affected the outcome of the trial where the record shows that defendant anticipated the prosecutorial theory that the knife found at the scene was a "plant" placed on the victim's body by defendant to support his self-defense claim; numerous witnesses testified that they either hunted, fished, or worked with defendant and that, to their knowledge, defendant never possessed nor would have possessed such a cheap knife as that found on the body; and with defense counsel's prior knowledge of the witness's testimony on direct and a second statement of the witness provided in discovery in which the witness did identify the knife as belonging to defendant, defense counsel was more than adequately prepared to thoroughly cross-examine the witness regarding his identification of the knife.

Am Jur 2d, Criminal Law § 774.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment. 7 ALR3d 181.

2. Constitutional Law § 249 (NCI4th)— discovery—denial of motion for impeaching information—no due process violation

Defendant's due process rights were not violated by the trial court's denial of defendant's motion for the discovery of impeaching information, including any information about any internal affairs investigation of the chief investigating officer and information as to whether a State's witness suffered from any mental defect or had a history of substance abuse, since the information requested exceeded the scope of *Brady v. Maryland*, 427 U.S. 97 (1976), and the requirements of N.C.G.S. § 15A-903, and there was no showing that the State suppressed any material evidence.

Am Jur 2d, Criminal Law § 774.

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. Evidence and Witnesses § 285 (NCI4th)— murder victim's criminal history and prison infractions—no knowledge by defendant—inadmissible to show self-defense

The trial court in a murder prosecution did not err by denying defendant's motion to permit defendant to introduce, pursuant to Rule 404(b), prior convictions of the victim for assault with a deadly weapon and burglary, forensic evaluation records from Dorothea Dix Hospital pertaining to the assault conviction, and prison records of the victim's disciplinary infractions where there was no evidence that defendant was aware of the victim's criminal past at the time of the killing, and defendant's stated purpose for offering the evidence was to show that the victim had a propensity for violence and was the aggressor in the affray which led to the fatal shooting, since Rule 404(b) expressly prohibits admission of evidence for this purpose. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 373.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Greeson, J., at the 19 January 1993 Criminal Session of Superior Court, Halifax County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 31 January 1994.

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

Thomas Courtland Manning and Mary Boyce Wells for defendant-appellant.

PARKER, Justice.

Defendant, Charles Ray Smith, was tried noncapitally upon a proper bill of indictment charging him with the murder of Berry LaMark Bowser, later determined to be Barry Lamont Bowser. The jury found defendant guilty of first-degree murder and the trial court entered judgment sentencing him to life imprisonment. Defendant appeals to this Court as a matter of right.

An extensive recital of the evidence introduced at trial is unnecessary to understand the dispositive issues in this case on appeal. Briefly, the State's evidence tended to show that on the evening of 3 February 1992, defendant was repairing a mobile home in the trailer park which he owned and operated in rural southwestern Halifax County. One of the residents, Grady Jefferson, was assisting him when Barry Bowser approached the two men and asked Jefferson if he knew anything about a check which was missing from his mother's mailbox. An argument ensued which resulted in defendant's asking Bowser to leave the premises. The argument became more heated and Jefferson escorted the victim off the trailer park property. However, the victim returned and began arguing with defendant again. The argument ended when defendant shot Bowser. The jury rejected defendant's defense of self-defense and recommended he be sentenced to life imprisonment for the premeditated and deliberate murder of Barry Bowser.

[1] In his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss based on the State's failure to disclose impeaching information in its response to his discovery motion filed pursuant to N.C.G.S. § 15A-903(f). Defendant argues the State violated his due process rights by failing to disclose Grady

Jefferson's inability or unwillingness to positively identify defendant's knife when Jefferson was first questioned on the night of the murder.

At trial, Jefferson testified that, during the altercation, he saw defendant get a knife from his truck and that he did not see the victim with a knife until after the shooting. Prior to Jefferson's cross-examination by defense counsel, the State provided defendant with two prior statements given by Jefferson to investigating officers. The first statement, made three hours after the shooting at the scene of the crime, did not mention that Jefferson saw defendant get a knife out of his truck nor did it mention that Captain Ward had shown Jefferson a knife found on the victim's body and that Jefferson told Captain Ward he did not recognize it. The second statement, made three weeks after the shooting, was as follows:

> A."Captain Ward, I have been thinking a lot about what happened that night. Every time I lay down and go to sleep I think about it. That knife you showed me, I've seen Charles Smith with that knife while I was helping him work on some trailers. He used it to cut wires and tape and insulation. I've seen him use it a couple of times. Sometimes he would use his big hunting knife if he had it with him. If he didn't have the big knife, he would use the knife you showed me. He kept the big knife in his truck most of the time."

Captain Ward testified that at the close of the first interview he showed Jefferson the knife found in the victim's hand and asked Jefferson if he could identify it, and Jefferson said that he could not. In denying defendant's motion, the trial court stated that the information had come out in time for defendant to use it in court and allowed defendant to recall Jefferson if defendant wished.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). The Supreme Court of the United States, in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), rejected the notion that every nondisclosure automatically constitutes reversible error and ruled "that prejudicial error must be determined by examining the materiality of the evidence." *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985).

We note first that whether or not the prosecutor knew prior to Captain Ward's testimony that Jefferson had failed to identify the knife on the evening of 3 February 1992 is irrelevant. Captain Ward, the lead investigator who testified at trial, had knowledge of this information; thus, the State is deemed under *Brady* to have had knowledge of the information as well. *See State v. Crews*, 296 N.C. 607, 616, 252 S.E.2d 745, 752 (1979) (holding that within possession of State as used in N.C.G.S. § 15A-903(d) and (e) means within possession, custody, or control of the prosecutor or those working in conjunction with him or his office); *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (explaining that suppression by prosecution of evidence favorable to an accused violates due process where the evidence is material, irrespective of the good faith or bad faith of the prosecution).

"In determining whether the suppression of certain information was violative of the defendant's right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial." *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983). The defendant has the burden of showing that the evidence not disclosed was material and affected the outcome of the trial. *Id.* While we agree that Jefferson's failure to positively identify the knife only three hours after the murder is relevant to defendant's theory of self-defense, we find that defendant has failed in this instance to show how he was prejudiced by the nondisclosure of this information. The record discloses that defendant anticipated the prosecutorial theory that the knife found at the scene was a "plant" placed on the victim's body by defendant to support his claim of self-defense. Numerous witnesses were called to testify that they either hunted, fished, or worked with defendant and that, to their knowledge, defendant never possessed nor would he ever possess such a cheap knife as State's Exhibit No. 7. With this prior knowledge, Jefferson's testimony on direct that he did not remember the knife when he first spoke with Captain Ward and the two statements provided by the State, defense counsel was more than adequately prepared to thoroughly cross-examine Jefferson regarding his identification of the knife.

In light of the foregoing principles, we conclude that the State's failure to specifically disclose Jefferson's previous failure to identify the knife as belonging to defendant does not constitute prejudicial error since there is no reasonable probability that disclosure would have affected the outcome of defendant's trial. *See also State v. Howard*, 334 N.C. at 606, 433 S.E.2d at 744 (holding that the State's failure to disclose a witness' previous "inability to positively identify defendant [as the assailant] was not material because there [was] not a reasonable probability that disclosure would have affected the outcome of defendant's trial"). We, thus, reject this assignment of error.

[2] In a related assignment of error, defendant contends the trial court erred when it denied his pretrial motion for disclosure of impeaching information. In his motion defendant requested documentation of any internal investigation of any law enforcement officer whom the State intended to call to testify at trial and records revealing any defect or deficiency of capacity of any witness to observe, remember, or recount events. During the hearing on the motion, defense counsel informed the court he had hearsay information concerning possible discipline the chief investigator may have received as a result of an internal affairs investigation prior to his employment with the Halifax County Sheriff's Department. The State countered that the request went beyond the scope of *Brady*, that all the categories of discovery under N.C.G.S. § 15A-903 had been complied with, and that the State was not in possession of any of the records sought by defendant. The trial court ruled that prior to its requiring the State to produce any information pertaining to an internal affairs investigation, a *voir dire* of the witness could be conducted, upon request, to determine if any potentially impeaching evidence existed, was relevant, and was admissible.

Following the direct examination of Linda Tyler, a witness who was present at the trailer park on the night of the shooting, defendant renewed his motion for disclosure of impeaching information as to whether this witness suffered from any mental defect or history of substance abuse which might affect her ability to recollect or recount the events occurring on the evening of 3 February 1992. In denying the motion, the court noted that counsel could question the witness concerning these matters, within reason, but refused to order the State to make inquiry into the background of its witnesses.

Defendant contends his specific requests for discovery triggered the State's duty to determine if any such impeachment evidence

existed and, if so, to disclose the information to the defense. Defendant argues that the State's failure to do so violated defendant's right to due process. We disagree.

To prevail under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), defendant must first show that evidence favorable to the accused was actually suppressed and that the suppressed evidence was material either to guilt or punishment such that there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *See also United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976). Nothing in the record before us reveals that the State suppressed material evidence. The State informed both the court and defendant that it had produced all discoverable materials in its possession, and defendant has failed to show otherwise.

Moreover, the information requested exceeds the scope of *Brady* and the requirements of N.C.G.S. § 15A-903. The State is not required to conduct an independent investigation to determine possible deficiencies suggested by defendant in State's evidence. Such exploration could result in time being wasted on frivolous fishing expeditions not necessary to the State's prosecution of the charges against defendant. In the instant case, defendant's motion was nothing more than a fishing expedition for impeachment evidence and the trial court properly disallowed the motion. *See State v. Brewer*, 325 N.C. 550, 574, 386 S.E.2d 569, 583 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990); *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 643 (1983). This assignment of error is overruled.

[3] Finally, defendant assigns error to the trial court's denial of his motion, pursuant to Rule 404(b) of the North Carolina Rules of Evidence, to allow evidence tending to show that the victim was the aggressor on the night of the shooting. Specifically, defendant sought to introduce the following: (i) a prior conviction of Bowser for assault with a deadly weapon in 1983, (ii) forensic evaluation records from Dorothea Dix Hospital pertaining to Bowser's 1983 conviction, (iii) records from the North Carolina Department of Corrections regarding Bowser's disciplinary infractions, and (iv) three prior convictions for burglary in 1988 and 1989 in New Jersey. Defendant argued that this evidence was relevant to the issue of whether Bowser was the aggressor in the altercation and the state of mind of defendant after Bowser threatened to attack him in the same manner he had attacked another on a prior occasion. The trial court ruled as follows:

First of all, this Court feels that the acts offered by the defendant in defendant's voir dire exhibits of #1 through #5 are not similar enough individually or collectively in representation of the conduct of the deceased in order to indicate any type of . . . pattern of acts that would establish that the deceased was the aggressor on February the 3rd of 1992. In other words, there is no commonality between the offered prior acts nor the acts of the deceased's conduct on February the 3rd, 1992, and, therefore, are not relevant.

Further, all the acts are individually, too remote in time to establish a commonality between the individual acts and the deceased's conduct on February the third. And collectively they do not establish any modus operandi nor signature of similar conduct indicating the deceased was the aggressor on February the 3rd of 1992, and, therefore, [are] also [ir]relevant on that basis.

It's the Court's feeling that the acts when considered individually and collectively are offered to show that the deceased had a propensity for violence and, therefore, must have been the aggressor, and the Court feels that the commentary to Rule 404(b) infers that according to the North Carolina Supreme Court in State v. Morgan at page 638, that evidence of a violent disposition to prove that a person was the aggressor in an affray is an impermissible use of evidence of other crimes and, therefore, not admissible under 404(b).

Further, this Court finds that even assuming, which the Court rules that it didn't, but even assuming that these acts individually or collectively were relevant and were admissible under 404(b), which the Court has held that they aren't, this Court finds that the probative value of these proffered exhibits, individually and collectively, is far outweighed by the prejudicial effect of their admissibility and their admission. And that they would only serve to show to the jury that the deceased was somewhat less worthy of living than someone who hadn't performed these relevant acts.

Rule 404(b) of the North Carolina Rules of Evidence provides:

(b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as

> proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). This rule is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

In determining that the evidence was not relevant for any of the listed purposes under Rule 404(b), the trial court was correctly governed by *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). Defendant had asserted that the evidence went directly to defendant's state of mind during the confrontation and was, thus, admissible. However, no showing was made that defendant was aware of Bowser's criminal past; hence, the fact that Bowser had assaulted a man nine years earlier or had committed burglary four years earlier "has no tendency . . . to make the existence of [defendant's] belief as to the apparent necessity to defend himself from an attack 'more or less probable than it would be without the evidence.' " *Morgan*, 315 N.C. at 639, 340 S.E.2d at 92, quoting N.C.G.S. § 8C-1, Rule 401. Had the evidence defendant sought to have admitted been to the effect that Bowser had pointed a gun at or threatened defendant in the recent past, such evidence would more likely have been relevant to support defendant's theory that Bowser was the aggressor in the affray and that defendant reacted justifiably in self-defense. *Morgan*, 315 N.C. at 639, 340 S.E.2d at 92 (holding that had the State's evidence shown defendant had pointed a gun at or threatened the victim at an earlier date, "such evidence would more likely be relevant as tending to show a plan or design or as negating defendant's claim the [victim's] attack on [defendant] was unprovoked").

Defendant's own stated purpose for offering the evidence was to show that Bowser, based on his prior crimes and other wrongful acts, was more likely the aggressor in the affray which led to the fatal shooting. Defendant was endeavoring to show that since Bowser had a history of criminal convictions and disciplinary infractions, he had a propensity for violence; therefore, he must have been the aggressor in the altercation with defendant. Rule 404(b) expressly prohibits admission of evidence for this purpose. The trial court did not err in

disallowing the evidence, and this assignment of error is without merit.

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

NO ERROR.

EDITH B. RAGAN AND CALVIN P. RAGAN v. JAMES T. HILL, ADMINISTRATOR OF THE ESTATE OF JERRY WAYNE THOMAS AND JOHN K. WILLIFORD

No. 296PA93

(Filed 9 September 1994)

Limitations, Repose, and Laches § 69 (NCI4th); Executors and Administrators § 103 (NCI4th)— claim against estate—not timely presented—no personal representative or collector appointed—claim not barred

A claim against an estate arising from an automobile collision was not barred because it was not timely presented where no personal representative or collector had been appointed. N.C.G.S. § 28A-19-3 requires that claims arising at or after the death of the decedent be presented to the personal representative or collector within six months after the date on which the claim arises; however, contrary to language in *Brace v. Strother*, 90 N.C. App. 357, this statute requires only that a claim be presented to the personal representative or collector and does not require the filing of an action in court. The statutory scheme presumes the appointment of a personal representative or collector to receive those claims and the legislature did not intend the non-claim statute to operate where no personal representative or collector has been appointed. Although N.C.G.S. § 28A-5-2 allows an interested person to apply to have entitled persons adjudged to have renounced and to then have letters of administration issued to some other person, this statute addresses the rights of various persons to administer the estate and there is no requirement that persons in plaintiffs' position have a personal representative appointed when no one entitled steps forward to administer the estate. N.C.G.S. § 28A-19-3 is a non-claim statute which serves a different purpose and operates independently of the statute of limitations, which may also be applicable.

Am Jur 2d, Executors and Administrators §§ 584 et seq., 633 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 110 N.C. App. 648, 430 S.E.2d 489 (1993), reversing and remanding a judgment entered by Read, J., in the Superior Court, Durham County, on 13 September 1991. Heard in the Supreme Court 3 February 1994.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and Robert E. Levin, for plaintiff-appellants.

Bryant, Patterson, Covington & Idol, P.A., by Lee A. Patterson, II, for defendant-appellee Hill; and Thompson, Barefoot & Smyth, by Sanford W. Thompson, IV, for unnamed defendant-appellee N.C. Farm Bureau Mutual Insurance Company.

FRYE, Justice.

In this appeal, plaintiffs contend that the Court of Appeals erred in holding that their personal injury action was barred because a claim was not presented to the personal representative of decedent's estate within six months of decedent's death. Plaintiffs further contend that defendant and plaintiffs' underinsured motorist carrier are estopped from asserting this time bar as a defense because they did not raise the defense until twenty-two months after the complaint was filed and after representing during discovery that no such defense was present. We find it unnecessary to address plaintiffs' estoppel argument since we conclude that the applicable statute does not operate in this case to bar plaintiffs' cause of action.

On 23 March 1986, Edith B. Ragan was driving an automobile owned by Mae White Womble along Highway 55 near Fuquay-Varina. Ragan sustained serious permanent injuries when a vehicle driven by Jerry Wayne Thomas veered into the path of the Womble vehicle, causing a head-on collision. Thomas died as a result of injuries suffered in the accident. It is undisputed that Thomas was negligent in the operation of his automobile and that his negligence resulted in serious personal injury to Ms. Ragan and a loss of consortium to Mr. Ragan. The collision also involved Dr. John K. Williford, whose vehicle collided into the rear of the Womble vehicle. Although Dr. Williford was a defendant in this case at trial, the jury found no negligence on his part and he is not a party to this appeal.

On 8 July 1988, plaintiffs initiated this action against James T. Hill, Administrator of Thomas' estate, and against Williford. Integon Insurance Company, Thomas' liability carrier, elected not to file an answer on defendant's behalf and admitted liability to the extent of its $25,000 policy limit. Nationwide Mutual Insurance Company, the underinsured motorist (UIM) carrier for the Womble vehicle, filed an answer on behalf of defendant Hill. Pursuant to N.C.G.S. § 20-279.21(b), the Ragans' UIM carrier, North Carolina Farm Bureau Insurance Company (Farm Bureau), also filed an answer in its own name denying any negligence on the part of Thomas and asserting a second defense of contributory negligence. On 6 July 1990, defendants Hill and Farm Bureau were granted leave to amend their answers to add a defense of statute of limitations. Prior to trial, defendants Hill and Farm Bureau filed motions for summary judgment which were denied. On 6 February 1991, Farm Bureau elected, pursuant to N.C.G.S. § 20-279.21(b), to appear and participate in the trial in the name of James T. Hill, Administrator of the Estate of Jerry Wayne Thomas.

The case came on for trial before Judge J. Milton Read, Jr. Defendant Hill moved for a directed verdict at the close of plaintiffs' evidence and again at the close of all the evidence. Judge Read denied both motions. On 13 September 1991, the jury returned a verdict in favor of Ms. Ragan in the amount of $325,000 for her personal injuries and in favor of Mr. Ragan in the amount of $10,000 for loss of consortium. Defendant Hill then filed a motion for judgment notwithstanding the verdict, and Judge Read denied that motion and entered judgment on the jury's verdict. Defendants Hill and Farm Bureau appealed.

The Court of Appeals reversed, holding that the case was indistinguishable from *Brace v. Strother*, 90 N.C. App. 357, 368 S.E.2d 447, *rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988), which held that a similar claim was barred by time limitations under N.C.G.S. § 28A-19-3. This statute has since been amended to provide that such claims are not barred where there is underinsured or uninsured motorist coverage that might extend to such claims. 1989 N.C. Sess. Laws ch. 485, § 65.

The version of N.C.G.S. § 28A-19-3 applicable in *Brace*, and in the instant case, provides:

> (b) All claims against a decedent's estate which arise at or after the death of the decedent, . . . founded on contract, tort, or

other legal basis are forever barred against the estate, . . . unless presented to the personal representative or collector as follows:

. . . .

(2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

. . . .

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; . . .

. . . .

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment.

N.C.G.S. § 28A-19-3(b)(2), (i)(1) (1984).

In *Brace v. Strother*, the plaintiff filed his personal injury action twenty-three months after an automobile accident in which he was injured and the defendants' son was killed. At the time of the accident the defendants' son had an automobile liability insurance policy providing up to $25,000 in bodily injury coverage. The plaintiff's automobile insurance policy provided up to $100,000 in UIM coverage. In his suit, the plaintiff sought damages from the defendants and from his own insurance carrier for the limits of the UIM coverage. The trial court granted the UIM carrier's summary judgment motion as to all the plaintiff's claims and granted the defendants' summary judgment motion for the plaintiff's claims in excess of $25,000. Applying the above statute, the Court of Appeals stated that

> [p]laintiff had an outside time limit of six months, or until 2 January 1985, to file an action against the decedent's estate. Since plaintiff did not initiate this action until 13 June 1986, he is clearly barred from recovering anything from the decedent's estate, except "to the extent that the decedent . . . is protected by insurance coverage with respect to such claim . . . ." N.C. Gen. Stat. § 28A-19-3(i) (1984). The decedent in this case had an automobile liability insurance policy with Nationwide with policy limits of $25,000 for bodily injury. Plaintiff may recover only up to this

amount if he prevails in his negligence action against decedent's personal representative or collector.

Brace, 90 N.C. App. at 360, 368 S.E.2d at 449. Following *Brace*, the Court of Appeals, in the present case, reversed the trial court's denial of defendant's motion for a directed verdict and vacated that part of the judgment greater than $25,000, the amount of the decedent's liability insurance.

In considering the application of *Brace* to the present case, it is necessary that we first clarify the nature and operation of section 28A-19-3. This section is the type of statute that is commonly referred to as a "non-claim statute." Though similar to a statute of limitations, it serves a different purpose and operates independently of the statute of limitations that may also be applicable to a given claim. Section 28A-19-3 is a part of Chapter 28A, entitled "Administration of Decedents' Estates," enacted in 1973 to provide faster and less costly procedures for administering estates. The time limitations prescribed by this section allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate. The statute also promotes the early and final resolution of claims by barring those not presented within the identified period of time.

Subsection (b) of section 28A-19-3 specifically requires that claims arising at or after the death of the decedent be presented to the personal representative or collector within six months after the date on which the claim arises. Section 28A-19-1 sets out the manner of presentation of claims including some circumstances under which the filing of an action in a court of law may constitute the presentation of a claim. N.C.G.S. § 28A-19-1 (1984). However, contrary to language from the Court of Appeals in *Brace*, section 28A-19-3 does not require the filing of an action in a court of law. *Brace*, 90 N.C. App. at 360, 430 S.E.2d at 449. Instead, the statute requires only that a claim be presented to the personal representative or collector within the stated period. The filing of an action is of course applicable to statutes of limitations which restrict the assertion of legal rights to a specific time period in order to avoid stale claims. The usual statute of limitations applicable to a personal injury action is three years as found in N.C.G.S. § 1-52(5). A cause of action may be barred by either or both of these statutes.

Under the above statutes, plaintiffs in the present case were required to present their claim to the personal representative or col-

lector of the estate within six months after the claim arose and then, if not satisfied with the response, to file their personal injury action within the three year statute of limitations. To the extent that *Brace* interprets § 28A-19-3 as requiring the filing of an action in court within six months after the claim arises, it is overruled.

Plaintiffs complied with the statute of limitations, but did not present their claim in accord with the non-claim statute. Plaintiffs contend, however, that their claim should not be barred by the non-claim statute since there was no "personal representative or collector of the estate" to whom a claim could be presented during the six months following the decedent's death. Plaintiffs argue that this fact distinguishes the present case from *Brace*, in which the decedent's parents did serve as collectors by affidavit pursuant to N.C.G.S. § 28A-25-1. Defendants, however, contend that this distinction is meaningless since the collector by affidavit is not a "personal representative or collector of the estate" as those terms are used in Chapter 28A.

The plaintiffs in *Brace* could have presented their claim to the collectors by affidavit, persons authorized by the Small Estates Article of Chapter 28A to pay claims against the estate to the extent that personal property of the decedent has been collected by them. N.C.G.S. § 28A-25-3(a) (1984). However, the Court of Appeals, in *Brace*, did not focus on the question of whether presenting a claim to the parents as collectors by affidavit would satisfy the non-claim statute but instead focused on whether a suit could be maintained against them in their representative capacity. Furthermore, according to the opinion in *Brace*, "[p]laintiff concede[d] that his recovery [was] limited to the amount of insurance applicable to this claim, since he filed suit more than six months after the decedent's death." *Brace*, 90 N.C. App. at 360, 368 S.E.2d at 449. Thus, we do not consider *Brace* as authority for this case where no one had been appointed or purported to act on behalf of the estate in any official capacity; thus, there was no "personal representative or collector of the estate" to whom a claim could have been presented within the six months following the death of the decedent.

Section 28A-19-3(b) requires that claims be presented "to the personal representative or collector." Under section 28A-19-1, presentation of a claim is accomplished by mailing or delivering "to the personal representative or collector" a written statement of the claim. N.C.G.S. § 28A-19-1 (1984). While the Uniform Probate Code and some other states allow claims to also be filed with the clerk of court,

Chapter 28A recognizes only presentment to the personal representative or collector. *See Uniform Probate Code* (U.L.A.) § 3-804(1); Colo. Rev. Stat. § 15-12-804(1) (1987); N.D. Cent. Code § 30.1-19-04(1) (3-804) (1976). Thus, our statutory scheme for handling claims against decedents' estates presumes the appointment of a personal representative or collector to receive those claims. We do not believe that the legislature intended the non-claim statute to operate where no personal representative or collector has been appointed.

This result is not in conflict with the purpose of the statute, the prompt and cost-effective administration of estates where no prior action has been taken to administer the estate. Plaintiffs' pursuit of their claim in the present case, more than two years after the claim arose, had no adverse impact on the timeliness of the administration of the decedent's estate, since no one had been appointed to administer the estate. Because there was no personal representative or collector against whom their claim could be asserted, plaintiffs requested that James T. Hill qualify as administrator. Once Hill was appointed administrator, plaintiffs were able to proceed with this action against Hill in his role as administrator pursuant to N.C.G.S. § 28A-18-1. If anything, plaintiffs' efforts to recover on their claim caused the administration of this estate to take place sooner than it otherwise would have. We further note that claimants who, like plaintiffs, find no personal representative to whom they may present their claims are not without some time limitations on actions to recover on their claims. As noted above, any action filed in a court of law will be subject to the applicable statute of limitations, in this case, three years. Further, N.C.G.S. § 28A-19-3(f) provides that any claims barrable under subsections (a) and (b) "shall, in any event, be barred if the first publication or posting of the general notice to creditors . . . does not occur within three years after the death of the decedent." N.C.G.S. § 28A-19-3(f) (1984).

Defendants argue that the present cause of action should be barred even though no personal representative had been appointed, because plaintiffs had the means to secure the appointment of a personal representative prior to the expiration of the non-claim period, citing N.C.G.S. § 28A-5-2. Section 28A-5-2 provides for the appointment of an administrator in cases where qualified persons renounce the right to apply for letters of administration. N.C.G.S. § 28A-5-2 (1984). This section specifically allows an interested person to apply to have entitled persons adjudged to have renounced and to then have letters of administration issued to some other person. This statute

addresses the rights of various persons to administer the estate, including allowing interested persons to "quicken [the] diligence" of persons primarily entitled to administration by applying to have some other person appointed. *Royals v. Baggett*, 257 N.C. 681, 682, 127 S.E.2d 282, 283 (1962). However, there is no requirement in this statute or elsewhere in Chapter 28A that persons in plaintiffs' position have a personal representative appointed when no one entitled to serve steps forward to administer the estate. We decline to judicially impose such a requirement under the facts of the present case.

We thus conclude that plaintiffs' cause of action is not barred for failure to present the claim to the personal representative within the time prescribed by N.C.G.S. § 28A-19-3(b) where no personal representative or collector had been appointed for the estate. For the reasons stated herein, the decision of the Court of Appeals is reversed, and the case is remanded for reinstatement of the judgment of the trial court.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. MARY RUTH WEBSTER

No. 358A93

(Filed 9 September 1994)

1. Constitutional Law § 325 (NCI4th)— speedy trial—length of delay—not per se determinative—trigger for examination of other factors

A delay of sixteen months from arrest to trial in a second-degree murder prosecution was not in itself enough to conclude that a constitutional speedy trial violation had occurred, but was clearly enough to cause concern and to trigger examination of other factors.

Am Jur 2d, Criminal Law §§ 654-659, 859-864.

2. Constitutional Law § 326 (NCI4th)— speedy trial—delay not caused by malevolent prosecutorial intention

A delay of sixteen months from arrest to trial in a second-degree murder prosecution was due largely to the operation of neutral factors and there was no showing that the prosecution willfully or through neglect or improper purposes delayed

defendant's trial where case was calendared but not called for either disposition of pretrial motions or trial six times; the case was continued once because of the judge's scheduling conflicts; the case was calendared but not heard on another occasion due to concerns about trying the case piecemeal during the Christmas holidays; the prosecutor's office was two or three assistants short during the pendency of the case, there were two capital cases pending, and there were a large number of cases in which defendants awaiting trial were incarcerated while defendant was free on bond; defendant was given five days credit on her sentence for time served awaiting trial; and this was a two week trial in which a number of witnesses were called both for the State and the defense, both sides presented forensic experts, and both sides relied largely on circumstantial evidence. Although the Supreme Court disapproved the practice of calendaring but not calling the case due to the waste of time, money, and resources of the State and private citizens, the practice alone did not demonstrate prosecutorial negligence or willfulness.

Am Jur 2d, Criminal Law §§ 654-659, 859-864.

3. Constitutional Law § 323 (NCI4th)— speedy trial—failure to assert right

Defendant's failure to assert her speedy trial claim sooner in the process did not foreclose the claim, but weighed against it, where she was arrested on 30 November 1989, there was a probable cause hearing on 9 January 1990, she was indicted on 29 January 1990, she did not formally assert her speedy trial right until she filed her demand on 28 January 1991 and her motion to dismiss on 4 February 1991, the motions were heard in February, 1991, and she was convicted in April, 1991.

Am Jur 2d, Criminal Law §§ 664, 665, 865-867.

Waiver or loss of accused's right to speedy trial. 57 ALR2d 302.

4. Constitutional Law § 325 (NCI4th)— speedy trial—defendant prejudiced, defense not impaired—no violation

There was no violation of defendant's constitutional right to a speedy trial where defendant suffered prejudice from a delay of sixteen months between arrest and trial in that she suffered anxiety, her employment was disrupted, her financial resources drained, her association with people in the community curtailed,

and her liberty impaired, but she conceded that she suffered no impairment of her ability to defend and she was released from jail on bond only five days after her arrest and remained free from that time until her sentence.

Am Jur 2d, Criminal Law §§ 654-659, 859-864.

Justice FRYE dissenting.

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. 72, 431 S.E.2d 808 (1993), finding no error in defendant's conviction and judgment at the 8 April 1991 Criminal Session of Superior Court, Johnston County, Hobgood, J., presiding. Heard in the Supreme Court 13 April 1994.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale and Jacquelyn L. Lee, for defendant-appellant.

EXUM, Chief Justice.

Defendant Mary Ruth Webster was convicted of second-degree murder, and Judge Hobgood imposed the presumptive sentence of fifteen years imprisonment. A majority of the Court of Appeals panel found no error in the trial. Judge Wells dissented on the ground defendant's constitutional right to a speedy trial had been violated. Defendant appealed on the basis of this dissent and petitioned for further review of additional issues. We denied defendant's petition for discretionary review of additional issues. The issue before us is whether the Court of Appeals majority correctly determined that defendant's constitutional right to a speedy trial was not violated. We conclude its decision on this issue was correct and affirm.

I.

On 30 November 1989 defendant Mary Ruth Webster was arrested for the murder of her husband, Melvin Braxton Webster. After a probable cause hearing on 9 January 1990 defendant was bound over for trial on a charge of second-degree murder. On 29 January 1990 the grand jury indicted defendant for first-degree murder.

On 10 January 1990 defendant filed a Request for Voluntary Discovery and on 17 January 1990, a Motion for Discovery. On 7 February 1990 defendant filed a Motion and Affidavit to Continue, based in part on the outstanding discovery motions. A response to the request for voluntary discovery was filed on 2 March 1990. On 8 March 1990 defendant filed motions for a list of the State's witnesses, to record all proceedings, and to determine aggravating factors prior to trial. On 9 March 1990 the State filed a supplemental discovery response and on 30 March 1990, a motion to compel discovery. On 3 July 1990 defendant filed eight additional motions, five of which related to the case's status as a capital prosecution; and on 23 August 1990 she filed a motion to compel discovery.

The District Attorney calendared the case for trial for court sessions beginning 12 February 1990, 12 March 1990, 2 April 1990, 9 July 1990, 30 July 1990, and 13 August 1990 for the purpose of resolving various pending motions and "working out a negotiated plea," yet he apparently never actually called the motions for hearing during these sessions.

Finally, on 4 September 1990, at a special session of court requested by the District Attorney, the District Attorney called this case for trial before the Honorable I. Beverly Lake, Jr., judge presiding. Judge Lake heard and ruled on several pending motions. He entered orders, among others, to compel certain discovery, for the production of witness statements, and to declare the case to be a non-capital prosecution. The State and defendant announced their readiness for trial, and eight jurors were selected. On Wednesday, 5 September 1990, Judge Lake continued the case *sua sponte*, citing the anticipated length of trial, his being scheduled to preside in another district the following week and possible problems for the eight jurors already seated. Defendant objected to the continuance.

The case was calendared, but not called for trial, at the 10 December 1990 session.

On 28 January 1991 defendant filed written demand for a speedy trial and moved to dismiss the indictment on due process grounds. On 4 February 1991 defendant moved to dismiss the indictment for denial of her constitutional right to a speedy trial. These motions were heard before the Honorable Wiley F. Bowen on 12 February 1991. Judge Bowen made findings of fact and conclusions of law and denied each motion in separate orders.

On the basis of the transcript, record, briefs and arguments of counsel, we conclude, as did the Court of Appeals, that Judge Bowen properly denied defendant's motion to dismiss on speedy trial grounds.

II.

Defendant argues she was denied her constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution and Article 1, Section 18 of the North Carolina Constitution. The United States Supreme Court has identified four factors "which courts should assess in determining whether a particular defendant has been deprived of his right" to a speedy trial under the federal constitution. *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972). These factors are: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of [the] right to a speedy trial, and (4) prejudice resulting from the delay." *State v. Willis*, 332 N.C. 151, 164, 420 S.E.2d 158, 163 (1992). We follow the same analysis in reviewing speedy trial claims under Article I, Section 18 of the North Carolina Constitution. *See State v. Jones*, 310 N.C. 716, 314 S.E.2d 529 (1984) and *State v. Avery*, 95 N.C. App. 572, 383 S.E.2d 224 (1989), *disc. rev. denied*, 326 N.C. 51, 389 S.E.2d 96 (1990).

A. Length of the Delay.

[1] The length of the delay is not *per se* determinative of whether a speedy trial violation has occurred. *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904, *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985). This Court has held a delay of twenty-two months between accusation and trial long enough to trigger consideration of the other factors. *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984). The United States Supreme Court has viewed even shorter delays sufficient to trigger examination of the other factors:

> Depending on the nature of the charges, the lower courts have generally found postaccusation delay "presumptively prejudicial" at least as it approaches one year. We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry.

Doggett v. United States, 505 U.S. ——, —— n.1, 120 L. Ed. 2d 520, 528 n.1 (1992) (citations omitted). In *State v. Kivett*, 321 N.C. 404, 410, 364 S.E.2d 404, 408 (1988), this Court determined that a 427 day delay

between indictment and trial was not "sufficient, standing alone, to constitute unreasonable or prejudicial delay."

The length of the delay in this case, from arrest to trial, was sixteen months. While not enough in itself to conclude that a constitutional speedy trial violation has occurred, this delay is clearly enough to cause concern and to trigger examination of the other factors. *State v. McKoy*, 294 N.C. 134, 141, 240 S.E.2d 383, 388 (1978).

B. Reason for the Delay.

[2] The defendant has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution. *State v. Marlow*, 310 N.C. 507, 521, 313 S.E.2d 532, 541 (1984). The transcript, record and the findings of the trial court do not reveal that the delay was due to prosecutorial negligence or willfulness. We are concerned that the District Attorney placed the case on the trial calendar six times from February through August 1990 without calling the case either for the disposition of pretrial motions or trial. This required repeated, futile preparation for trial and attendance at court by defendant and her witnesses and, presumably, the State and its witnesses. We expressly disapprove this practice because of the waste it causes of the State's and private citizens' time, money and resources; but we do not think the practice itself, nothing else appearing, demonstrates prosecutorial negligence or willfulness in delaying disposition of cases so calendared.

The District Attorney calendared the case during a special session of the 4 September 1990 court session and was prepared for trial. The case was continued on motion of the trial judge, through no fault of the prosecution or defense, because of the judge's scheduling conflicts and the anticipated length of trial. Although calendared for trial, the case was not heard at the 10 December 1990 session due to concerns about trying the two week case piecemeal over the Christmas holidays.

During the pendency of this case, the District Attorney's office was "sometimes two or three assistants short," there were two capital cases pending which consumed much of several intervening sessions of court and there were a large number of cases in which defendants awaiting trial were incarcerated.

Defendant filed her first demand for a speedy trial on 28 January 1991. The motion was denied, and the case went to trial on 8 April

1991, two months and eleven days later. The defendant was given five days credit on her sentence for time served awaiting trial.

This was a two week trial in which a number of witnesses were called both for the State and the defense. Both sides presented experts in forensic science, and both sides relied largely on circumstantial evidence.

Because of all the foregoing factors, we conclude there has been no showing that the prosecution willfully or through neglect or for improper purposes delayed defendant's trial. We do not condone the delay in trial that occurred here and urge both our prosecutors and defense counsel to work to see that our system of justice is not burdened with trial delays of this length. We conclude, nevertheless, that delay in this case was due largely to the operation of neutral factors and not to any malevolent intent on the part of the prosecution. *See State v. Tann*, 302 N.C. 89, 95, 273 S.E.2d 720, 724 (1981).

C. Assertion of the Right.

[3] Although failure to demand a speedy trial does not constitute a waiver of that right, it is a factor to be considered. In *Barker*, the United States Supreme Court stated that the assertion of the speedy trial right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18. However, the Court also emphasized "that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 532, 33 L. Ed. 2d at 118.

Defendant did not formally assert her speedy trial right until she filed her demand for it on 28 January 1991 and her motion to dismiss based on speedy trial grounds on 4 February 1991. These motions were promptly heard in early February 1991, and the case was scheduled for trial and tried in April 1991. Defendant's failure to assert her speedy trial right sooner in the process does not foreclose her speedy trial claim, but it does weigh somewhat against her contention that she has been unconstitutionally denied a speedy trial.

D. Prejudice to the Defendant.

[4] Finally, we consider whether defendant has suffered any prejudice as a result of the delay in her trial. The right to a speedy trial is designed:

(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Of these, the most serious is the last*, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Id. (emphasis added).

In this case, we are duly concerned by the trial court's finding that because of the delay in defendant's trial her "employment has been disrupted, her financial resources have been drained, her association with people in the community has been curtailed, her liberty has been impaired, and she has suffered anxiety." Although these are the kinds of things the speedy trial right exists to prevent, they do not loom as large as actual impairment of the defendant's ability to defend against the criminal charges themselves. As to this, the trial court found, "defendant has not been deprived of any defenses available to her and that all potential witnesses for defendant are still available." Defendant appears to concede that there has been no actual impairment of her ability to defend caused by the delay in trial.

Importantly, too, there was no oppressive pretrial incarceration inasmuch as defendant was released from jail on bond only five days following her arrest and has remained free on bond from that time until her trial and sentence.

While there has been some prejudice to defendant as found by the trial court caused by the delay in her trial, the weight of it in the balancing process is diminished by the absence of any impairment to her defense against the criminal charge and the absence of substantial pretrial incarceration.

After balancing the four factors—length of delay, cause of delay, assertion of the speedy trial right, and prejudice to defendant—we hold defendant's constitutional right to a speedy trial has not been violated and affirm the Court of Appeals' decision on this issue.

AFFIRMED.

Justice FRYE dissenting.

Believing that defendant's constitutional right to a speedy trial was violated, I vote to reverse the Court of Appeals and vacate the judgment of the trial court. I agree essentially with the reasoning set

forth in the dissenting opinion in the Court of Appeals, *State v. Webster*, 111 N.C. App. 72, 82, 431 S.E.2d 808, 814 (1993) (Wells, J., dissenting).

RUTHANN M. CAGE v. COLONIAL BUILDING COMPANY, INC. OF RALEIGH

No. 416PA93

(Filed 9 September 1994)

1. **Limitations, Repose, and Laches § 32 (NCI4th)— real property improvement statute of repose—person in possession and control exclusion—when applicable**

Subsection (d) of the real property improvement statute of repose, N.C.G.S. § 1-50(5), excludes from the six-year statute of repose in subsection (a) any person who is in possession or control of property at the time that person's negligent conduct proximately causes injury or damage to the claimant.

Am Jur 2d, Building and Construction Contracts § 114.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

2. **Limitations, Repose, and Laches § 29 (NCI4th)— negligent construction of townhouse—statute of repose—exclusion inapplicable—claim barred**

Plaintiff's claim for negligent construction and breach of warranty of a townhouse plaintiff purchased from defendant builder was barred by the six-year real property improvement statute of repose set forth in N.C.G.S. § 1-50(5)(a) where plaintiff purchased the townhouse from defendant more than six years before plaintiff brought her claim; defendant was no longer in possession or control of the property after plaintiff acquired title; and the exclusion in subsection (d) of the statute thus does not apply because defendant was not in possession or control when its allegedly negligent conduct proximately caused plaintiff's damage.

Am Jur 2d, Building and Construction Contracts § 114.

What statute of limitations governs action by contractee for defective or improper performance of work by private building contractor. 1 ALR3d 914.

On defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 111 N.C. App. 828, 433 S.E.2d 827 (1993), reversing an order dismissing plaintiff's complaint entered 20 May 1992 by Stephens (Donald W.), J., at the 18 May 1992 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 10 May 1994.

Petree Stockton, L.L.P., by Kevin L. Miller and M. Gray Styers, Jr., for plaintiff-appellee.

Joslin & Sedberry, by William Joslin and Nell Joslin Medlin, for defendant-appellant.

EXUM, Chief Justice.

This case arises out of the allegedly negligent construction by defendant Colonial Building Company, Inc., ("Colonial") of a townhouse subsequently purchased by plaintiff Ruthann Cage. Plaintiff purchased the townhouse more than six years before she brought this action. The question presented is whether the claim is barred by the six-year real property improvement statute of repose, N.C.G.S. § 1-50(5). We conclude the claim is barred and reverse the Court of Appeals' contrary decision.

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, N.C.R. Civ. P. 12(b)(6); therefore, we take all allegations of fact in the complaint 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 Rule 12(b)(6) motion to dismiss for failure to state a claim should not be granted unless it "appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 66 (1970). 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 by the statute. *Oates v. JAG, Inc.*, 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).

Plaintiff's complaint, filed in 1991[1], alleges: Plaintiff purchased her townhouse from Colonial on 7 December 1984. Colonial was in the business of building homes and was the owner of and general contractor for the townhouse when plaintiff purchased it. Water began leaking through the dining room ceiling of plaintiff's townhouse in October 1990 causing certain structural damage. The leakage was caused by improper and negligent construction on the part of Colonial. Repairs were completed in 1991 at substantial cost to plaintiff. The complaint, sounding in negligence and breach of warranty, seeks damages in excess of $10,000 for plaintiff's loss.

Colonial answered and moved to dismiss pursuant to Rule 12(b)(6). Judge Stephens allowed the motion on the ground the claim was barred by the six-year statute of repose found in N.C.G.S. § 1-50(5). The Court of Appeals reversed.

N.C.G.S. § 1-50(5) 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.
>
> . . . .
>
> (d) The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

N.C.G.S. § 1-50(5)(a),(d) (1983).

1. Plaintiff brought an action *pro se* against Colonial on 25 January 1991 in the Small Claims Division of Wake County District Court for recovery of her repair costs. By order entered 25 February 1991, the magistrate dismissed plaintiff's claim with prejudice. Plaintiff appealed. Subsequently plaintiff retained counsel and on 21 June 1991 filed an amended complaint against Colonial in District Court alleging negligence, breach of implied warranties and negligence per se and seeking recovery of damages in excess of $10,000.00. By consent order the action was transferred to Superior Court on 26 August 1991.

The Court of Appeals concluded that because Colonial was in control of the property at the time of its negligent conduct, if any, subsection (d) of the statute excluded plaintiff's claim from the provisions of subsection (a). Applying the ten-year statute of repose, N.C.G.S. 1-52(16), and the three-year statute of limitations, N.C.G.S. 1-52(5), the Court of Appeals held plaintiff's claim was not time-barred.

[1] We conclude that subsection (d) of the statute, by its terms, plainly excludes from subsection (a) any person who is in possession or control of property at the time that person's negligent conduct proximately causes injury or damage to the claimant. This interpretation comports with the purpose of the exclusion, which, we have held, is to place a continuing duty "to inspect and maintain premises" on persons who, after having constructed the property, remain in possession and control. *Wilson v. McLeod*, 327 N.C. 491, 517, 398 S.E.2d 586, 600 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991); *accord Lamb v. Wedgewood*, 308 N.C. 419, 432, 302 S.E.2d 868, 875 (1983) (purpose of exclusion is to preserve claims against those in possession or control who built improvement).

[2] At the time Colonial's conduct proximately caused damage to plaintiff, Colonial was not in possession or control of the property. Plaintiff could not have suffered injury or damage which was legally compensable until she acquired title to the property. Such injury or damage entails a compensable harm to a legally protected interest. Restatement (Second) of Torts § 902 (1970). *See also* W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 30, at 165 (5th ed. 1984); Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts*, § 16.91, at 212 (1991). Before plaintiff acquired title to the property, she had no legally protected interest which could have been harmed by Colonial's conduct. *See Motor Lines v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962); *Barbee v. Atlantic Marine Sales & Servs., Inc.*, 113 N.C. App. 80, 88, 437 S.E.2d 682, 686 (1993), *on reh'g*, 115 N.C. App. 641, 446 S.E.2d 117 (1994). After she acquired title to the property, Colonial was no longer in possession or control of the property. Therefore, at the earliest time at which plaintiff could have suffered damage (when she acquired title) Colonial was not in possession or control.

Since Colonial was not in possession or control when its allegedly negligent conduct proximately caused plaintiff's damage, the exclusion in subsection (d) of the statute does not apply. Because

Colonial's conduct occurred more than six years before plaintiff brought her claim, the six-year statute of repose in subsection (a) bars the claim.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

SYLVIA BROWN, INDIVIDUALLY AND AS EXECUTRIX, ESTATE OF EUNICE COLLINS NEAL v. NEIL O'TOOLE

No. 378PA93

(Filed 9 September 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. 265, 434 S.E.2d 248 (1993), reversing judgment entered by Stanback, J., at the 17 August 1992 Criminal Session of Superior Court, Durham County, and remanding the matter for further proceedings. Heard in the Supreme Court 12 May 1994.

Loflin & Loflin, by Thomas F. Loflin and Ann F. Loflin, for plaintiff-appellee.

Young Moore Henderson & Alvis P.A., by Walter E. Brock, Jr. and David M. Duke, for defendant-appellant.

Dameron & Burgin, by Charles E. Burgin, and Smith Helms Mulliss & Moore, L.L.P., by Jo Ann T. Harllee, for the North Carolina Bar Association, amicus curiae.

PER CURIAM.

Pursuant to *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994), the decision of the Court of Appeals is reversed.

REVERSED.

NATIONWIDE MUTUAL INSURANCE COMPANY and PLYMOUTH HOUSING AUTHORITY	)	
v.	)	ORDER
LARRY R. HENDERSON, DIANE HENDERSON and JEREMIAH H. BAZEMORE	)	

No. 332P94

(Filed 7 September 1994)

Upon consideration of plaintiffs' motion to dismiss defendants' petition for discretionary review, it appearing to the Court from the attachments to the motion that plaintiffs and defendants have compromised and settled all matters in controversy between them and that the motion should be allowed;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion to dismiss defendants' petition for discretionary review as moot be, and hereby is, allowed and defendants petition for discretionary review is dismissed.

By order of the Court in Conference, this 7th day of September, 1994.

s/Parker, J.
For the Court

STATE v. RITCHIE

[337 N.C. 688 (1994)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
STEVEN GEORGE RITCHIE	)	

No. 313P94

(Filed 8 September 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 21 June 1994, is vacated, and the case is remanded to the Court of Appeals for reconsideration in light of this Court's opinion in *State v. Bryant*, 337 N.C. 298, 446 S.E.2d 71 (1994).

By order of the Court in Conference, this 8th day of September, 1994.

s/Parker, J.
For the Court

BARBEE v. ATLANTIC MARINE SALES & SERVICE

No. 120P94

Case below: 113 N.C.App. 80

Petition by defendant (Mako Marine, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

BLUE RIDGE PRODUCTS, INC. v. MUNDAY

No. 289P94

Case below: 114 N.C.App. 665

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

BRYANT v. K-MART CORP.

No. 333P94

Case below: 115 N.C.App. 173

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

BURTON v. SEABOLT

No. 314P94

Case below: 115 N.C.App. 173

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

COLOMBO v. DORRITY

No. 315P94

Case below: 115 N.C.App. 81

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

CONE MILLS CORP. v. ALLSTATE INS. CO.

No. 311PA94

Case below: 114 N.C.App. 684

Petition by defendant for discretionary review pursuant to G.S 7A-31 allowed 8 September 1994; the case to be consolidated for briefing and argument with 355PA94 by order of the Court in conference.

CONE MILLS CORP. v. ALLSTATE INS. CO.

No. 355PA94

Case below: 115 N.C.App. 173

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 8 September 1994; the case to be consolidated for briefing and argument with 311PA94 by order of the Court in conference.

CROSSMAN v. MOORE

No. 327PA94

Case below: 115 N.C.App. 372

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 September 1994.

DAVIS v. PUBLIC SCHOOLS OF ROBESON COUNTY

No. 272P94

Case below: 115 N.C.App. 98

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

DEVEREUX PROPERTIES, INC. v. BBM&W, INC.

No. 283P94

Case below: 114 N.C.App. 621

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

DICKERSON CAROLINA, INC. v. HARRELSON

No. 303P94

Case below: 114 N.C.App. 694

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 8 September 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

DODD v. STEELE

No. 285P94

Case below: 114 N.C.App. 632

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

DONOHUE v. CONE MILLS CORP.

No. 323P94

Case below: 115 N.C.App. 397

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

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

No. 200P94

Case below: 114 N.C.App. 203

Petition by defendant (North Carolina Farm Bureau Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

FLOWERS v. BLACKBEARD SAILING CLUB

No. 383PA94

Case below: 115 N.C.App. 349

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 8 September 1994.

GARRITY v. MORRISVILLE ZONING BD. OF ADJUSTMENT

No. 391P94

Case below: 115 N.C.App. 273

Petition by defendants (Southport Business Park & Morrisville) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994. Motions by plaintiffs (Johathan Garrity d/b/a Cambridge Hanover Aviation Parkway Associates and Browning-Ferris Industries, Inc.) to dismiss, or in the alternative, to strike petition for discretionary review denied 8 September 1994. Motion by plaintiff (Browning-Ferris Industries, Inc.) for sanctions denied 8 September 1994.

HILL v. MORTON

No. 368PA94

Case below: 115 N.C.App. 390

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 September 1994.

HOUSTON & ASSOC. v. COUNTY OF BRUNSWICK

No. 299P94

Case below: 114 N.C.App. 504

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

HOWARD v. TRAVELERS INSURANCE COS.

No. 354P94

Case below: 115 N.C.App. 458

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

HUGHES v. YOUNG

No. 362P94

Case below: 115 N.C.App. 325

Petition by defendant (Samuel K. Young) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

IN RE APPEAL OF R. W. MOORE EQUIPMENT CO.

No. 337P94

Case below: 115 N.C.App. 129

Petition by petitioner (R. W. Moore Equipment Company, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

IN RE WILL OF JONES

No. 301P94

Case below: 114 N.C.App. 782

Petition by caveator (Herbert C. Mitchener, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

JAMES FARMS, INC. v. CITY OF STATESVILLE

No. 282P94

Case below: 114 N.C.App. 665

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

JUSTICE v. PORTER

No. 175P94

Case below: 114 N.C.App. 266

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

KRAFT FOODSERVICE, INC. v. HARDEE

No. 325PA94

Case below: 111 N.C.App. 928

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 September 1994.

KELLY v. BRADLEY

No. 310P94

Case below: 114 N.C.App. 819

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

MACKINS v. MACKINS

No. 287P94

Case below: 114 N.C.App. 538

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

McLEOD v. NATIONWIDE MUTUAL INS. CO.

No. 352P94

Case below: 115 N.C.App. 283

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

MEDINA v. MEDINA

No. 340P94

Case below: 115 N.C.App. 493

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

MINTON v. LOWE'S FOOD STORES

No. 384P94

Case below: 115 N.C.App. 398

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

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

No. 351P94

Case below: 115 N.C.App. 398

Petition by defendant (N.C. Farm Bureau Mutual Ins. Co.) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

MUSSELWHITE v. HOUSEHOLD INTERNATIONAL, INC.

No. 371P94

Case below: 115 N.C.App. 398

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 September 1994.

NAEGELE OUTDOOR ADVERTISING v. CITY OF WINSTON-SALEM

No. 158A94

Case below: 113 N.C.App. 759

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 September 1994.

NATIONSBANK OF N.C. v. AMERICAN DOUBLOON CORP.

No. 264P94

Case below: 114 N.C.App. 505

Petition by defendants (Parsons and RPC) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

NATIONWIDE MUT. FIRE INS. CO. v. BANKS

No. 300P94

Case below: 114 N.C.App. 760

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

N.C. INSURANCE GUARANTY ASSN. v. CENTURY INDEMNITY CO.

No. 373P94

Case below: 115 N.C.App. 175

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

OLIVE v. OLIVE

No. 215P94

Case below: 114 N.C.App. 269

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

SIZEMORE v. MacFIELD TEXTURING, INC.

No. 370P94

Case below: 115 N.C.App. 398

Motion by defendant to withdraw petition for discretionary review allowed 19 August 1994.

SMITH v. ALLEGHANY COUNTY DEPT. OF SOCIAL SERVICES

No. 290P94

Case below: 114 N.C.App. 727

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

SMITH v. RIGGSBEE

No. 434P94

Case below: 115 N.C.App. 729

Petition by defendants (Don L. Smith and Clymer Smith) for writ of supersedeas and motion for temporary stay denied 8 September 1994. Petition by defendants (Don L. Smith and Clymer Smith) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 September 1994.

STATE v. CONNELLY

No. 210P94

Case below: 114 N.C.App. 269

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 September 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

STATE v. FISHER

No. 62A93

Case below: 336 N.C. 684

Motion by defendant for reconsideration of the decision of this Court and temporary stay of mandate denied 8 September 1994.

STATE v. HAUSER

No. 350PA94

Case below: 115 N.C.App. 431

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 September 1994.

STATE v. HUGHES

No. 288P94

Case below: 114 N.C.App. 742

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

STATE v. ROBINSON

No. 381P94

Case below: 115 N.C.App. 358

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

STATE v. SCHOFIELD

No. 186P94

Case below: 114 N.C.App. 267

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

STATE v. SHORES

No. 243P94

Case below: 114 N.C.App. 666

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 September 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

TRANSAMERICA INS. CO. v. WOODY'S RESTAURANT & TAVERN

No. 294P94

Case below: 114 N.C.App. 820

Petition by defendants (Woody's Restaurant & Tavern and Tony A. Williams, Sr.) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

UNITED SERVICES AUTOMOBILE ASSN. v. GAMBINO

No. 302P94

Case below: 114 N.C.App. 701

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

WHITE v. DAVENPORT

No. 277P94

Case below: 114 N.C.App. 667

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

WILLIAMS v. PALEY

No. 360P94

Case below: 114 N.C.App. 571

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

ZENNS v. HARTFORD ACCIDENT AND INDEMNITY CO.

No. 345P94

Case below: 115 N.C.App. 482

Petition by plaintiff (Gerald Zenns) for discretionary review pursuant to G.S. 7A-31 denied 8 September 1994.

STATE OF NORTH CAROLINA v. MICHAEL McGAY REEVES

No. 193A92

(Filed 6 October 1994)

1. **Criminal Law § 478 (NCI4th)— first-degree murder—sentencing hearing—judge's communication with jury foreperson—continuance of deliberations—food for jury—absence of other jurors**

There was no prejudicial error in a first-degree murder sentencing hearing where the foreperson returned to the courtroom late in the day after deliberations had begun and indicated that the jury would like to deliberate at least another hour and, when the judge indicated that dinner could be brought in, requested drinks and something light. There was no discussion of matters material to the case which the foreperson could have conveyed to the other members of the jury.

Am Jur 2d, Trial §§ 1562 et seq.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-*Parker* cases. 35 ALR4th 890.

2. **Evidence and Witnesses § 2171, 290 (NCI4th)— first-degree murder—sentencing hearing—psychiatric expert—cross-examination—other offenses—basis for opinion**

The trial court did not abuse its discretion in a sentencing hearing for first-degree murder by allowing the State to ask a psychiatrist questions on cross-examination which revealed rapes and assaults by defendant in Virginia and Tennessee. The witness testified that he had used the evidence of the Tennessee and Virginia crimes in forming his opinion as to defendant's condition, which made it relevant under N.C.G.S. § 8C-1, Rule 705. Whether evidence should be excluded under N.C.G.S. § 8C-1, Rule 403 as being more prejudicial than probative is within the discretion of the judge.

Am Jur 2d, Evidence §§ 404 et seq.; Expert and Opinion Evidence §§ 75 et seq.

3. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing hearing—Virginia convictions and sentences—excluded as mitigating evidence

The trial court did not err in a first-degree murder sentencing hearing by excluding from the evidence a certified copy of defendant's Virginia convictions and sentences and precluding his arguing that they were mitigating evidence.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Evidence and Witnesses § 2899 (NCI4th)— first-degree murder—sentencing hearing—psychiatrist—defendant's adjustment in prison—cross-examination—escape attempt

There was no error in a first-degree murder sentencing hearing where a psychiatrist who had examined defendant testified that defendant had functioned well for more than a year in jail and that with medication and treatment "would be safe" in a prison setting, and the State was allowed to ask the witness on cross-examination whether it would affect his opinion if he had heard that defendant had attempted to escape from prison in Virginia. Although N.C.G.S. § 8C-1, Rule 705 allows a party to elicit evidence of the underlying facts of a witness' opinion, it does not restrict a party from asking otherwise proper questions and there has been no suggestion that this question was not asked in good faith.

Am Jur 2d, Witnesses §§ 484 et seq.

5. Indigent Persons § 19 NCI4th)— first-degree murder—sentencing hearing—appointment of psychiatrist with particular expertise—denied—no error

The trial court did not err in a sentencing hearing for first-degree murder by refusing to appoint a psychiatrist with expertise in sexual disorders where defendant said at the hearing on his motion for the appointment of such a person that he would rely on his serious sexual disorder as a defense; he asked the court to appoint a particular psychiatrist from Johns Hopkins; the court asked if defendant had an alternate and defendant gave the court the name of a general forensic psychiatrist in Chapel Hill; the court appointed that psychiatrist; and defendant contends that the appointed psychiatrist did not provide the constitutionally required assistance. There is no showing in the record that a psychiatrist specializing in sexual problems could have

been any more explicit than the appointed psychiatrist, and the appointed psychiatrist testified that he had consulted with a PhD in psychology who specialized in sex problems, who was in the courtroom, and who would testify, and defendant decided not to call that witness, telling the jury that the appointed expert had covered everything.

Am Jur 2d, Criminal Law § 1006.

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

6. Criminal Law § 1067 (NCI4th)— first-degree murder —sentencing hearing—evidence of character of victim and impact on victim—no error

There was no error in a first-degree murder sentencing hearing where a witness testified that the victim was a good wife and mother, a good person who always went to church and would do anything for anyone, and who died not knowing what happened to her two-and-a-half-year-old child. The testimony was not barred by the United States Constitution because it was not so prejudicial that it made the trial fundamentally unfair, it was not excludable under N.C.G.S. § 8C-1, Rule 402 because it was relevant to give the jury information as to all the circumstances of the crime, and N.C.G.S. § 8C-1, Rule 404 had no application because the evidence was not offered to show that the witness acted in conformity with the crime. While evidence of a victim's character may not by the strictest interpretation be relevant to any given issue, the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far.

Am Jur 2d, Criminal Law §§ 598, 599.

7. Evidence and Witnesses § 740 (NCI4th)— first-degree murder—sentencing hearing—victim's family members and friends—identified to jury—no error

There was no plain error in a first-degree murder sentencing hearing where the district attorney identified to the jury several family members and friends of the victim.

Am Jur 2d, Appeal and Error §§ 797-803.

8. Evidence and Witnesses §§ 2539, 2542 (NCI4th)— first-degree murder—sentencing hearing—testimony of victim's daughter—two-and-a-half years old at time of crime, five years old at time of sentencing—admissible

There was no error in a first-degree murder sentencing hearing in the admission of the testimony of the victim's daughter, who was two-and-a-half years old at the time of the killing and five years old at the time of the hearing. There is no age below which one is incompetent as a matter of law to testify, and the court was able to see the witness and determine whether she could express herself. Although defendant contended that the child would be incompetent at five if she was incompetent at two-and-a-half, the child could remember what she had observed and be better able to articulate it when she was older.

Am Jur 2d, Witnesses §§ 88 et seq.

Witnesses: child competency statutes. 60 ALR4th 369.

9. Evidence and Witnesses § 2540 (NCI4th)— first-degree murder—sentencing hearing—child witness—understanding of duty of witness to tell truth

The trial court did not err in a first-degree murder sentencing hearing by admitting the testimony of the victim's two-and-a-half-year-old daughter, who was five at the time of the hearing, where the daughter testified in effect that a person could be punished for not telling the truth. While she did not answer on some occasions when asked about the difference between telling the truth and not telling the truth, the court could have found from all of the testimony that the child understood the duty of a witness to tell the truth.

Am Jur 2d, Witnesses §§ 88 et seq.

Witnesses: child competency statutes. 60 ALR4th 369.

10. Evidence and Witnesses § 2538 (NCI4th)— five-year-old witness—testimony from stepmother's lap—no error

There was no error in a first-degree murder sentencing hearing where the prosecutor requested that the victim's daughter, five years old at the time of the hearing, be allowed to testify while sitting on her stepmother's lap; the court warned the stepmother that she must not intimate in any way to the child how she should testify; and the court put in the record after the testimony

was complete that the stepmother had followed the court's instructions. Although a court should be cautious in allowing this procedure, this court had observed the witness and the Supreme Court could not say that the trial court was wrong in allowing a procedure which it felt would promote the ability of the witness to testify truthfully.

Am Jur 2d, Witnesses §§ 88 et seq.

Propriety and prejudicial effect of third party accompanying or rendering support to witness during testimony. 82 ALR4th 1038.

11. Evidence and Witnesses § 542 (NCI4th)— first-degree murder—sentencing hearing—testimony of victim's daughter—relevant

The trial court did not err in a first-degree murder sentencing hearing by admitting the testimony of the victim's five-year-old daughter, who was in another room of their home when the victim was killed. Although defendant contended that the testimony was not relevant under N.C.G.S. § 8C-1, Rule 401 because the only aggravating circumstance submitted was whether defendant had previously been convicted of a felony involving the use or threat of violence, the testimony as to the circumstances of the victim's death did "throw light" on the crime, which makes it relevant.

Am Jur 2d, Homicide §§ 245 et seq., 578 et seq.

12. Evidence and Witnesses § 90 (NCI4th)— first-degree murder—sentencing hearing—testimony of victim's daughter while sitting in stepmother's lap—not more prejudicial than probative

The trial court did not err in a first-degree murder sentencing hearing by not excluding as more prejudicial than probative testimony from the victim's five-year-old daughter delivered from her stepmother's lap. Although defendant contended that the testimony concerned only background matters and was only cumulative while the manner in which it was introduced was highly inflammatory, the Supreme Court paid deference to the ruling of the trial judge and could not say that he committed error in the admission of otherwise relevant testimony because of the manner in which the testimony was presented.

Am Jur 2d, Evidence §§ 324 et seq.

13. Evidence and Witnesses § 931 (NCI4th)— first-degree murder—sentencing hearing—statement of victim's daughter—excited utterance

The trial court did not err in a first-degree murder sentencing hearing by allowing the victim's mother-in-law to testify that on the morning of the murder she went to the victim's home, where the victim's two-and-a-half-year-old daughter came to the door and said, "Mama is asleep. Mama is dead." The statement by the daughter was made a few hours after the murder, she had been through a startling experience which suspended reflective thought, and her statement was a spontaneous reaction not resulting from fabrication. It was an excited utterance and was admissible as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2).

Am Jur 2d, Evidence § 865.

When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed 451.

14. Jury § 142 (NCI4th)— first-degree murder—sentencing hearing—jury selection—accountability to victim's family—not staking jury out

There was no plain error in a first-degree murder sentencing hearing where the prosecutor asked questions during jury selection which defendant argued suggested that the jury was accountable to the victim's family and staked the jury out. It was not error to tell the jury it should be fair to the victim and her family; a jury should be fair to all persons interested in a case and it was proper to tell them so.

Am Jur 2d, Jury §§ 201, 202.

15. Jury § 122 (NCI4th)— first-degree murder—sentencing hearing—jury selection—prosecutor's questions—defendant's intoxication—jury not staked out

There was no plain error in jury selection in a first-degree murder sentencing hearing where the prosecutor asked several questions of the jury to the effect that, if they found the defendant had a diminished capacity because of the consumption of alcohol, would they consider before finding this mitigating circumstance that the defendant knew when he consumed alcohol that its use affected him. This was a proper question; the prose-

cutor did not attempt to stake the jury out as to what their answer would be on a hypothetical question.

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.

16. Jury § 123 (NCI4th)— first-degree murder—sentencing hearing—jury selection—prosecutor's questions—death penalty

There was no plain error during jury selection in a first-degree murder sentencing hearing where the prosecutor asked on eleven occasions whether the jury would be willing to vote for death. Although the defendant contends that these questions contained inadequate and misleading statements of law, he reads the questions too narrowly. The death penalty procedures were explained in detail to the jury before and after the prosecuting attorney asked the disputed questions and an attorney cannot be expected to incorporate in every question all the qualifications which govern the death penalty. Although the questions had a tendency to stake the jurors out by asking how they would vote on a hypothetical situation, it was not error for the court not to have intervened *ex mero motu*.

Am Jur 2d, Jury §§ 201, 202.

17. Jury § 147 (NCI4th)— first-degree murder—sentencing hearing—jury selection—prosecutor's statement—death penalty case—no error

It was not error for the prosecutor to say during jury selection in a first-degree murder case that this was a death penalty case where defendant contended that this was an expression of the prosecutor's opinion, but this was, in fact, a death penalty case.

Am Jur 2d, Jury §§ 201, 202.

18. Jury § 147 (NCI4th)— first-degree murder—sentencing hearing—jury selection—prosecutor's statement—death penalty or work release

A misstatement by a prosecutor during jury selection for a first-degree murder prosecution was not so egregious that it required the court to intervene *ex mero motu* where the prosecu-

tor stated that "the twelve of you that sit on this jury will recommend either work release or [the] death sentence in this case," but immediately before and immediately after that statement told the prospective jurors they would be recommending either a life or a death sentence.

Am Jur 2d, Jury §§ 201, 202.

19. Jury § 132 (NCI4th)— first-degree murder—sentencing hearing—jury selection—prosecutor's statement—absence of victim

There was no error during jury selection for a first-degree murder sentencing hearing where the prosecutor asked whether the jury would be influenced by the victim not being there for them to see while the defendant was there. Although defendant argued that the prosecutor misled the jury by telling them that they could not consider the defendant's courtroom presence, appearance, and demeanor, the thrust of the argument was for the jury not to be unduly influenced by the absence of the deceased victim.

Am Jur 2d, Jury §§ 201, 202.

20. Jury § 141 (NCI4th)— first-degree murder—sentencing—jury selection—questions concerning parole

There was no error during jury selection for a first-degree murder sentencing hearing where the court denied defendant's motion to question jurors regarding their conceptions as to parole eligibility and, when two of the jurors asked about defendant's eligibility for parole, instructed them not to consider parole in their deliberations.

Am Jur 2d, Jury §§ 201, 202.

21. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—comfortable prison life

There was no plain error in a first-degree murder sentencing hearing where the prosecutor argued that defendant, if sentenced to life, would lead a comfortable life in prison. If the prosecutor used some hyperbole to describe life in prison, it was not so egregious as to require the court to intervene *ex mero motu*.

Am Jur 2d, Trial §§ 554 et seq.

22. Criminal Law § 461 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—memory of victim's daughter—general knowledge

There was no plain error in a first-degree murder sentencing hearing where the prosecutor argued that the victim's daughter, who was two-and-one-half years old and present in the home when the killing occurred, would probably begin to remember more of the events. Although defendant contended that there was nothing in the record to support the argument, the prosecutor was arguing what he considered to be general knowledge.

Am Jur 2d, Trial §§ 609 et seq., 664 et seq.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.

23. Criminal Law § 463 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—defendant's sexual disorder—supported by evidence

There was no error in a first-degree murder sentencing hearing where the prosecutor argued that defendant's sexual disorder had not come up until he was in his twenties when he was caught in Virginia for abducting a park worker. Although defendant argued that all of the evidence showed that defendant's disorder was a long-standing problem, there was testimony that defendant's disorder was first revealed in a forensic evaluation when he was arrested in Virginia.

Am Jur 2d, Trial §§ 554 et seq.

24. Criminal Law § 433 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—reference to defendant as predator

There was no plain error in a first-degree murder sentencing hearing where the prosecutor referred to defendant as a predator.

Am Jur 2d, Trial §§ 681, 682.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

25. Criminal Law § 461 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—aggravating and mitigating circumstances

There was no plain error in a first-degree murder sentencing hearing in the prosecutor's argument concerning balancing aggravating and mitigating circumstances where defendant contended that it was error for the prosecutor to argue that the jury could consider other factors than the aggravating and mitigating circumstances found in determining whether the aggravator outweighed the mitigating circumstances, but any error was not so egregious as to require the court to intervene *ex mero motu*.

Am Jur 2d, Trial §§ 609 et seq.

26. Criminal Law § 468 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—previous convictions

There was no plain error in a first-degree murder sentencing hearing where defendant contended that it was error for the prosecutor to argue prior rape and kidnapping convictions as reasons for imposing the death penalty when the court had ruled that these were not to be considered as substantive evidence but only as factors on which a medical expert based his opinion. The prosecuting attorney did not dwell on this part of his argument.

Am Jur 2d, Trial §§ 609 et seq.

27. Criminal Law § 454 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—defendant's responsibility

There was no plain error in a first-degree murder prosecution from the prosecutor's argument that defendant had written his own death warrant when he brutalized and killed the victim. Although defendant contended that the prosecutor was leading the jury to believe that the responsibility for the imposition of the death penalty lay elsewhere, the prosecutor argued that the defendant had brought the death penalty on himself and the jury should not have deduced that it was their responsibility to impose the death penalty.

Am Jur 2d, Trial §§ 567 et seq.

28. Criminal Law § 1056 (NCI4th)— first-degree murder—sentencing hearing—allocution—greater distance from jury than attorneys

There was no error in a first-degree murder sentencing hearing where defendant was allowed to address the jury, but the court moved the podium from before the jury box, where the attorneys made their arguments, to a place in front of the defendant's table. Although defendant says that the court showed the jurors that it thought defendant was an extremely dangerous individual who posed a risk to the jurors' safety, it was not an error for the court to make the distinction because defendant was not an attorney and his speech should not have been considered in the same light as the speeches of the attorneys.

Am Jur 2d, Criminal Law § 531.

29. Criminal Law § 1338 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—elimination of witness—no plain error

There was no plain error in a first-degree murder sentencing hearing where defendant contended that the prosecutor travelled outside the record to argue that the killing was done to eliminate a witness, but the prosecutor mentioned not leaving a witness or killing a witness and did not explicitly refer to witness elimination in the language of the aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599.

30. Criminal Law §§ 1357, 1360 (NCI4th)— first-degree murder—sentencing hearing—mitigating circumstances not found—evidence not uncontradicted

There was no error in a first-degree murder sentencing hearing where the jury did not find the mitigating circumstances that the murder was committed under the influence of mental or emotional disturbance or that defendant's capacity to appreciate the criminality of his conduct was impaired. Although defendant contends that a jury cannot refuse to find and consider a statutory mitigating circumstance which is supported by uncontradicted and credible evidence, the evidence in regard to these two mitigating circumstances was not uncontradicted.

Am Jur 2d, Criminal Law §§ 598, 599.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

31. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing hearing—instructions—nonstatutory mitigating circumstances—mitigating value required

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that they could refuse to find any nonstatutory mitigating circumstance which they found did not have mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

32. Criminal Law § 1328 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstances not found—no violation of Eighth Amendment

There was no violation of the Eighth Amendment in a first-degree murder sentencing hearing where the jury failed to find five nonstatutory mitigating circumstances which defendant says were supported by uncontradicted and manifestly credible evidence and had mitigating value.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

33. Criminal Law § 1328 (NCI4th)— first-degree murder—sentencing—failure to find mitigating circumstances—influence of passion, prejudice, and arbitrary circumstances

The Supreme Court did not find error in a first-degree murder sentencing hearing where defendant contended that the verdict was imposed under the influence of passion, prejudice, and arbitrary factors because the jury failed to find any mitigating circumstances, although defendant contended that the circumstances were supported by uncontradicted and manifestly credible evidence.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

34. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—prior felony involving violence

The trial court did not err in a first-degree murder sentencing hearing by charging the jury that they could find the aggravating circumstance of a prior felony involving violence if they found that defendant had been convicted of second-degree rape and

assault with a deadly weapon inflicting serious injury. Although defendant contended that this instruction relieved the jury from proving every element of the offense in that second-degree rape does not always involve the threat or use of violence, the defendant had stipulated that the assault and rape had involved cutting the victim with a knife.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

35. Criminal Law §§ 1357, 1360 (NCI4th)— first-degree murder—sentencing—mitigating circumstances—mental or emotional disturbance—impaired capacity

The trial court did not err in a first-degree murder sentencing hearing in its instructions on impaired capacity and mental or emotional disturbance where defendant contended that the court limited the jury's consideration of disturbances and sources of impairment, but the court instructed the jury that they could consider "any other mental or emotional disturbance or personality disorder."

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.

Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

36. Jury § 226 (NCI4th)— first-degree murder—sentencing hearing—opportunity to rehabilitate juror denied—no error

There was no error in a first-degree murder sentencing hearing where the trial court refused to allow defendant to rehabilitate a juror whom the State challenged for cause. There was no showing that further questioning by defendant would have produced a different answer from that given to the court.

Am Jur 2d, Jury §§ 289, 290.

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

37. Jury § 262 (NCI4th)— first-degree murder—sentencing hearing—peremptory challenges—reservations about death penalty

There was no error in a first-degree murder prosecution where the trial court allowed the State to use peremptory challenges to remove jurors who had expressed reservations about the death penalty but who could not have been challenged for cause.

Am Jur 2d, Jury §§ 289, 290.

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

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

A sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the record supports the finding of the aggravating circumstance on which the death penalty was based, and the sentence was not excessive or disproportionate where defendant entered the home of a person he did not know; ordered her to send her two-and-a-half-year-old child from the room; forced her to undress and sexually assaulted her using two different types of instruments, including one with a sharp edge capable of inflicting an incised wound found within her vagina; a bloody footprint and bloodstains on the soles of the victim's foot indicated she had stepped in blood at some point during the assault; the defendant placed a pillow over the victim's face, pressed the barrel of a pistol hard against the pillow and pulled the trigger; the victim died as the result of a single gunshot wound to the head; the terror of the victim can be imagined as she went through this torture, knowing all the while that her two-and-a-half-year-old child was in the home and subject to the brutality she was suffering; and the jury heard evidence that defendant had raped and assaulted a woman a few years previously and shortly after being released from prison had raped again, this time also brutally murdering his victim.

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 by Phillips, J., at the 4 May 1992 criminal session of Superior Court, Carteret County, upon a jury verdict after the defendant had pled guilty to murder in the first degree. Heard in the Supreme Court 11 October 1993.

The defendant pled guilty to first-degree murder and no contest to first-degree sexual offense. He was tried by a jury to determine the punishment on the murder plea. The evidence showed the defendant went to the door of a house occupied by Susan Toler and her husband. Mrs. Toler was at home with her two-and-a-half-year-old daughter at that time.

The defendant forced his way into the home and ordered Mrs. Toler to send her child to another room, which she did. The defendant then forced Mrs. Toler to undress and sexually assaulted her. The defendant used at least two sharp tools to assault Mrs. Toler and she suffered five wounds in her vaginal area. The defendant then forced her to lie on the floor at which time he put a pillow over her head and shot her to death.

The jury found one aggravating circumstance. Three statutory and fifteen nonstatutory mitigating circumstances were submitted to the jury and none of the jurors found any of them. The jury recommended a death penalty which was imposed.

The defendant appealed.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, and Rudolph A. Ashton, III, for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to what he contends was an improper communication by the court with the foreman of the jury out of the presence of the other jurors. After the jury had been deliberating for approximately two hours, the judge had them returned to the courtroom at 5:10 p.m. He asked the jury if they would like to break for the evening or whether they wanted to continue their deliberation. At the request of the jury, the judge allowed the jury to return to the jury room to decide whether they wanted to continue deliber-

ating. The judge told the jury at that time that he would have dinner brought to the jury room for them if they wanted him to do so. The jury then retired. The foreman returned to the courtroom and the following colloquy occurred:

> THE COURT: Yes, sir.
>
> JUROR HOOKER: Your Honor, we would like to have at least another hour or so maybe.
>
> THE COURT: We are here at your pleasure. You remain as long as you like and let us know if at any time you would like to take a recess or take a break. If you would like us to order dinner for you for the evening, simply let us know that. Whenever you want us to furnish that for you, it will take about a half hour, 45 minutes.
>
> JUROR HOOKER: They said maybe some drinks and some crackers, something light would be about it, I guess.
>
> THE COURT: All right. We'll do that for you now.
>
> [PROSECUTOR]: Judge, are you going to let them give her [the bailiff] a drink and cracker order? Perhaps if they will write it out. If anybody needs to make a phone call.
>
> THE COURT: Just give them 6 Cokes and 6 Pepsis.
>
> [PROSECUTOR]: Some people might want diet. Let her write it out. Can we then be back at ease, Judge?
>
> THE COURT: Sure. . . . I would like to get [some] things in the record if I may, please, ma'am. Show that there are no jurors present . . . .

At 6:25 p.m. the jury returned to the courtroom and rendered its verdict.

The defendant argues that the judge's communication with the foreman in regard to whether the jury wanted to continue their deliberations and whether they wanted food brought to them without the other jurors present was reversible error. He says, relying on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), that this violated his right to a unanimous verdict guaranteed by Article I, Section 24 of the Constitution of North Carolina. In *Ashe*, we held that it was reversible error not to bring the whole jury to the courtroom before hearing the

foreman's request to be allowed to review certain testimony. In that case we said:

> Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. . . .

314 N.C. at 36, 331 S.E.2d at 657.

This case is distinguishable from *Ashe*. The judge's conversation with the jury foreman concerned whether the jury would break their deliberations and whether the jury would be furnished a meal. There was no discussion of matters material to the case which the foreman could have conveyed to the other members of the jury. Any error was harmless beyond a reasonable doubt. *State v. Harrington*, 335 N.C. 105, 436 S.E.2d 235 (1993).

This assignment of error is overruled.

[2] The defendant next assigns error to the court's allowing the State to ask certain questions on cross-examination of Dr. Billy Royal, a psychiatrist appointed by the court to examine the defendant. The defendant called Dr. Royal as a witness. Dr. Royal testified that in his opinion the defendant suffers from substance and alcohol abuse. Dr. Royal also testified that in his opinion the defendant has a borderline personality disorder which is a significant illness that begins in early childhood, but may not manifest itself for a number of years. It features suicide attempts, losing control of one's self, having difficulty with relationships and a great many short term relationships and jobs and having problems with sexual identity.

Dr. Royal testified that in his opinion the defendant was also suffering with organic brain syndrome, provisional, which means the defendant may have something organically wrong with his brain. Finally, Dr. Royal testified that in his opinion the defendant suffered from sexual paraphilia, which was manifested by a long history of sexual difficulty, conflicts, problems and behavior. He testified that the defendant is very confused about his sexual orientation and has a huge conflict and huge amount of animosity at some deep level relat-

ed to women. Dr. Royal testified further that the defendant could control his behavior when he was not consuming alcohol. Dr. Royal testified that in his opinion the defendant's behavior is such that at times he is not in control or does not have insight into what he is doing. Dr. Royal testified that one fact on which he based his opinion was that approximately eight months after the defendant had murdered Susan Toler, he kidnapped, raped and cut a woman in Virginia for which he was given two life sentences plus 110 years in prison.

During the cross-examination of Dr. Royal the following colloquy occurred:

> Q. [Y]ou referred earlier, Dr. Royal, to an incident that occurred in the State of Virginia for which he was prosecuted. Were you provided with the facts of that occurrence by any source?
>
> A. I was provided that information by [defendant], and I am not certain that I reviewed it otherwise.
>
> . . . .
>
> Q. Dr. Royal, when [defendant] told you about the incident in Virginia in October of 1989 some eight months after he had murdered Susan Toler, did he tell you that he kidnapped a woman—
>
> [DEFENSE COUNSEL]: Your Honor, for the record we would object again for the reasons we stated.
>
> THE COURT: Yes, sir. Overruled.
>
> Q. —who was a secretary in a park service office, who was a stranger to him, raped her, sodomized her, and then cut her throat and left her for dead?
>
> A. He told me that—I am not sure about the cutting her throat. He indicated she was cut and he left her. The terms left her for dead were never used or the concept was never used, but he—the other information he indicated to me, yes, sir.
>
> . . . .
>
> Q. . . . . Did you also testify that [defendant] had related other acts of violence against women to you that you used as a basis for the opinions you have expressed to this jury?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> . . . .

A. . . . [defendant] did in fact discuss two other incidents in which he's involved with assaultive behavior toward women.

Q. Did you use those or include those in your opinions . . . in this case?

A. Yes, I did.

Q. Did they occur around this same period of time?

A. Yes.

Q. Were they in Virginia or North Carolina?

A. As I understand, they were in Tennessee.

Q. And what activity did they involve?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

A. They involved two episodes occurring within 24 hours, as I understand it, of rape of two other women.

Prior to the defendant's resting his case, the court instructed the jury as follows:

You will recall that you have heard testimony concerning certain matters involving the defendant in Tennessee and in Virginia and you have heard testimony concerning the particular facts of events in Virginia concerning a park service employee, a secretary.

I instruct you now that this evidence may be considered by you only as you find it to bear upon the issue of the basis for Dr. Royal's opinion regarding the mental and emotional condition of the defendant. It may not be considered by you for any other purpose. It may not be considered by you as an aggravating factor in the case. Do all of you understand that instruction? Is there anyone who does not? Will all of you follow that instruction, understand and follow that instruction? Let me know that by just raise [sic] your hands, because if there are any questions about it, I need to know that.

Then I would indicate that the jurors understand and can follow the instruction.

The defendant contends it was error to allow this testimony by Dr. Royal as to other crimes. N.C.G.S. § 8C-1, Rule 705 (1992) 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.

Although Dr. Royal testified that he used the evidence of the rapes and assaults in Virginia and Tennessee as facts on which he based his opinion, which would make them admissible under Rule 705, the defendant nevertheless says it was error to admit this testimony. He says the questions were asked not to test the soundness of Dr. Royal's opinion, but to put before the jury evidence that the defendant had committed other heinous crimes.

The defendant says that the testimony should have been excluded under N.C.G.S. § 8C-1, Rule 403 (1992) which says:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The defendant says the probative value of the evidence of the out-of-state crimes is slight in relation to the impact of the evidence if considered for other purposes. He argues that this evidence is more prejudicial than probative and it should have been excluded under Rule 403. Whether evidence should be excluded under this rule as being more prejudicial than probative is within the discretion of the superior court judge. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). The witness testified that he used the evidence of the Tennessee and Virginia crimes in forming his opinion as to the defendant's condition. This made it relevant under Rule 705. We cannot hold that the court's ruling was so arbitrary that it could not have been the result of a reasoned decision. We cannot hold the court abused its discretion. *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

This assignment of error is overruled.

[3] The defendant next assigns error to the exclusion from substantive evidence of a certified copy of his Virginia convictions and sentences and the preclusion of his arguing that the convictions and sentences were mitigating evidence. In *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded*, — U.S. —, 122 L. Ed. 2d 113, *aff'd in*, 334 N.C. 615, 433 S.E.2d 746 (1993), *vacated and remanded*, — U.S. —, 129 L. Ed. 2d 888 (1994), we held that evidence that the defendant had been convicted and was serving a sentence for another crime is not mitigating evidence. It was not error to exclude it in this case. This assignment of error is overruled.

[4] The defendant next assigns error to certain questions asked of Dr. Royal on cross-examination. Dr. Royal testified that the defendant had functioned well for more than a year in the Craven County jail and that with medication and treatment he believed the defendant "would be safe" in a prison setting. The following colloquy then occurred on cross-examination:

> Q. Dr. Royal . . . [d]o you know whether or not [defendant] has ever tried to escape from jail anywhere?
>
> A. Without having specific recall of that, it seems to me there was some suggestion of that once, but I don't—
>
> . . . .
>
> [DEFENSE COUNSEL]: Objection.
>
> Q. Does that refresh your recollection or not?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. I don't recall ever seeing any factual data on that, so I don't have any knowledge of that, except . . . seems to me, I have heard that on one occasion. But I have no data that I can give you on that.
>
> Q. You have heard that he tried to escape from jail—
>
> [DEFENSE COUNSEL]: Objection.
>
> Q.—but you don't have any specific data. Is that your statement, Dr. Royal?
>
> THE COURT: Overruled.

A. I have heard that he may have. I have not heard in fact that he did.

Q. Would that not have some substantial bearing on his adjustments to prison life, would you say, if he in fact has a documented escape attempt?

A. Well, I don't—again, I don't know the history of that. . . .

The defendant argues that this testimony was not admissible under N.C.G.S. § 8C-1, Rule 705 because only evidence of facts which the witness uses in forming his opinion may be elicited pursuant to that section. Although Rule 705 allows a party to elicit evidence of the underlying facts of a witness' opinion, it does not restrict a party from asking otherwise proper questions. The district attorney asked the witness in this case whether it would affect his opinion that the defendant would adjust well to prison if he had heard the defendant had attempted to escape from prison in Virginia. There has been no suggestion that this question was not asked in good faith. It was well within the scope of proper cross-examination. This assignment of error is overruled.

[5] The defendant next contends it was error not to appoint for him a psychiatrist with expertise in sexual disorders. The defendant made a motion for the appointment of such a person. At the hearing on the motion, the defendant said that he would rely on his serious sexual disorder as a defense. He asked the court to appoint Dr. Fred Berlin, a psychiatrist who directs the Sexual Disorders Clinic at Johns Hopkins University in Baltimore, Maryland, an expert in sexual disorders. The court asked if he had an alternative and the defendant furnished the court with the name of Dr. Billy Royal of Chapel Hill, North Carolina, who specializes in forensic psychiatry generally.

The defendant says that Dr. Royal's performance as the appointed expert showed that he did not provide the constitutionally required assistance. He bases this argument on Dr. Royal's testimony that the defendant had "sexual paraphilia not otherwise designated" and that this sexual disorder affected defendant's behavior. He could not say why defendant committed the crimes he committed, but he was able to control his action until 1985 and then exploded with sexual violence. The defendant argues that this showed Dr. Royal's assistance to him was not constitutionally sufficient.

The first difficulty with this argument by the defendant is that there is nothing in the record which shows a psychiatrist specializing

in sexual problems could have been any more explicit than Dr. Royal. Without such a showing, we cannot say Dr. Royal, a forensic psychiatrist, was inadequate in his help to the defendant.

The second reason the defendant must fail in this assignment of error is shown in the record. Dr. Royal testified that he had consulted with Dr. Faye Sultan, a PhD in psychology, who specialized in dealing with patients with sex problems. Dr. Sultan was in the courtroom and Dr. Royal said she would testify and would go into defendant's sexual fantasy life in more detail.

After Dr. Royal had completed his testimony, the defendant decided not to call Dr. Sultan as a witness. The defendant's attorney told the jury, "[w]e made the decision Dr. Royal's testimony covered everything we needed to." We can only conclude from this that a person who specialized in dealing with sexual problems could not have added anything to Dr. Royal's testimony. This assignment of error is overruled.

[6] The defendant next assigns error to the admission of testimony that the victim "was a very good person. She always went to church. She loved her children. She was a good wife and mother. And she was just a very good person, would do anything for anybody, and she died not knowing what happened to her two-and-a-half-year-old child." The defendant contends that this was a victim impact statement which should have been excluded.

The United States Supreme Court in *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991), recently overruled *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440 (1987) and *South Carolina v. Gathers*, 490 U.S. 805, 104 L. Ed. 2d 876, *reh'g den*ied, 492 U.S. 938, 106 L. Ed. 2d 636 (1989), and held that a victim impact statement may be admitted at a capital sentencing proceeding unless the evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." 501 U.S. at 825, 115 L. Ed. 2d at 735. The evidence of the impact of the victim's death on her family was not so prejudicial that it made the trial fundamentally unfair. The testimony was not barred by the United States Constitution.

The defendant argues that the testimony should have been excluded under N.C.G.S. § 8C-1, Rule 402 and Rule 404(a)(2). Rule 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitu-

> tion of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

This evidence was relevant to give the jury information as to all the circumstances of the crime. There is nothing in the Constitution of the United States or North Carolina, any Act of Congress or the General Assembly or the Rules of Evidence which requires its exclusion. The evidence was not excludable under Rule 402.

Rule 404 provides:

> (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, except:
>
> . . . .
>
> (2) Character of victim. —Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

Rule 404 deals with the offering of evidence of a person's character to show he acted in conformity therewith. That is not why the evidence was offered in this case. Rule 404 has no application to this case.

While evidence of a victim's character may not by the strictest interpretation be relevant to any given issue, the State should be given some latitude in fleshing out the humanity of the victim so long as it does not go too far. The State should not be permitted to ask for the death sentence because the victim is a "good person," any more than a defendant should be entitled to seek life imprisonment because the victim was someone of "bad character." The State did not do so in this case.

The cases upon which the defendant relies are not helpful to him. In *State v. Quick*, 329 N.C. 1, 25, 405 S.E.2d 179, 194 (1991), we held that testimony in the guilt phase of the trial that the victim was a good man who helped people in the community was harmless error. In *State v. Laws*, 325 N.C. 81, 118, 381 S.E.2d 609, 631 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *death sentence aff'd*, 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), we relied on *Booth* to say a reference by the district attorney to the victims and their families was harmless error. *Booth* has now been overruled. In *State v. Page*, 215 N.C. 333, 1 S.E.2d 887 (1939), we granted a new trial after the defendant had been convicted of rape. The prosecuting witness testified at length about her background in such a way that we said would arouse sympathy for her and prejudice against the defendant in the minds of the jurors. There is no such danger in this case.

This assignment of error is overruled.

[7] The defendant next assigns error to the district attorney's identifying to the jury several members of the family and friends of the victim. During jury selection, the district attorney pointed to "a group of folks seated . . . [in] the courtroom" and identified them as "Susan Toler's family and close friends." He specifically identified several of them and directed her husband to stand up. On several other occasions, he referred to the family members and on one occasion had the victim's husband and two children stand. He also referred to the victim's family during his argument to the jury. The defendant did not object to this, but contends this procedure was used only to prejudice him and is plain error requiring a new trial.

In *State v. Laws*, 325 N.C. at 103, 381 S.E.2d at 622, we held it was not error to identify members of the victim's family who were in the courtroom. This assignment of error is overruled.

[8] The defendant's next assignment of error deals with the testimony of the victim's daughter, Lisa Toler, who was two-and-a-half-years-old at the time of the murder and five years old at the time of the sentencing hearing. The court held a hearing outside the presence of the jury to determine whether the child was competent to testify. At the request of the prosecuting attorney, Lisa was allowed to sit in her stepmother's lap while testifying.

Lisa testified under questioning by the prosecutor that her name was "Lisa Toler;" that she was five-years-old; that she lived with her father and stepmother; that she attended school at Vanceboro Farm Life Elementary School; that her teachers were "Mrs. Wright and Ms. Jackson"; that she went to church with her family and grandmother, but did not know the name of the church; that she knew the difference between telling a lie and telling the truth; that if one tells a lie, "[s]ometimes you get punished, and sometimes you get a whipping"; that she remembered the day her mother died; and "some" of the

things that happened that day; and, that she would tell the truth about what she remembered. On cross-examination, Lisa indicated that she was two-and-one-half-years-old when her mother died. When asked again if she could tell the difference between "telling the truth and lying," Lisa at first answered "yes," but then paused when the question was repeated a number of times. Lisa continued to testify on cross-examination that the principal at her school was "Mr. Bowers," and that she was in kindergarten. When asked again if she could relate the difference between telling the truth and lying, Lisa then responded, "[w]hen you tell lies, sometimes you get punished and sometimes you get a whooping. When you tell the truth, you don't get a whooping and you don't get punished." Lisa recalled that she talked to the prosecutor, but did not remember how many times or when was the last time. Lisa answered that she remembered what happened to her mother, but did not remember if anyone wrote down what she said about her mother's death. In response to a leading question, Lisa indicated that she sometimes forgets what happened to her mother.

The court made findings of fact consistent with this testimony and concluded that the child understood the duty of a witness to tell the truth and was competent to testify. It also concluded that the child's testimony would relate to the last moments of the victim's life and would be helpful to the jury in determining the issues it would have to decide. The court found that any prejudice to the defendant would be outweighed by the value of the testimony to the jury. The court said it had observed the child testify while sitting in her stepmother's lap and her stepmother had not influenced the child in any way and the stepmother could continue to offer the child nourishment and comfort by allowing her to sit in her lap while testifying to the jury.

Lisa's stepmother was then sworn as a witness and identified to the jury. Lisa testified before the jury from her stepmother's lap that she remembered her mother and the day that her mother died; that she and her mother were at home that day; that she was watching television in the living room, and her mother was in the kitchen when Lisa heard someone knock at the door; that her mother did not hear the knock, and when Lisa told her someone was at the door, her mother told her to go into the bathroom; that her mother then went to answer the door; that Lisa hid in the bathroom as instructed, and her mother opened the door; and, that Lisa did not see or hear her mother open the door. Lisa answered that she did not know what happened next, and she did not respond when asked if someone had

entered the bathroom where she was hiding. Lisa also indicated that she did not see the man who entered her mobile home, and that she did not remember anything else that happened that day. Lisa testified that she had forgotten what she earlier had told the prosecutor. Lisa answered that it "hurt" to think about what happened that day, and it made her sad.

The defendant first says under this assignment of error that the undisputed evidence showed that the child was not a competent witness. He says that her age of two-and-a-half years at the time of the murder shows she did not have the capacity to understand facts or relate what happened and if she was then incompetent she was just as incompetent to do so three years later. The defendant also argues that the testimony of the child showed she was incompetent as a witness. He bases this part of his argument on what he says was her inability on five separate occasions to answer when asked the difference between telling the truth and lying.

N.C.G.S. § 8C-1, Rule 601 provides in part:

> (a) *General Rule.*—Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) *Disqualification of witness in general.*—A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

We have said that "[t]here is no age below which one is incompetent as a matter of law to testify." *State v. Eason*, 328 N.C. 409, 426, 402 S.E.2d 809, 818 (1991). The court was able to see the witness and determine whether she could express herself. The transcript indicates that she could do so. We know that a five-year-old child can tell what she has observed. We disagree with the defendant's contention that if the child was incompetent to be a witness when she was two-and-a-half years of age, she would be incompetent at five years of age. She could remember what she had observed and be better able to articulate it when she was older.

[9] We also believe the evidence at the hearing supports the court's finding that the child understood the duty of a witness to tell the truth. She testified in effect that a person could be punished for not telling the truth. She did not answer on some occasions when asked

about the difference between telling the truth and not telling the truth, but the court could have found, which it did, from all the testimony that the child understood the duty of a witness to tell the truth. We cannot hold that it was error to find that Lisa was competent to testify.

[10] The defendant next argues under this assignment of error that it was error to allow Lisa to testify to the jury while sitting on her stepmother's lap. The prosecuting attorney requested that this be done which was allowed by the court. The court warned the stepmother that she must not intimate in any way to the child as to how she should testify. After the testimony was complete, the court put in the record a finding that the stepmother had followed the court's instructions.

The defendant contends that it was error to allow this procedure because there was no showing that it was necessary. He says that this was a very prejudicial way of presenting the child's testimony and without any showing that it was necessary should not have been allowed.

This is apparently a case of first impression in this jurisdiction. It has arisen in other states. *See Commonwealth v. Pankraz*, 382 Pa.Super. 116, 125, 554 A.2d 974, 979, *appeal denied*, 522 Pa. 618, 563 A.2d 887 (1989). Implicit in the allowance of the motion to let Lisa sit in her stepmother's lap while testifying was the court's finding that the child would be more at ease and be able to testify better if it was done. Although a court should be cautious in allowing this procedure, we cannot say it was error in this case to allow it. The court had observed the witness and we cannot say the court was wrong in allowing a procedure which it felt would promote the ability of this witness to testify truthfully.

[11] The defendant argues finally under this assignment of error that Lisa's testimony was not relevant under N.C.G.S. § 8C-1, Rule 401 (1992) and should have been excluded under N.C.G.S. § 8C-1, Rule 402 (1992). He also says the testimony was more prejudicial than probative and should have been excluded under N.C.G.S. § 8C-1, Rule 403 (1992).

The defendant says the only aggravating circumstance that was submitted was whether the defendant had previously been convicted of a felony involving the use or threat of violence and Lisa's testimony was not relevant to that or to any element of the State's case. We

have said, "every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L. Ed. 2d 1044 (1966). Lisa's testimony as to the circumstances of her mother's death did "throw light" on the crime, which makes it relevant.

[12] The defendant also says this testimony was more prejudicial than probative and should have been excluded for that reason. He says this is so because her testimony concerned only background matters and was only cumulative while the manner in which it was introduced with a five-year-old girl sitting in her stepmother's lap was highly inflammatory. In passing on this assignment of error, we must pay a substantial deference to the ruling of the judge. We cannot say he committed error in the admission of otherwise relevant testimony because of the manner in which the testimony was presented.

This assignment of error is overruled.

[13] The defendant next assigns error to what he contends was the admission of hearsay testimony. The victim's mother-in-law testified that on the morning of the murder she went to the victim's home. Lisa came to the door and said, "Mama is asleep. Mama is dead." The defendant says this testimony by the mother-in-law was inadmissible hearsay.

We hold that this statement by a two-and-a-half-year-old child was an excited utterance and was admissible as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2) (1992). In *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985), we held that a witness could testify to a statement made to her by her four-year-old granddaughter that the defendant had sexually molested her. We said the testimony was properly allowed as an excited utterance. In *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988), the Court of Appeals held that a statement made ten hours after the event by a four-year-old child that the defendant pulled her pants down and "touched my pee patch again" was admissible as an excited utterance.

In this case, the statement by Lisa was made a few hours after the murder. She had been through a startling experience which suspended reflective thought. Her statement was a spontaneous reaction not resulting from fabrication. This assignment of error is overruled.

[14] The defendant next assigns error to questions asked by the prosecuting attorney during jury selection. The defendant did not object

to any of the questions so we shall consider them under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The defendant contends there are six different areas in which the prosecuting attorney crossed the line of what is permissible on jury *voir dire*.

The defendant says first that on at least eight occasions, the prosecuting attorney asked questions or made statements substantially as follows:

> The jury must not only "apply the law in this case fairly to the [defendant] but also to the Toler family and to Susan Toler."
>
> . . . .
>
> Being a juror "is important to [defendant], but it is important to Susan Toler and her family."
>
> . . . .
>
> Could you "give the [defendant] a fair hearing and the State and Susan Toler a fair hearing?"

The defendant argues that it was a misstatement of the law to suggest the jury was accountable to the victim's family. *State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985). It was not error to tell the jury it should be fair to the victim and her family. This did not, as the defendant contends, stake the jury out. A jury should be fair to all persons interested in a case and it was proper to tell them to do so.

[15] The defendant next argues that in questioning the jury in regard to the mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," N.C.G.S. § 15A-2000(f)(6) (1988), the prosecuting attorney asked questions which improperly staked the jury out not to find this mitigating circumstance.

The defendant had asked the jury whether they would consider intoxication as a mitigating circumstance. The prosecuting attorney asked several questions of the jury to the effect that if they found the defendant had a diminished capacity because of the consumption of alcohol, would they consider before finding this mitigating circumstance that the defendant knew when he consumed alcohol that its use affected him. The defendant, relying on *State v. Leroux*, 326 N.C. 368, 384, 390 S.E.2d 314, 325, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d

155 (1990), says these questions improperly staked the jury out not to find the diminished capacity mitigating circumstance.

In *Leroux*, we held it was not error not to allow a defendant to ask a prospective juror, "[d]o you have such strong feelings about the use of alcohol that you couldn't be fair to someone that you believed to be an alcoholic?" *Id.* at 383, 390 S.E.2d at 325. We said that counsel is not permitted to "fish" for legal conclusions or argue the case to the jury during the jury *voir dire* and for that reason there was no error in prohibiting the question. We said that it is within the discretion of the court as to the extent of an inquiry on jury *voir dire*.

In this case, the prosecuting attorney asked the jurors if they would consider that the defendant voluntarily consumed alcohol in determining whether he was entitled to the diminished capacity mitigating circumstance. This was a proper question. He did not attempt to stake the jury out as to what their answer would be on a hypothetical question.

[16] The defendant next argues that it was error for the prosecuting attorney on eleven different occasions to ask the following questions.

> If you believe death to be the appropriate sentence, would you be willing to vote to impose death in this case?
>
> . . . .
>
> You realize that if you get to that point where you look at those aggravating and mitigating factors regardless of what the numbers are and say "we have got a capital sentencing law in this case and there are aggravating factor or factors here and this is one of those cases where the death sentence is the appropriate sentence," would you vote to impose the death sentence in this case?

The defendant says these two questions contained inadequate and misleading statements of the law. He says first that jurors cannot vote for death simply because they believe it appropriate. He says further that the questions did not contain any explanation of the manner and procedures under which a death sentence is imposed. We believe the defendant reads the questions too narrowly. The death penalty procedures were explained in detail to the jury before and after the prosecuting attorney asked the disputed questions. The jury should have understood that it was under these procedures that the appropriateness of the death penalty must be determined. An attorney cannot be expected to incorporate in every question all the qualifications

which govern the death penalty. He can rely on these qualifications and procedures being otherwise explained.

We agree with the defendant that the questions had a tendency to stake the jurors out by asking how they would vote on a hypothetical situation. *See State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). We cannot hold, however, that it was error for the court not to have intervened *ex mero motu*.

[17] The defendant says next that it was error for the prosecuting attorney to say during jury selection that this was a death penalty case. The defendant contends that this was an expression of the prosecutor's personal opinion. This is in fact a death penalty case. The defendant was tried to determine whether he would receive the death penalty. It was not error for the prosecuting attorney to say so.

[18] The defendant next says it was error requiring a new sentencing hearing for the prosecuting attorney to say, "the 12 of you that sit on this jury will recommend either work release or [the] death sentence in this case." Immediately before making this statement and immediately afterwards, the prosecutor told the prospective jurors they would be recommending either a life or death sentence. This misstatement by the prosecuting attorney was not so egregious that it required the court to intervene *ex mero motu*.

[19] Finally, the defendant argues under this assignment of error that it was error for the prosecutor to make the following statement to the jury:

> Now, you know Susan Toler is not here for you to see to look at, the defendant is, and during the course of the several days this hearing will take, do you feel like that would affect or influence your recommendation?

The defendant says it is well settled that a juror may consider a defendant's courtroom presence, appearance, and demeanor in reaching a decision. *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). He says it was error for the prosecutor to mislead the jury by telling them they could not do so. The thrust of this statement by the prosecuting attorney was for the jury not to be unduly influenced by the absence from the courtroom of the deceased victim. This was a proper statement.

This assignment of error is overruled.

[20] The defendant's next assignment of error involves the court's rulings on matters in regard to parole eligibility. The court denied the defendant's motion to question the jurors in regard to their conceptions of parole eligibility. During jury selection two of the jurors asked about the defendant's eligibility for parole and the court instructed them in accordance with *State v. Conner*, 241 N.C. 468, 85 S.E.2d 584 (1955), not to consider parole in their deliberations. The defendant concedes that these rulings are in accord with our decisions, but asks us to change the law in this regard. This we decline to do. This assignment of error is overruled.

[21] The defendant's next assignment of error deals with what he contends was prosecutorial misconduct during jury argument. The defendant did not object to any of the matters in the jury argument to which he now assigns error and we must examine them under the plain error rule. We also note that a party is given a broad latitude in jury argument and it is not error for a court not to intervene *ex mero motu* unless the impropriety is glaring or grossly egregious. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1.

The defendant first argues under this assignment of error that the prosecutor argued things outside the record in three ways. First, he told the jury that if sentenced to life imprisonment, the defendant would have a "cozy little prison cell . . . with [a] television set, air conditioning and three meals a day" and that his prison cell would be "heated and air conditioned." The defendant says there was no evidence in the record as to the condition of any prison cell in which the defendant would be incarcerated. The prosecuting attorney was arguing that the defendant would lead a comfortable life in prison. If he used some hyperbole to describe that life it was not so egregious as to require the court to intervene *ex mero motu*.

[22] The defendant next argues there was nothing in the record to support the prosecutor's argument when discussing Lisa Toler's lack of memory in which he said, "she'll probably begin to remember more of [the events]. [S]ome people think a child's mind is like a piece of film. It records it and it develops it later." The prosecutor was arguing what he considered to be general knowledge, which he could do. This argument was not so egregious that it required *ex mero motu* intervention.

[23] The third place the defendant says the prosecutor went outside the record is when he was arguing the defendant's sexual disorder and said, "[w]ell, first of all, that never came up until when? It never

came up until he got caught in Virginia for abducting the park service worker. . . . [W]ould have been in his mid twenties is the first time that came up." The defendant argues that all the evidence showed that defendant's sexual disorder was a long-standing problem which manifested itself long before his arrest in Virginia. Dr. Royal testified on cross-examination that it was not until the defendant's arrest in Virginia "that he first revealed in a forensic evaluation or alleged that he had been sexually abused[.]" This would support the argument by the prosecutor.

[24] The defendant next argues that he is entitled to a new sentencing hearing because the prosecuting attorney referred to him as a predator. He says, relying on *State v. Hamlet*, 312 N.C. 162, 172, 321 S.E.2d 837, 845 (1984), that this Court has repeatedly condemned prosecutorial arguments which compare defendants to members of the animal kingdom. In *Hamlet*, we said that while we do not condone comparisons of criminal defendants to members of the animal kingdom, the reference to the defendant as an animal in that case was not so egregious as to require the judge to intervene *ex mero motu*. Following the precedent of *Hamlet*, we hold it was not reversible error for the court not to intervene *ex mero motu* in this case.

[25] The defendant next contends it was reversible error for the prosecuting attorney to make the following argument:

> But I say to you that even if you do find . . . every one of them and you put them on the scales and you put what you know about this man and that aggravating factor on the other side and you begin to weigh the two, who he is, the life he has chosen to live, his prior record of violence, I say to you folks, greatly outweighs, greatly outweighs what they are arguing to you mitigates the punishment in this case.

The defendant, relying on *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), argues that the jury must make its decision based solely on the aggravating and mitigating circumstances found and it was error for the prosecuting attorney to argue that the jury could consider other factors in determining whether the aggravator outweighed the mitigators in this case. Assuming the defendant is correct in this argument, we hold the reference by the prosecutor to matters which were not in evidence was not so egregious as to require the court to intervene *ex mero motu*. The court properly instructed the jury as to how to treat aggravating and mitigating circumstances found.

[26] The defendant next argues that it was error for the prosecutor to argue the defendant's rape and kidnapping convictions as reasons for imposing the death penalty after the court had ruled these were not to be considered as substantive evidence but only as factors on which the medical expert based his opinion. The prosecuting attorney did not dwell on this part of his argument and again we cannot hold it was so egregious that the court should have intervened *ex mero motu*.

[27] Finally, the defendant says the following argument was improper:

> Today is [defendant's] judgment day. The way he's lead [sic] his life, ladies and gentlemen, he has written his own judgment. On February 6th, 1989, [defendant] wrote his own death warrant when he killed and brutalized Susan Toler. And that death warrant that he has wrote is here before you folks to sign, to make legal.

The defendant says that this argument improperly caused jurors to believe that it was the defendant and not they who was responsible for the death verdict. He says this violates the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), that the jury cannot be led to believe that the responsibility for the imposition rests elsewhere. We disagree. The prosecutor argued that the defendant had brought the death penalty on himself. The jury should have in no way deduced from this that it was not their responsibility to impose the death penalty.

This assignment of error is overruled.

[28] The defendant next assigns error to the requirement by the court that he allocute from a different position than the position from which the attorneys argued. The defendant notified the court that he would like to allocute and the court allowed him to address the jury after his attorney had made an opening address and the prosecuting attorney had addressed the jury, but before the defendant's attorney had made his final argument. There was a podium before the jury box from which the attorneys made their arguments which the court had moved to a place in front of the defendant's table from which position the defendant made his allocution.

The defendant says that by requiring him to allocute from a greater distance from the jury than the distance from which the attorneys spoke, the court showed the jurors that it thought the defendant

was an extremely dangerous individual who posed a risk to the jurors' personal safety and that he could not be trusted in society. The defendant says this was an expression of an opinion on the evidence by the judge in violation of N.C.G.S. § 15A-1222 (1988).

The only right of allocution in a capital case in this state is the right to present legal arguments to the judge as to why no judgment should be entered. *State v. Green*, 336 N.C. 142, 190-193, 443 S.E.2d 14, 42-44 (1994). We disagree with the defendant that it was an expression of an opinion on a fact to be proved when the court required the defendant to speak from a position different from the position from which the attorneys spoke. The defendant was not an attorney. His speech to the jury should not have been considered in the same light as the speeches of the attorneys. It was not error for the court to make the distinction which it made.

This assignment of error is overruled.

[29] The defendant next assigns error to a portion of the prosecutor's argument in which the defendant says the prosecutor argued that the defendant killed Mrs. Toler to avoid arrest and for the purpose of eliminating her as a witness. No objection was made to this argument and we shall consider it under the plain error rule. The prosecutor argued as follows:

> If you look at what he did to Alison Clarke (the 1985 Craven County victim) when he cut her, raped her and left her . . . alive as a witness sent him to prison, and then you look at what he did to Susan Toler less than a year after he got out of prison, you can see an escalation in his conduct. You can see that, the first time, he leaves a witness alive and he goes to prison, and the second time, he killed Susan Toler and he doesn't leave a live witness. Escalation of his conduct.

Later in his closing argument the prosecutor said:

> The capacity of the defendant to appreciate the criminality of his conduct was impaired. Well, is that true, or is it true that he killed the witness?

The defendant says that the prosecutor travelled outside the record because there was no evidence that the killing was done to eliminate a witness. He also says the argument was erroneous because it urged the jury to return a death sentence based on an aggravating circumstance which was not supported by the evidence.

"The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." N.C.G.S. § 15A-2000(e)(4) (1988). The defendant says this requires a new sentencing hearing under *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986).

Williams is distinguishable from this case. That case was tried for the second time after we granted a new sentencing hearing because the prosecutor argued witness elimination when there was no evidence of it. At the second sentencing hearing, the prosecutor explicitly and repeatedly argued witness elimination on the same evidence. We held the court should have intervened *ex mero motu*.

Here at one point, the prosecutor said "he [didn't] leave a live witness." At another point, he said "he killed the witness[.]" Those are true statements and they are supported by the evidence. The prosecutor did not explicitly refer to "witness elimination" in the language of the aggravating circumstance. If there was any error in this argument it was not so egregious that it was reversible error for the court not to intervene on its own motion. This assignment of error is overruled.

[30] The defendant next assigns error to the jury's failure to find two statutory mitigating circumstances, N.C.G.S. § 15A-2000(f)(2) and (f)(6) which are: "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." The defendant, relying on *State v. Kirkley*, 308 N.C. 196, 220, 302 S.E.2d 144, 158 (1983), says a jury cannot refuse to find and consider a statutory mitigating circumstance which is supported by uncontradicted and credible evidence.

By this assignment of error, the defendant attempts to raise a question as to whether he is entitled to a new sentencing hearing if the jury, under proper instructions, fails to find a statutory mitigating circumstance, which is supported by uncontradicted and credible evidence. We do not have to answer the question in this case. The defendant relied principally on the testimony of Dr. Royal to establish the two mitigating circumstances. When asked whether the defendant's mental condition could have diminished his capacity to understand what he was doing, Dr. Royal said he was "not quite sure" but offered that "often his behavior is such that he is not in control or doesn't have insight into why he's doing what he is doing[.]" Several

witnesses who saw defendant near the time of the crime indicated he did not appear to be under the influence of alcohol or drugs. The evidence in regard to these two mitigating circumstances was not uncontradicted. The jury did not have to find them. *See State v. McCollum*, 334 N.C. 208, 229, 433 S.E.2d 144, 155 (1993), *cert. denied*, —— U.S. ——, 129 L. Ed. 2d 895, *reh'g denied*, 1994 WL 459889 (1994).

This assignment of error is overruled.

[31] The defendant next assigns error to the instruction by the court that the jury could refuse to find any nonstatutory mitigating circumstance which they found did not have mitigating value. He concedes this argument on this point is contra to our decisions. *See State v. Hill*, 331 N.C. 387, 417 S.E.2d 765, *cert. denied*, —— U.S. ——, 122 L. Ed. 2d 684, *reh'g denied*, —— U.S. ——, 123 L. Ed. 2d 503 (1993); *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), *remanded for new sentencing hearing*, 329 N.C. 233, 404 S.E.2d 842 (1991). This assignment of error is overruled.

[32] The defendant next assigns error to the jury's failure to find five nonstatutory mitigating circumstances which he says were supported by uncontradicted and manifestly credible evidence and had mitigating value as a matter of law. He says the jury's failure to find these mitigating circumstances rendered the verdict arbitrary and capricious in violation of the Eighth Amendment to the Constitution of the United States. We have rejected this argument in *State v. Hill*, 331 N.C. 387, 417, 417 S.E.2d 765, 780 and *State v. Fullwood*, 323 N.C. 371, 395, 373 S.E.2d 518, 533. This assignment of error is overruled.

[33] Under his next assignment of error, the defendant argues that the verdict of the jury was imposed under the influence of passion, prejudice, and arbitrary factors. He bases this argument on the jury's failure to find any of the mitigating circumstances submitted to it. He says many of the circumstances submitted to the jury were supported by uncontradicted and manifestly credible evidence and the only explanation for its action is that it did not act rationally. We cannot hold that because the jury did not find that the defendant's evidence had mitigating value that the jury was acting under passion, prejudice, or any other arbitrary factor. This assignment of error is overruled.

[34] The defendant next assigns error to the court's charge on the aggravating circumstance on which the State relied in this case. There

was a stipulation by the State and the defendant that on 23 June 1986, the defendant had pled guilty in Superior Court, Craven County, to second-degree rape and assault on Alison Clarke with a deadly weapon inflicting serious injury which crimes occurred on 19 October 1985. It was further stipulated that the assault involved the defendant's cutting Ms. Clarke with a knife. The State relied on this stipulation to prove the aggravating circumstance N.C.G.S. § 15A-2000(e)(3) (1988), "[t]he defendant had been previously convicted of a felony involving the use or threat of violence to the person."

The court charged the jury that second-degree rape and assault with a deadly weapon inflicting serious injury are by definition felonies involving the use of violence to a person and if they found beyond a reasonable doubt that defendant had been convicted of these crimes, they would find this aggravating circumstance. The defendant says this instruction relieved the State from proving every element of the offense. *Francis v. Franklin*, 471 U.S. 307, 314, 85 L. Ed. 2d 344, 353 (1985). He says this is so because an essential element of the (e)(3) aggravating circumstance is the use or threat of violence. Second degree rape does not always involve the threat or use of violence, N.C.G.S. § 14-27.3(a)(2) (1993), and the defendant says the jury should have been told they had to find this element in order to find the aggravating circumstance.

The defendant had stipulated that the assault and rape had involved cutting the victim with a knife. The rape to which he stipulated did involve violence. When the court charged the jury that the rape to which the defendant had been convicted involved violence, he charged the jury correctly. The jury could have found from the stipulation that the defendant committed the crime. When it did so, it found that the crime involved violence.

This assignment of error is overruled.

[35] The defendant next assigns error to the portion of the charge on two of the mitigating circumstances submitted to the jury which were N.C.G.S. § 15A-2000(f)(2), "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and (f)(6) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired."

As to each submitted circumstance, the court charged substantially as follows:

> I instruct you that you would find this mitigating circumstance if you find any of the diagnoses about which the witness Dr. Royal testified—that is: substance abuse, alcohol, borderline personality disorder, paraphilia not otherwise specified, organic mental syndrome provisional, alcohol or drug abuse or any other mental or emotional disturbance or personality disorder . . . that was long standing and deep seated in its nature and that it was coupled with the use of alcohol and appears to result in aggressive and generally impulsive violent behavior toward women; or if you find the defendant attempted suicide in July of 1989; and if you find that, as a result, the defendant was under the influence of [a] mental or emotional disturbance when he killed the victim.

The defendant argues that he suffered from mental and emotional disturbances and had sources of impaired capacity other than those listed by the court and it was error for the court to limit the jury's consideration to matters listed. The court instructed the jury they could consider some of the things to which Dr. Royal testified and "any other mental or emotional disturbance or personality disorder." The court did not restrict the jury in what it could consider in determining whether to find either of these mitigating circumstances.

This assignment of error is overruled.

[36] The defendant next assigns error to the court's refusal to let him rehabilitate a juror whom the State challenged for cause pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). Under questioning by the prosecutor, the prospective juror said that her feelings about the death penalty "would prevent or substantially impair [her] ability to follow the court's instruction and vote to impose the death sentence in this case." The court then asked the prospective juror, "[c]ould you, given your present view with respect to the imposition of the death penalty, impose the death penalty in this or any other case?" The juror answered "[n]o, I couldn't." The court then allowed the State's challenge for cause.

There is no showing that further questioning by the defendant would have produced a different answer from that given to the court. It was not error for the court to deny the defendant the right to question the prospective juror further. *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990). This assignment of error is overruled.

[37] The defendant's last assignment of error is to the court's allowing the State to challenge peremptorily several jurors who expressed

reservations about the death penalty but could not have been challenged for cause under *Witherspoon*. The defendant candidly concedes that we have held to the contrary. *State v. Fullwood*, 323 N.C. 371, 381-82, 373 S.E.2d 518, 525. He asks that we reconsider our position on this question. We decline to do so. This assignment of error is overruled.

We find no error in the defendant's sentencing hearing.

Proportionality Review

[38] Having found no error in the trial, we are next required by N.C.G.S. § 15A-2000(d) to determine whether the record supports the jury's finding of the aggravating circumstance upon which the sentence was based and whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. We must also determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *See 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).

There is nothing in the record which shows that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The record supports the finding of the aggravating circumstance on which the death penalty was based. The defendant stipulated to sufficient facts to support the finding of this circumstance.

We must next determine whether the sentence of death was excessive or disproportionate to the sentence imposed in similar cases, considering both the crime and the defendant. In determining proportionality, we are impressed with the cold-blooded, callous and brutal nature of this murder. According to his own statement, the defendant entered the home of a person he did not know, ordered her to send her two-and-a-half-year-old child from the room, forced her to undress and sexually assaulted her using two different types of instruments, including one with a sharp edge capable of inflicting an incised wound found within her vagina. A bloody footprint and bloodstains on the soles of the victim's foot indicated she had stepped in blood at some point during the assault. Finally, the defendant placed a pillow over the victim's face, pressed the barrel of a pistol hard against the pillow and pulled the trigger. The victim died as the result of a single gunshot wound to the head. We can imagine the terror

Susan Toler felt as she went through this torture, knowing all the while that her two-and-a-half-year-old child was in the home and subject to the brutality she was suffering.

Our search of the pool of cases which we use to determine proportionality reveals there are fourteen cases in which the only aggravating circumstance found was the (e)(3) circumstance that the "defendant had been previously convicted of a felony involving the use or threat of violence to the person" and the defendant was sentenced to life in prison. There is one case, *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, in which this was the sole aggravating circumstance found by the jury and the jury returned the death sentence. In affirming the death penalty in *Brown*, we held that there were several factors which distinguished that case from the cases in which life sentences were imposed. Among these factors were (1) the sanctity of the victim's home was invaded, (2) the murder was as calculated as it could have been, and (3) the defendant showed no remorse for the killing. All these factors are present in this case. This case is more similar to *Brown* than to the other cases which found the prior felony conviction circumstance and the jury recommended life.

We have said that the final decision as to whether a death sentence is proportionate in a particular case rests upon the "experienced judgments" of this Court. *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46 (1994). In this case, the jury heard the evidence that the defendant had raped and murdered an innocent woman. They heard the evidence that he had raped and assaulted a woman a few years previously and shortly after being released from prison he had raped again. The second time he did not simply assault his victim, but brutally murdered her. This could have added great weight in the judgment of the jury, as it does in our judgment, to the aggravating circumstance that was found. This was a very brutal murder.

We are confident that the sentence of death imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases.

NO ERROR.

HERMAN BEST v. DUKE UNIVERSITY, TRADING AND DOING BUSINESS AS DUKE UNIVERSITY HOSPITAL AND DUKE MEDICAL CENTER

No. 51PA94

(Filed 6 October 1994)

1. Malicious Prosecution § 3 (NCI4th)— elements of action

A plaintiff must establish four elements to support a malicious prosecution claim: (1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff.

Am Jur 2d, Malicious Prosecution § 6.

2. Malicious Prosecution § 19 (NCI4th)— prosecution for larceny—probable cause shown as matter of law

Probable cause existed as a matter of law for plaintiff's arrest on charges of trespass and larceny and for his subsequent prosecution for larceny so that the trial court should not have submitted an issue of malicious prosecution to the jury where the uncontradicted evidence at trial tended to show that a detective working as a security officer at a hotel on the Duke University campus observed plaintiff acting suspiciously in the area of the Duke Faculty Club at 5:00 a.m. on 26 August 1989; the detective saw plaintiff turn his vehicle into the Faculty Club driveway, turn off the headlights, and continue to move down the driveway; ten to fifteen minutes later plaintiff's vehicle went to the rear of the hotel; when the detective tried to stop plaintiff as he exited, plaintiff sped around his vehicle; the detective chased plaintiff's vehicle, and plaintiff did not stop when the detective pulled beside him, rolled down his window, and flashed his badge; plaintiff did not stop until other officers who had joined in the chase flashed their blue lights; all of the officers observed wrought-iron patio furniture in plaintiff's vehicle; plaintiff told the officers that he was taking the furniture to a friend's house; and a Faculty Club employee reported to the police later that morning that wrought-iron patio furniture, similar to those pieces in defendant's vehicle, was stolen from the Faculty Club between 10:00 p.m. on 25 August and 8:30 a.m. on 26 August.

Am Jur 2d, Malicious Prosecution §§ 159-183.

Acquittal, discharge, or discontinuance of criminal charge as evidence of want to probable cause in malicious prosecution action. 59 ALR2d 1413.

Comment Note.—Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury. 87 ALR2d 183.

3. **Malicious Prosecution § 19 (NCI4th)— dismissal of criminal charge by prosecutor—lack of probable cause not shown**

Where uncontroverted evidence existed that was sufficient to establish probable cause as a matter of law, evidence of the dismissal of the criminal charge by the district attorney before the criminal trial is not sufficient evidence of a lack of probable cause to establish a question of fact for the jury in a malicious prosecution action. To the extent that *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, may be read to suggest otherwise, it is disapproved. Furthermore, the dismissal of a trespass charge did not establish a prima facie showing of the absence of probable cause for a larceny charge based on the same events that was fully tried.

Am Jur 2d, Malicious Prosecution §§ 159-183.

Acquittal, discharge, or discontinuance of criminal charge as evidence of want to probable cause in malicious prosecution action. 59 ALR2d 1413.

Comment Note.—Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury. 87 ALR2d 183.

4. **Negligence § 6 (NCI4th)— negligent infliction of emotional distress—arrest of defendant—insufficient evidence of negligence**

Plaintiff failed to present sufficient evidence of negligent conduct by defendant public safety officer resulting in plaintiff's arrest to survive defendant's motion for judgment notwithstanding the verdict in an action for the negligent infliction of emotional distress where the uncontroverted evidence tended to show: defendant knew that another officer had seen plaintiff's vehicle go down the driveway of the Duke Faculty Club at 5:00 a.m. with its headlights off, and that plaintiff led the officer on a chase when the officer attempted to stop his vehicle after it

exited the Faculty Club driveway; after plaintiff's vehicle was stopped, defendant personally observed patio furniture in the vehicle; defendant obtained a warrant for plaintiff's arrest after the theft of patio furniture from the Faculty Club was reported later that morning as having occurred during the time period when plaintiff was observed in the vicinity; probable cause existed as a matter of law for plaintiff's arrest; when defendant went to plaintiff's place of work to make the arrest, he allowed plaintiff to retrieve personal items; defendant then handcuffed plaintiff outside and placed him in a vehicle; and the handcuffing of plaintiff was in defendant's discretion and was reasonable in light of defendant's knowledge that plaintiff had fled from another officer.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 1, 2.

5. Malicious Prosecution § 10 (NCI4th)— punitive damages— insufficient evidence

The trial court did not err in granting defendant public safety officer's motion for a directed verdict on the issue of punitive damages in a malicious prosecution action because the evidence was inadequate to present a question of actual malice for the jury where probable cause based on uncontroverted facts existed for plaintiff's arrest and prosecution for larceny, and plaintiff testified that the officers were polite and professional to him at his stop and during his arrest.

Am Jur 2d, Malicious Prosecution § 94.

Justice FRYE dissenting in part.

Chief Justice EXUM and Justice MITCHELL 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, 112 N.C. App. 548, 436 S.E.2d 395 (1993), affirming a judgment entered by Stanback, J., on 22 May 1992 in Superior Court, Durham County. Heard in the Supreme Court 15 September 1994.

Robert R. Seidel for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Alene M. Mercer & Kari L. Russwurm, for defendant.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State, amicus curiae.

Thomas D. Haigwood for the Conference of District Attorneys of North Carolina, amicus curiae.

Ronald L. Hall, James Rogers, and Julie Risher for the North Carolina Association of Police Attorneys, amicus curiae.

WHICHARD, Justice.

On 26 August 1989, Detective McDonald Vick, a Durham police officer, was providing security during his off hours for the Washington-Duke Hotel, which is located on the campus of Duke University. He testified at plaintiff's civil trial in this case that at approximately 5:00 a.m. on August 26th, he observed plaintiff's vehicle enter Science Drive. From his location in the hotel parking lot, he watched plaintiff's vehicle enter the Duke Faculty Club driveway, which serves as access for both the hotel and the Faculty Club. Plaintiff turned off the headlights and then continued to move down the driveway. Ten to fifteen minutes later, Detective Vick saw plaintiff's vehicle exit the driveway of the Faculty Club, turn right, and then head toward the rear of the hotel.

Detective Vick stated that he then became concerned because he knew the hotel had been having problems with theft. He therefore decided to angle his car in order to block plaintiff's exit when he returned from the rear of the hotel. After angling his vehicle, Detective Vick exited from it and stood at the front bumper, holding up his hands to indicate that plaintiff should stop. Plaintiff then sped up and drove around Detective Vick, almost striking him. A chase ensued. Detective Vick flashed his headlights and eventually drove beside plaintiff, who was speeding. He showed him his badge. During the chase, Detective Vick called for assistance from the Durham police. It was not until the police arrived and were flashing their blue lights that plaintiff pulled over on the side of the road.

After plaintiff stopped, Detective Vick approached the vehicle and observed wrought-iron patio furniture inside. He had a brief conversation with plaintiff about the furniture and then left the scene because his shift had ended. At that time, several Duke Public Safety officers, including Officer Stephen Russell, had arrived after hearing Detective Vick's call for assistance. Officer Russell testified at plain-

tiff's civil trial. He stated that Detective Vick described to him what had happened prior to his arrival.

Officer Russell looked inside plaintiff's vehicle with the aid of a flashlight and observed the bluish-gray, wrought-iron patio furniture, consisting of three chairs and one table. He questioned plaintiff, who told him he was taking the furniture to a friend's house. Officer Russell then radioed Officer Schwab, a fellow Duke Public Safety officer, and asked him to go to the Faculty Club to check for missing patio furniture. Officer Schwab did so and returned to the scene where he informed Officer Russell that no furniture appeared to be missing from the Faculty Club. Officer Russell then apologized to plaintiff for the delay and told him he was free to leave.

The next evening when Officer Russell returned to work, he learned that John LeBar of the Faculty Club had called in a larceny report that morning indicating that seven gray, wrought-iron patio chairs and two patio tables had been stolen from the Faculty Club the previous night. Officer Russell believed the description matched the furniture he had seen in plaintiff's vehicle. He therefore contacted his supervisor, who suggested that he seek a warrant. Officer Russell then went to the magistrate's office, presented his information, and obtained warrants for plaintiff's arrest for trespass and larceny. Officer Schwab and he then went to plaintiff's workplace at Duke Hospital and served the warrants on him. They allowed plaintiff to retrieve his personal items in their presence. Officer Russell then handcuffed plaintiff outside the building beside the Duke Public Safety vehicle and placed him in the vehicle. Officer Russell testified that it is in the officer's discretion whether to handcuff someone when making an arrest.

Plaintiff testified at his civil trial that at the time of the events at issue, he was employed as a radiologic technologist at Duke Hospital and worked the second shift on 25 August 1989. He arrived home from work at approximately midnight. He was having trouble sleeping due to pain in his leg, and at approximately 3:00 a.m. he decided to get up and load three patio chairs and a table in the back of his vehicle. He intended to take the furniture to the house of a friend.

Plaintiff first ate breakfast at a restaurant in Durham. He then drove on Route 751 through the Duke campus. At some point, he realized he was driving to his friend's old address. When he realized his mistake, he drove into the hotel entrance in order to turn his vehicle around. He backed his car into the Faculty Club driveway and noticed

a strange man, whom he identified at trial as Detective Vick, staring at him. He was concerned about this man and decided to drive toward the hotel rather than back onto the main road because he wanted to see if anyone was at the hotel. He testified that he did not exit his car at the hotel because he did not see anyone inside. He then drove toward the exit and saw that Detective Vick was blocking one lane of the exit.

Plaintiff admitted that he drove around Detective Vick and onto the main road. He remembered Detective Vick waving at him. He further stated that a chase ensued and that he was speeding. He also testified that Detective Vick flashed his headlights and showed him his badge but plaintiff did not pull over. Plaintiff stated that he was afraid of Detective Vick and wanted to stop his vehicle near overhead lights. Plaintiff admitted that he did not stop his car until he saw the Durham police vehicles' flashing lights.

Plaintiff testified that the Duke officers were polite to him and professional both at the traffic stop and later during his arrest. He testified that he had no reason to believe the officers had anything against him personally and that in his opinion they were "doing their job."

Plaintiff's criminal trial was held on 4 January 1990, and plaintiff pled "not guilty" to both the trespass and larceny charges. Detective Vick was not present and therefore did not testify. He was never subpoenaed by the District Attorney despite the fact that his name and address were known to the District Attorney. The State took a voluntary dismissal as to plaintiff's trespass charge at the close of the State's evidence. Plaintiff was found not guilty of the larceny charge after a trial on the merits.

On 25 February 1992 a civil trial, from which this appeal arises, was held on plaintiff's claims for malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages, all allegedly arising from the events described above. In support of his emotional distress claim, plaintiff presented the expert testimony of Dr. Carolyn Burgess, a psychologist. Dr. Burgess stated that in 1991, almost two years after plaintiff's arrest, she saw plaintiff in a grocery store. He indicated that he was having some problems and wanted to schedule an appointment. Several months later plaintiff scheduled an appointment; this was the first time plaintiff had sought treatment. Dr. Burgess saw him several times. Plaintiff's initial complaint was the recent death of his brother,

who was an alcoholic and had died violently. After two or three sessions, plaintiff told Dr. Burgess about the arrest. Dr. Burgess characterized the arrest as one stressor in plaintiff's life, others being chronic leg pain and the death of his brother. Dr. Burgess testified that plaintiff was depressed and suffered from low esteem during the treatment, but she did not state that the depression was severe or disabling.

At the close of plaintiff's evidence, the trial court granted defendant's motions for directed verdict on the claims for intentional infliction of emotional distress and punitive damages. The court denied defendant's motions for directed verdict on the claims for malicious prosecution and negligent infliction of emotional distress. At the close of all the evidence, defendant renewed its motions for directed verdict on the claims for malicious prosecution and negligent infliction of emotional distress. The court denied the motions. On 28 February 1992, the jury returned verdicts for plaintiff on the claims for malicious prosecution and negligent infliction of emotional distress and awarded plaintiff $40,000 and $60,000 respectively for those claims.

On 9 March 1992 defendant filed a motion for judgment notwithstanding the verdict and a motion for a new trial. The court granted defendant's motion for judgment notwithstanding the verdict on the claim for negligent infliction of emotional distress but denied the motion on the malicious prosecution claim. The court further ordered that defendant would be entitled to a new trial if the Court of Appeals reversed its ruling in favor of defendant as a matter of law on the claim for negligent infliction of emotional distress. Defendant appealed the court's denial of its motion for a directed verdict on the malicious prosecution claim. Plaintiff appealed the court's ruling as to his claims for negligent infliction of emotional distress, intentional infliction of emotional distress, and punitive damages.

The Court of Appeals affirmed the trial court's denial of defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on the claim for malicious prosecution. It also affirmed the trial court's granting of defendant's motion for judgment notwithstanding the verdict on the claim for negligent infliction of emotional distress, as well as the trial court's granting of defendant's motions for directed verdict on the claims for intentional infliction of emotional distress and punitive damages.

Defendant sought a rehearing on the issue of the claim for malicious prosecution. The Court of Appeals denied the petition. On 3 March 1994, this Court allowed plaintiff's petition for discretionary review on his claims for negligent infliction of emotional distress and punitive damages. It also allowed defendant's petition for discretionary review on the claim for malicious prosecution.

Defendant argues that the Court of Appeals erred by affirming the trial court's denial of its motions for directed verdict, judgment notwithstanding the verdict, and new trial as to the issue of malicious prosecution. It contends that it was entitled to prevail as a matter of law on plaintiff's claim for malicious prosecution because there was insufficient evidence of lack of probable cause. We agree and accordingly reverse the Court of Appeals' decision on this issue.

To survive a motion for a directed verdict, the nonmoving party, plaintiff here, must present "sufficient evidence to sustain a jury verdict in [his] favor, . . . or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citation omitted). The same standard is used in determining the sufficiency of the evidence for the motion for judgment notwithstanding the verdict because such a motion is essentially "a renewal of the movant's prerequisite motion for a directed verdict." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). The trial court must examine the evidence in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences that may be drawn therefrom. If sufficient evidence exists to support each element of the nonmoving party's claim, the trial court should deny the motion for directed verdict and the motion for judgment notwithstanding the verdict. *Id.* at 214-15, 436 S.E.2d at 825.

[1] Plaintiff must establish four elements to support a malicious prosecution claim: (1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984). Here, plaintiff clearly established that he was tried criminally at defendant's initiative, that he was found not guilty of the larceny charge, and that the trespass charge was dismissed, thereby satisfying the first and fourth elements. The trial court determined that plaintiff also established malice and lack of probable cause and denied defendant's motions for directed verdict and judgment notwithstanding the verdict. The Court of Appeals

agreed with the trial court's view of the evidence. It relied on this Court's decision in *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 249 S.E.2d 375 (1978), for the proposition that "[a] plaintiff makes a prima facie showing of the absence of probable cause by evidence of a voluntary dismissal of the prosecution by the State with no reason assigned for the dismissal." *Best v. Duke University*, 112 N.C. App. 548, 553, 436 S.E.2d 395, 399 (1993); *see Pitts*, 296 N.C. at 87, 249 S.E.2d at 379. The Court of Appeals concluded that because the reason for the State's dismissal of the trespass charge was not established, the voluntary dismissal of that charge was prima facie evidence of the lack of probable cause. We disagree with the Court of Appeals' application of *Pitts* to this case.

Where the claim is one for malicious prosecution, " '[p]robable cause . . . has been properly defined as the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution.' " *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907). Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court. *Id.* at 171, 147 S.E.2d at 914.

[2] Here, the facts supporting probable cause were admitted and established. The uncontroverted evidence at trial showed that Detective Vick observed plaintiff acting suspiciously in and around the area of the Faculty Club during the early morning hours of 26 August 1989. He saw plaintiff turn his vehicle off the main road into the Faculty Club driveway and thereafter observed that plaintiff turned off the vehicle's headlights and then continued to move closer to the hotel. When Detective Vick tried to stop plaintiff as he exited, plaintiff sped around Detective Vick's vehicle and engaged in a chase. He did not stop his vehicle when Detective Vick pulled beside him, rolled down his window, and flashed his badge. Further, when plaintiff finally stopped his vehicle, all of the officers personally observed wrought-iron patio furniture in plaintiff's vehicle. Plaintiff admitted these facts at trial.

Further, it was established that John LeBar reported on the morning of 26 August 1989 that wrought-iron patio furniture, similar to those pieces in defendant's vehicle, was stolen from the Faculty Club between 10:00 p.m. on 25 August 1989 and 8:30 a.m. on 26 August 1989. Defendant was in the area where the theft occurred during the

period when it occurred. Plaintiff's explanation for the presence of the furniture in his car, that he was taking it to a friend's house, was weak considering the hour. Based on these undisputed facts and circumstances, which were known to defendant at the time of the commencement of the prosecution, we conclude that probable cause existed as a matter of law for plaintiff's arrest on the charges of trespass and larceny and for his subsequent prosecution for larceny. There was no question for the jury; these uncontroverted facts fully established that a reasonable person would be induced thereby to commence a prosecution against plaintiff. Thus, the issue of malicious prosecution should not have been submitted to the jury. The trial court therefore erred in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict on that issue, and the Court of Appeals erred in affirming it.

Our decision in *Pitts* does not change our analysis or its outcome. The Court of Appeals determined, and plaintiff here argues, that *Pitts* requires that where the State takes a voluntary dismissal in a criminal prosecution without explanation, a prima facie showing of the absence of probable cause is made. We do not read *Pitts* so broadly. In *Pitts* the plaintiff had been charged with the crime of embezzlement. Prior to the criminal trial, the District Attorney voluntarily dismissed the action. The plaintiff then initiated a malicious prosecution action against the defendant. The defendant moved for summary judgment, which the trial court granted. This Court reversed the trial court's decision because there was a question of fact for the jury as to the existence of probable cause. *Pitts*, 296 N.C. at 87, 249 S.E.2d at 379.

[3] The distinguishing feature in *Pitts* was that there was no evidence before the trial court other than the magistrate's issuance of a warrant for plaintiff's arrest and the subsequent dismissal of the charge prior to the criminal trial. Here, uncontroverted evidence existed that was sufficient to establish probable cause as a matter of law. Where such is the case, evidence of the dismissal of a criminal charge by the District Attorney before the criminal trial is not sufficient evidence of a lack of probable cause to establish a question of fact for the jury in a malicious prosecution action. To the extent that *Pitts* may be read to suggest otherwise, it is disapproved.

We note as well that in *Pitts* the District Attorney had dismissed the sole charge against the plaintiff. *Id.* at 82, 249 S.E.2d at 376-77. Here, by contrast, the District Attorney dismissed only the trespass

charge but prosecuted plaintiff on the larceny charge. Even when viewed in the light most favorable to plaintiff, the dismissal of the trespass charge does not establish a prima facie showing of the absence of probable cause where the larceny charge based on the same events was fully tried.

[4] Plaintiff appeals the Court of Appeals' ruling that the trial court did not err in granting defendant's motion for judgment notwithstanding the verdict on the issue of negligent infliction of emotional distress. In order to take a claim for negligent infliction of emotional distress to the jury, the plaintiff must present evidence to support the following elements: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). In a negligence action, a law enforcement officer "is held to the standard of care that a reasonably prudent person would exercise in the discharge of official duties of a like nature under like circumstances." *Bullins v. Schmidt*, 322 N.C. 580, 582, 369 S.E.2d 601, 603 (1988).

We conclude that there was no evidence here to raise an inference that defendant engaged in negligent conduct resulting in plaintiff's arrest. The evidence was uncontroverted that Officer Russell knew of the events that transpired between Detective Vick and plaintiff in the early morning of 26 August 1989 in the area of the Faculty Club. He personally observed patio furniture in plaintiff's vehicle. Based on these facts, he obtained a warrant for plaintiff's arrest when the theft of patio furniture was reported by John LeBar as occurring during the same time period as when plaintiff was observed in the vicinity of the Faculty Club. When Officer Russell went to plaintiff's place of work to make the arrest, he allowed plaintiff to retrieve personal items. He then handcuffed him outside and placed him in the Duke Public Safety vehicle. Officer Russell stated that handcuffing plaintiff was in his discretion, and given his knowledge that plaintiff had led Detective Vick on a chase, we cannot say that a reasonable person could conclude that a reasonably prudent law enforcement officer would have discharged these official duties differently. Further, as we have held, probable cause existed as a matter of law for plaintiff's arrest. We therefore agree with the Court of Appeals' conclusion that plaintiff failed to present sufficient evidence of negligent conduct to survive defendant's motion for judgment notwithstanding

the verdict. The trial court did not err in granting the motion nor did the Court of Appeals err in affirming this ruling.

[5] Plaintiff next argues that the Court of Appeals erred in affirming the trial court's granting of defendant's motion for directed verdict on the issue of punitive damages. To survive a motion for directed verdict on punitive damages, plaintiff must offer sufficient evidence to present a question for the jury as to whether defendant had actual malice in prosecuting plaintiff. Actual malice exists "only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights." *United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 191, 437 S.E.2d 374, 379 (1993) (quoting *Hardy v. Toler*, 288 N.C. 303, 306-07, 218 S.E.2d 342, 345 (1975)); *see also Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 319, 317 S.E.2d 17, 20 (1984) (actual malice conveys sense of "ill-will, spite, or desire for revenge"), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985). We hold that the evidence of the officers' conduct was inadequate to present a question of actual malice for the jury. Probable cause for plaintiff's arrest and prosecution existed based on uncontroverted facts. Further, plaintiff testified that the officers were polite and professional to him at his stop and during his arrest. The trial court therefore did not err in granting defendant's motion for a directed verdict on the issue of punitive damages. We affirm the Court of Appeals' ruling on this issue.

Accordingly, we affirm that part of the Court of Appeals' decision that affirmed the trial court's granting of defendant's motion for directed verdict on the claim for punitive damages and the trial court's granting of defendant's motion for judgment notwithstanding the verdict on the claim for negligent infliction of emotional distress. We reverse that part of the Court of Appeals' decision that affirmed the trial court's denial of defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on the claim for malicious prosecution. The case is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice FRYE dissenting in part.

The majority concludes that the trial court erred in denying defendant's motions for directed verdict and judgment notwithstand-

ing the verdict as to plaintiff's malicious prosecution claim, holding that probable cause existed as a matter of law for plaintiff's arrest on the charges of trespass and larceny. I believe that the evidence in this case, viewed properly, presented a question of fact for the jury as to the existence of probable cause and, therefore, I must dissent from that portion of the majority opinion which takes this issue away from the jury.

In ruling on a motion for directed verdict or a motion for judgment notwithstanding the verdict, "the trial court must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence." *Abels v. Renfro Corp.*, 335 N.C. 209, 214-15, 436 S.E.2d 822, 825 (1993). Furthermore, all conflicts in the evidence must be resolved in the nonmoving party's favor. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). The question presented by a motion for directed verdict is whether the evidence is sufficient to entitle the nonmovant to have the jury decide the issue in question. *Id.* It is for the jury to determine whether to believe all, part, or none of a witness' testimony.

Without unnecessary duplication, the evidence taken in the light most favorable to plaintiff, the nonmoving party, shows that plaintiff drove into the Faculty Club driveway to turn around and was in the driveway less than a minute. Plaintiff informed the officers who stopped him that he was taking the furniture in his automobile to a friend's house. In addition, plaintiff told Officer Russell he was welcome to look inside his automobile and opened the automobile door for him; however, Officer Russell appeared not to want to look and plaintiff closed the door. Russell told plaintiff that he recognized him as a Duke University Medical Center employee.

Russell looked "quite a few times" at the furniture in plaintiff's automobile, shining his flashlight through the windows of the automobile. He was checking the furniture for a Duke University identification sticker because he believed there would be a Duke sticker on the table had it belonged to the Faculty Club. Officer Russell found no Duke University sticker on the furniture. During the course of the stop, neither Officer Russell nor any of the other officers removed the furniture from the automobile to look at it. Officer Russell sent an officer to the Faculty Club, and when the officer reported that he saw

nothing unusual at the Club and no furniture appeared to be missing, Russell allowed plaintiff to leave.

When Officer Russell returned to work the next evening, he learned that John LeBar of the Faculty Club had called in a larceny report that morning indicating that "two tables, seven chairs, all gray in color" had been taken from the Faculty Club the previous night. Without contacting John LeBar to verify the report, Russell obtained warrants charging plaintiff with larceny of the furniture and trespass upon the premises of Duke University Faculty Club. Furthermore, Russell obtained these warrants without contacting plaintiff to hear his explanation and without inquiry as to the present location of the table and three chairs he had seen earlier in plaintiff's automobile. In addition, Russell did not go to the Faculty Club at any time between the stop and arrest of plaintiff.

The question before the Court on defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of lack of probable cause is not whether the evidence would support a finding of probable cause, but whether the evidence compels such a finding as a matter of law. After considering the evidence in this case, and weighing the credibility of the plaintiff and the officers, twelve jurors found that defendant instituted criminal charges against the plaintiff with malice and without probable cause. While there is much evidence that would support a contrary finding by a jury, it does not compel such a finding. Accordingly, the trial court was correct in denying defendant's motion for directed verdict, allowing the issue of lack of probable cause to go to the jury, and denying defendant's motion for judgment notwithstanding the verdict on this issue.

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

STATE OF NORTH CAROLINA v. RICKY LEE PRICE

No. 585A87

(Filed 6 October 1994)

Criminal Law §§ 458, 1363 (NCI4th)— capital sentencing—effect of Virginia life sentence—jury argument about parole—not mitigating circumstance

Since defendant would have been eligible for parole had he been sentenced to life imprisonment in North Carolina and that life sentence made to commence at the expiration of a life sentence defendant had received in Virginia, the decision of *Simmons v. South Carolina*, 512 U.S. —, 129 L. Ed. 2d 133 (1994), was inapplicable in this capital sentencing proceeding even though the State did argue defendant's future dangerousness as a reason for imposing the death penalty. Therefore, the trial court did not err under *Simmons* by (1) refusing to permit defense counsel to argue to the jury anything about parole; (2) refusing to permit defense counsel to argue that the trial court could require a life sentence imposed in the present case to commence at the end of the Virginia life sentence; and (3) refusing to submit to the jury defendant's Virginia life sentence as a nonstatutory mitigating circumstance.

Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 575, 576.

On remand from the Supreme Court of the United States. Determined on supplemental briefs without further argument.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

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

EXUM, Chief Justice.

Defendant was convicted of first-degree murder of Brenda Smith and sentenced to death at the 8 September 1987 Criminal Session of Superior Court, Person County. This Court concluded defendant's conviction of first-degree murder and his sentence of death were without error and held the sentence of death not to be disproportion-

ate. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (*Price I*). Thereafter the United States Supreme Court vacated the judgment and remanded the case to us for further proceedings in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *Price v. North Carolina*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990). This Court reaffirmed the conviction and judgment in *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992) (*Price II*). The United States Supreme Court again vacated judgment and remanded the case to this Court for further proceedings in light of *Morgan v. Illinois*, 504 U.S. —, 119 L. Ed. 2d 492 (1992). On remand this Court affirmed the conviction and sentence of death. *State v. Price*, 334 N.C. 615, 433 S.E.2d 746 (1993) (*Price III*).

This case is now before us again by order of the United States Supreme Court, which vacated our most recent judgment and remanded this case to us for further proceedings in light of *Simmons v. South Carolina*, 512 U.S. —, 129 L. Ed. 2d 133 (1994). *Price v. North Carolina*, — U.S. —, — L. Ed. 2d —, 62 USLW 3870 (30 June 1994).

The facts are summarized in *Price I* and will not be restated here except as necessary for proper treatment of the issue to be addressed.

In *Simmons*, the United States Supreme Court held that in a capital sentencing proceeding in which the prosecution relies on defendant's future dangerousness as a reason to impose the death sentence, it is violative of due process to deny defendant's request for a jury instruction that under state law defendant if sentenced to life imprisonment would not be eligible for parole. — U.S. at —, 129 L. Ed. 2d at 147.

The question before us is whether defendant should be given a new sentencing hearing in light of the United States Supreme Court's *Simmons* decision. After thoroughly reviewing again the record, briefs and transcript insofar as they pertain to this question, we conclude defendant's conviction and sentence of death should be affirmed.

I.

At defendant's sentencing proceeding two aggravating circumstances were submitted: Defendant had been convicted of a prior felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988). The murder of Brenda Smith was part of a

course of conduct that included the commission of other crimes of violence. N.C.G.S. § 15A-2000(e)(11) (1988). To support the prior violent felony aggravating circumstance, the State offered in evidence a Virginia judgment showing defendant had been previously convicted in Virginia of the murder of Joan Brady, for which he received a life sentence.

During the sentencing proceeding the trial court made several rulings which bear on the issue before us. It ruled defense counsel could not argue "anything concerning the possibility of parole, the possibility of executive clemency, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding." The State requested defense counsel not be permitted to argue that defendant "will or may spend the rest of his life in prison providing necessary prevention." Defense counsel inquired whether he could make reference to defendant's Virginia sentence of life imprisonment. The trial court ruled defense counsel could "not mislead the jury as to the effect of a life sentence" but could "argue to the jury that the defendant has received a life sentence in Virginia." Defense counsel then tendered his argument "that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia." The trial court ruled counsel "may not argue that to the jury." Defense counsel also requested the trial court to submit the following as a non-statutory mitigating circumstance: "The fact that defendant has received a life sentence and the fact that this judge may impose [an] additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society." Upon objection by the State, this request was denied; and requested circumstance was not submitted.

During the sentencing proceeding's closing arguments, the State argued to the jury that defendant was dangerous, saying, among other things, "both Doctor Centor and Doctor Rose agree that the defendant is dangerous and is dangerous to others"; defendant "is a dangerous man"; "[t]he defendant is dangerous."[1] Both the State and

1. The contexts in which the prosecutor argued defendant's dangerousness were as follows:

"Also, remember, ladies and gentlemen, when you are deciding whether any of these mental illnesses or emotional disturbances impair his capacity to conform to the law, that both Doctor Centor and Doctor Rose agree that the defendant is dangerous and is dangerous to others."

"Just like the other day when I said to Mr. Price on the stand, you hurt some guards when you tried to escape from Danville City Jail, didn't you? 'Well, that's putting

defendant noted in their jury arguments that defendant had received a life sentence in Virginia for the murder of Joan Brady. Defendant's counsel argued, "I'm not asking you to forgive him. I'm not asking that for a minute. He's already serving a life sentence."

In *Price I*, one of defendant's assignments of error was the trial court's prohibiting his counsel from arguing "anything concerning the possibility of parole." He also contended that the trial court erred in disallowing his proffered argument that the trial court could require a life sentence imposed in the present case to commence at the end of the life sentence defendant was presently serving in Virginia. This Court rejected defendant's contention on appeal that these jury arguments should have been permitted. We said:

> While it is generally true that counsel's argument should not be impaired without good reason, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), one "good reason" to limit argument is its irrelevance. "[C]ounsel [may not] argue principles of law not relevant to the case." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). This Court has noted many times that a criminal defendant's status under the parole laws is irrelevant to a determination of his sentence and that it cannot be considered by the jury during sentencing. *E.g.*, *State v. Robbins*, 319 N.C. at 518, 356 S.E.2d at 310. That this holding passes muster under the United States Constitution is implicit in the United States Supreme Court's recognition that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." *California v. Ramos*, 463 U.S. 992, 1013 n.30, 77 L. Ed. 2d 1171, 1188 n.30 (1983) (quoted in *Robbins*, 319 N.C. at 520, 356 S.E.2d at 311). In other words, the Constitution permits such argument or instruction, but it is not constitutionally required. *Robbins*, 319 N.C. at 519, 356 S.E.2d at 311.

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it mildly. I put eight of them in the hospital.' As Doctor Rose says, he is a dangerous man."

"You weren't able to protect the life of Joan Brady. You weren't able to protect the life of Brenda Smith. You have a duty. You must discharge it."

"The defendant is dangerous. The defendant says in State's Exhibit 10, 'I don't care, Babe. Listen Carol, I kill your dumb ass, bitch, whore, whatever.' Dangerous. Some girl named Carol. We don't even know who she is. He knows who she was. He told me who she was when I cross-examined him."

"You can protect Elaine Clay. You can protect nine-year-old Robbie Davis. You're all they have now. I've done all I can do. Find the truth."

> Argument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of parole upon defendant's sentence. It is equally irrelevant to a determination of his sentence. The trial court acted correctly in disallowing both arguments.

326 N.C. at 83-84, 388 S.E.2d at 99-100.

In *Price II*, this Court found no error in the trial court's refusal to submit to the jury defendant's Virginia life sentence as a non-statutory mitigating circumstance. We rejected defendant's argument that this life sentence could have served as a basis for a sentence less than death in the North Carolina case. We noted defendant's reliance on *Skipper v. South Carolina*, 476 U.S. 1, 90 L. Ed. 2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982); and *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978). We recognized these cases require as a matter of federal constitutional law that a capital sentencing jury be permitted to consider as a mitigating circumstance " ' "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*, 476 U.S. at 4, 90 L. Ed. 2d at 6 (quoting *Eddings*, 455 U.S. at 110, 71 L. Ed. 2d at 8 (quoting *Lockett*, 438 U.S. at 604, 57 L. Ed. 2d at 990 (plurality opinion of Burger, C.J.))).

We concluded, however, as follows:

> That 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. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n.12, 57 L. Ed. 2d at 990 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *see also State v. Robbins*, 319 N.C. 465, 519-23, 356 S.E.2d 279, 311-13 (1987) (evidence about possibility of parole is irrelevant to sentencing and the federal Constitution does not require consideration of such evidence).

331 N.C. at 634-35, 418 S.E.2d at 177.

Defendant now contends our decisions in *Price I* and *Price III* on the points at issue were erroneous in light of *Simmons*, which the United States Supreme Court decided after our decision in *Price III* and on the basis of which it has again remanded this case to us for reconsideration.

II.

Defendant Simmons had been convicted previously of an offense involving a violent crime; therefore, under South Carolina law he was ineligible for parole if convicted and sentenced for any subsequent violent-crime offense. S.C. Code Ann. § 24-21-640 (Supp. 1993). During closing arguments, the prosecutor argued Simmons' potential for future dangerousness as a reason for imposing the death penalty. Simmons sought to rebut the prosecution's argument by presenting evidence which showed his unique psychological problems limited his future dangerousness to elderly women; therefore, there would be no reason to expect further acts of violence once he was isolated in a male prison setting. Concerned that the jury might not understand that life imprisonment did not include the possibility of parole, Simmons requested the trial court instruct the jury on the meaning of life imprisonment in light of the South Carolina statute which governed this question. When the trial court denied this request, Simmons asked alternatively that the jury be instructed that it was not to speculate that a sentence of life meant anything other than imprisonment for the balance of the defendant's natural life. Though denying this instruction, the trial court indicated it would consider a similar instruction were the jury to inquire about parole eligibility. When the jury subsequently returned from deliberations with a question as to whether life imprisonment included the possibility of parole, the trial court responded by charging the jury, in essence, that it was not to consider parole eligibility in reaching its verdict.[2] The jury resumed deliberation and shortly returned with a recommendation of death.

On appeal the South Carolina Supreme Court held the trial court's instruction given to the jury satisfied the defendant's request for a

2. The trial court instructed the jury on parole eligibility as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning.

charge on parole ineligibility. *State v. Simmons*, — S.C. —, 427 S.E.2d 175, 179 (1993). The United States Supreme Court reversed, holding,

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because the truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

— U.S. at —, 129 L. Ed. 2d at 145-46. The Court also held that the trial court's instructions on parole were insufficient to convey to the jury defendant's parole ineligibility. The Court noted that the prosecution "raised the specter" of Simmons' future dangerousness, but it then frustrated any effort by Simmons to demonstrate that "he would never be released on parole and thus, in his view, would not pose a future danger to society." *Id.* at —, 129 L. Ed. 2d at 143. The Court relied on *Gardner v. Florida*, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 404 (1977), which held that due process forbids execution of a person on the basis of information he had no opportunity to deny or explain.

The Court in *Simmons* ruled that South Carolina could "not create a false dilemma by advancing generalized arguments regarding defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at —, 129 L. Ed. 2d at 147. The Court recognized that *California v. Ramos*, 463 U.S. 992, 77 L. Ed. 2d 1171 (1983), left to the states to determine whether and under what circumstances juries should be instructed on parole eligibility when it was available to life-sentenced defendants. *Id.* at —, 129 L. Ed. 2d at 145.

III.

While the State here did argue defendant Price's future dangerousness, unlike defendant Simmons, who under governing state law would not have been eligible for parole had he been given a life sentence, defendant Price would have been parole eligible had he been sentenced to life imprisonment in North Carolina and that life sentence made to run at the expiration of the life sentence received in

Virginia. N.C.G.S. § 15A-1371(a1) (1988); Va. Code Ann. § 53.1-151 (1985 Cumm. Supp. to 1982 Repl.).[3] Further, there was no jury inquiry in the case before us regarding defendant Price's parole eligibility. It is well settled with us that absent a jury inquiry on the subject, a capital defendant's parole eligibility is irrelevant to, and should not be considered by the jury in making, a capital sentencing determination. *See State v. Skipper*, 337 N.C. 1, 43, 446 S.E.2d 252, 275 (1994); *State v. Robinson*, 336 N.C. 78, 123, 443 S.E.2d 306, 329 (1994); *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).[4]

We think the United States Supreme Court's decision in *Simmons* is limited to those situations where the alternative to a sentence of death is life imprisonment without possibility of parole. The language and rationale of the main opinion and the concurring opinions are expressly confined to situations in which a defendant sentenced to life imprisonment will not be eligible for parole. The Court also acknowledged its earlier *Ramos* decision and distinguished it from the life-without-parole situation. We have previously determined that *Simmons* is so limited. *State v. Payne*, 337 N.C. 505, 448 S.E.2d 93 (1994); *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994); *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252.

We conclude, therefore, that *Simmons* does not require that we alter our prior decisions on the points at issue. We again conclude that the trial court's rulings on these points as delineated above were without error. We again affirm defendant's conviction of first-degree murder and sentence of death and remand the case to Superior Court, Person County, for proceedings consistent with this opinion.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

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3. Defendant makes no contention that he would be ineligible for parole under his Virginia sentence or under a North Carolina sentence of life imprisonment whether made to run concurrently with or at the expiration of the Virginia sentence.

4. The General Assembly recently amended N.C.G.S. § 15A-2002 to require the trial court to charge the jury in a capital sentencing proceeding as to parole eligibility of a defendant sentenced to life imprisonment. N.C.G.S. § 15A-2002 (Act of 23 March 1994, ch. 21, sec. 5, 1994 N.C. Extra Sess. Serv. 71). This amendment, however, is effective 1 October 1994 and is to be applied prospectively only. N.C.G.S. § 15A-2002 official commentary (1993).

STATE OF NORTH CAROLINA v. DEAN BRINSON

No. 189A93

(Filed 6 October 1994)

1. **Assault and Battery § 16 (NCI4th); Indictment, Information, and Criminal Pleadings § 40 (NCI4th)— aggravated assault—amendment of indictment—cell bars and floor as deadly weapons**

An indictment alleging that defendant assaulted the victim "with his fists, a deadly weapon, by hitting [the victim] over the body with his fists and slamming his head against the cell bars and floor" and that this assault resulted in the victim's broken neck and paralysis was sufficient to allege that the cell bars and floor were deadly weapons since the indictment specifically referred to the cell bars and floor, and the recitation of facts in the indictment necessarily demonstrated the deadly character of the cell bars and floor. Therefore, the trial court did not err by permitting the State to amend the indictment to allege that the cell bars and floor were deadly weapons since the amendment was not necessary to permit the jury to consider the cell bars and floor as deadly weapons, and the amendment did not substantially alter the charge in the original indictment. N.C.G.S. § 15A-923(e).

Am Jur 2d, Assault and Battery §§ 90, 91; Indictments and Informations §§ 171 et seq.

Comment Note.—Power of court to make or permit amendment of indictment. 17 ALR3d 1181.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery. 8 ALR4th 1268.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 8 ALR5th 775.

2. **Criminal Law §§ 1098, 1120 (NCI4th)— aggravated assault—broken neck as serious injury—paralysis as basis for severe and permanent injuries aggravating factor**

The trial court did not improperly aggravate defendant's sentence for assault with a deadly weapon inflicting serious injury

with evidence necessary to prove the serious injury element of the crime by finding as a nonstatutory aggravating factor that the victim sustained "extremely severe and permanent" injuries where the evidence showed that the victim suffered a broken neck and paralysis from the assault; the evidence relating to the victim's broken neck was sufficient to establish the serious injury element of the crime; the trial court's finding that the victim suffered "extremely severe and permanent" injuries was based solely on the victim's paralysis; and the injuries used by the trial court to aggravate the sentence thus went beyond the "serious injury" necessary to convict for the offense. N.C.G.S. § 15A-1340.3(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

Justice WEBB dissenting.

Appeal of right by the State pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 110 N.C. App. 314, 430 S.E.2d 313 (1993), vacating the trial court's judgment against defendant entered on 10 May 1991 by Reid, J., in Superior Court, Nash County and remanding for a new trial. Heard in the Supreme Court 14 October 1993.

Michael F. Easley, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, and William B. Crumpler, Associate Attorney General, for the State-appellant.

Terry W. Alford for defendant-appellee.

EXUM, Chief Justice.

On 4 March 1991 defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. On 10 May 1991 a jury found defendant guilty of assault with a deadly weapon inflicting serious injury. After finding aggravating factors, the court sentenced defendant to eight years imprisonment. A divided panel of the Court of Appeals vacated this judgment and remanded for a new trial. We find no error in the trial court proceedings and reverse.

At trial the State introduced evidence showing that defendant and John Delton Eason were cellmates at the Nash County Jail on the night of 25 October 1990. Eason was playing checkers with another inmate when defendant began yelling to some females in another cell. Eason told defendant to stop yelling so that he and other inmates

would not lose their privileges. Defendant approached Eason, who arose as defendant neared. They stood facing each other for a couple of minutes. Eason turned, but as he did so defendant struck him in the jaw and put him in a full nelson hold.[1]

Defendant then proceeded to slam Eason's head against the bars, at which time Eason heard his neck "pop." Defendant then slammed Eason's head on the floor several times. A jailor found Eason on the floor, lying on his stomach with his neck twisted and scratches on his face. Eason's neck was broken, resulting in paralysis below the chest.

Based on this evidence the jury found defendant guilty of assault with a deadly weapon inflicting serious injury. After finding factors in aggravation and none in mitigation, the trial court sentenced defendant to eight years imprisonment. The majority of the Court of Appeals panel reversed on the ground that the trial court improperly permitted the State to amend the indictment. In the event that the issue might recur at the new trial, the majority also held that a non-statutory aggravating factor found by the trial judge was improper. Judge Cozort dissented on the grounds that the amendment was neither improper nor prejudicial and that the non-statutory aggravating factor was properly considered.

I.

[1] The first issue presented is whether the trial court committed prejudicial error in permitting the State to amend the indictment. The original indictment stated that defendant

> unlawfully, willfully and feloniously did assault John Delton Eason, Jr. with his fists, a deadly weapon, by hitting John Delton Eason, Jr. over the body with his fists and slamming his head against the cell bars and floor. The assault was intended to kill and resulted in serious injury, a broken neck, which required emergency medical treatment and hospitalization and which left the victim paralyzed. This act was in violation of [N.C.G.S. § 14-32(a) (1993)[2]].

1. A full nelson is defined as "a hold gained by a wrestler, who from a position behind his opponent, places both arms under his opponent's arms and clasps his hands or wrists behind the opponent's neck." *Webster's Third New International Dictionary* 919 (1971).

2. N.C.G.S. § 14-32(a) states that "[a]ny person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class F felon."

On the day of trial before jury selection began, the State moved to amend the indictment. The amended indictment stated that defendant

> unlawfully, willfully and feloniously did assault John Delton Eason, Jr. with his fists by hitting John Delton Eason, Jr. over the body with his fists and slamming his head against the cell bars, a deadly weapon, and floor. The assault was intended to kill and resulted in serious injury, a broken neck, which required emergency medical treatment and hospitalization and which left the victim paralyzed. This act was in violation of the above referenced statute.

Defendant objected, contending that the grand jury should first determine whether a jail cell or a floor is a deadly weapon. Defendant claimed that he was not prepared to prove that the jail cell and floor were not deadly weapons. The trial court granted the State's motion and continued the trial to the next morning to give counsel for defendant additional time to prepare.

Defendant contends that it was error for the court to permit the State to prosecute defendant on the amended indictment. We disagree.

N.C.G.S. § 15A-923(e) provides that "a bill of indictment may not be amended." This statute, however, has been construed to mean only that an indictment may not be amended in a way which "would substantially alter the charge set forth in the indictment." *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). Thus, for example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not "substantially alter the *charge* set forth in the indictment." *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 559 (1984).

We conclude the amendment to the indictment was permissible because it did not substantially alter the charge in the original indictment. The original indictment was sufficient to allege that the cell floor and bars were deadly weapons.

N.C.G.S. § 15A-924(a)(5) states:

> A 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.

"[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused . . . ." *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984).

With regard to indictments "seeking to charge a crime in which one of the elements is the use of a deadly weapon," we have held that it is sufficient to "(1) name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon." *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977).

With respect to whether the original indictment properly alleged that the cell bars and floor were deadly weapons, the first prong of *Palmer* is met as the original indictment specifically referred to the cell bars and cell floor. The second prong of *Palmer* is likewise met as the indictment stated that the victim's broken neck and paralysis resulted from the "assault," which included defendant's "slamming [the victim's] head against the cell bars and floor." This recitation of facts "necessarily demonstrate[s] the deadly character of" the cell bars and floor. The original indictment's statement that defendant "slamm[ed] his head against the cell bars and floor" with the intent to kill resulting in a broken neck and paralysis is drafted with "sufficient precision clearly to apprise the defendant" that the cell bars and floor were alleged to be deadly weapons. N.C.G.S. § 15A-924(a)(5) (1988). If counsel for defendant was unprepared to counter this allegation at trial, it was through no deficiency in the indictment.

In attempting to establish the materiality and prejudice of the amendment, defendant emphasizes that the original indictment specifically stated that the fists were deadly weapons. Identifying fists as deadly weapons, however, does not preclude the State from identifying at trial other items as deadly weapons where the indictment both describes them and "necessarily demonstrates[s]" their deadly character. Presumably the fists were identified as deadly weapons as it might not have been clear from the entire indictment, without those words, whether the fists were used as deadly weapons. Since, however, the indictment clearly stated the deadly manner in which the floor and bars were used, it was not necessary under *Palmer* to allege in the indictment that they were deadly weapons.

Also, the indictment said that the victim was assaulted with defendant's "fists, a deadly weapon, *by* . . . slamming [the victim's] head against the cell bars and floor." Thus, the indictment clearly linked the deadly nature of the fists to their use in slamming the victim into the bars. Whether an item is deadly often depends entirely on its use. *See, e.g., State v. Strickland*, 290 N.C. 169, 177-78, 225 S.E.2d 531, 538 (1976) (plastic bag may be a deadly weapon when used to suffocate victim).

The original indictment, then, was sufficient to allege that both the fists of defendant and the cell bars and floor were deadly weapons. Thus, under the original indictment the State properly may have asserted at trial that defendant's fists, the cell floor, the cell bars, or a combination thereof were the deadly weapons which caused the victim's serious injury. Since the amendment to the indictment was not necessary to permit the jury to consider the cell bars and floor as deadly weapons, the amended indictment did not substantially alter the original indictment. There was, therefore, no error in the trial court's ruling allowing the amendment.

The decision of the Court of Appeals reversing the conviction for assault with a deadly weapon inflicting serious injury is reversed; defendant therefore remains convicted of that crime.

II.

[2] The next issue is whether the trial court erred by aggravating defendant's sentence for "assault with a deadly weapon inflicting serious injury" with the finding that the victim sustained "extremely severe and permanent injuries." A majority of the Court of Appeals concluded that the finding was error because it was based on the same evidence used to prove the serious injury element of the crime. We disagree.

Defendant was convicted under N.C.G.S. § 14-32(b), which states, "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class H felon." The trial judge found as a non-statutory aggravating factor that "[t]he injuries sustained by the victim were extremely severe and permanent." Based on this finding and on the aggravating factor found at N.C.G.S. § 15A-1340.4(a)(1)o, relating to prior crimes, defendant was sentenced to eight years imprisonment, in excess of the presumptive term of three years, N.C.G.S. § 15A-1340.3(f)(6) (1988).

Defendant contends the trial court violated N.C.G.S. § 15A-1340.3(a)(1), which states that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." We disagree.

The evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to establish the element of the crime that the defendant inflicted a "serious injury" upon the victim. *See, e.g., State v. Marshall*, 5 N.C. App. 476, 478, 168 S.E.2d 487, 488 (1982) (bullet wound to neck near spinal cord may be found to constitute serious injury).

The evidence relating to the broken neck, however, was not used in making the finding that the "injuries sustained by the victim were extremely severe and permanent"; instead, that finding rested solely on the victim's paralysis. In making this conclusion we first recognize the principle that an appellate court is to presume the trial court's findings were based only on competent evidence. *See, e.g., Contracting Co. v. Ports Authority*, 284 N.C. 732, 739, 202 S.E.2d 473, 477 (1974). By analogy, we presume that absent any indication to the contrary in the record, the trial court in making its findings of fact relied only on evidence which was proper to consider. Thus, without any indication in the record to the contrary, we are to presume that the trial court did not improperly aggravate the sentence with evidence necessary to prove the crime.

Moreover, the trial court's finding here affirmatively indicates that it did not improperly aggravate defendant's sentence. Since the victim's broken neck will heal in time whereas his paralysis is permanent, the "permanent" injuries used by the trial court to aggravate the sentence must refer to the victim's paralysis and not the broken neck. We are also persuaded that the trial court did not use evidence of the broken neck, which supported the "serious injury," to aggravate the sentence since the trial court described the injuries constituting the aggravating factor as not merely "serious," but "extremely severe," thereby clearly indicating that it was considering injury above and beyond that necessary to establish the crime.

Since the "extremely severe and permanent" injuries used by the trial court to aggravate the sentence for assault went beyond the "serious injury" necessary to convict for the offense, it did not violate N.C.G.S. § 15A-1340.4(a)(1). *Cf. State v. Blackwelder*, 309 N.C. 410, 413 n.1, 306 S.E.2d 783, 786 n.1 (1983) ("Where physical or emotional injury is in excess of that normally present in the offense, multiple

injuries would be an important consideration . . . as an additional factor in aggravation . . . .").

Thus, we find no error in the sentence imposed by the trial court.

The decision of the Court of Appeals is

REVERSED.

Justice WEBB dissenting.

I dissent from that part of the majority opinion which holds the superior court did not commit error by using evidence necessary to prove an element of the offense to prove an aggravating factor. One element of the offense was that the defendant inflicted serious injury upon the victim.

In order to prove the serious injury element, the State introduced evidence that the victim's neck was broken and he was paralyzed below the chest. After considering the evidence, the jury found the victim suffered serious injury. We cannot say what part of the evidence the jury used to reach its verdict, but I believe we should say it considered all of it.

The majority says that the evidence of the broken neck was sufficient to find the victim was seriously injured, which left the court free to use the evidence of paralysis to find as an aggravating factor that the victim sustained "extremely severe and permanent injuries." The State, when presenting its case in chief, offered all the evidence it could to prove the serious injury. The paralysis was relevant and competent to prove this element. I believe we are perverting the statute by allowing the State now to use this evidence to prove an aggravating factor. By our decision today, we have adopted a rule that after the State has used what evidence it feels is necessary to convict a defendant, it may then decide what of that evidence was necessary to convict and reuse the other evidence to prove an aggravating factor. I believe we should hold that all the evidence was necessary to prove the element of the crime. The State must have thought so or it would not have used it.

I vote to affirm the Court of Appeals in its holding that it was error to consider the evidence of paralysis in finding an aggravating factor. I agree with the majority opinion as to the first issue in this appeal.

STATE OF NORTH CAROLINA v. WILLIAM RONALD GRAY

No. 8A94

(Filed 6 October 1994)

1. **Evidence and Witnesses § 1706 (NCI4th)— homicide—autopsy photographs not excessive**

The trial court did not abuse its discretion in the admission of three autopsy photographs of a murder victim when a photograph of the victim at the shooting scene and a photograph of the victim's chest showing the hole where the bullet entered the body had already been admitted and when there was no dispute as to the cause of death or who inflicted the fatal wound where each photograph related to material events and facts to which each identifying witness was testifying, and the testimony of each witness whose testimony the photographs illustrated related to different aspects of the case and served different purposes.

Am Jur 2d, Evidence §§ 961 et seq.

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

2. **Criminal Law § 648 (NCI4th)— motion to dismiss after State's evidence—waiver by introducing evidence**

Defendant's assignment of error to the denial of his motion to dismiss at the conclusion of the State's case-in-chief was waived by defendant's presentation of evidence. Appellate Rule 10(b)(3).

Am Jur 2d, Trial § 1058.

3. **Homicide § 232 (NCI4th)— first-degree murder—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of first-degree murder based on premeditation and deliberation and failed to establish self-defense as a matter of law where it tended to show that after a minor shoving match, defendant pulled out his gun, pointed it at the victim twice, and then shot the victim at point blank range.

Am Jur 2d, Homicide §§ 425 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Britt, J., at

the 26 July 1993 Criminal Session of Superior Court, Columbus County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 September 1994.

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

Harold G. Pope for defendant-appellant.

MEYER, Justice.

Defendant appeals from his conviction of first-degree murder in a noncapital trial and the mandatory life sentence that was imposed and brings forward three assignments of error. After a careful and thorough review of the transcript, the record, the exhibits, the briefs, and oral arguments of counsel, we find no error.

The State's evidence tended to show that on 15 November 1992 at approximately 5:15 p.m., Police Officer Johnny L. Starks, Sr., found the victim, Reginald Anderson, lying face up with a gunshot wound to the chest. Officer Starks had been directed to the scene at Progressive Women's Park in Fair Bluff by two witnesses to the shooting, Jonathan Bullock and Randy Evans, who had reported the incident to officers at the police station. Reginald Anderson was transported by ambulance to the Columbus County Hospital, where he was later pronounced dead. Anderson had been shot once in the chest, and the bullet had pierced his heart and right lung before lodging in his back. Based upon the statements of several witnesses at the scene, the investigation focused on defendant, and he was sought for questioning. Defendant turned himself in at the police station approximately an hour and a half after the shooting.

At trial, Jonathan Bullock, a friend of defendant and a cousin of the victim, testified that he saw defendant and Reginald Anderson along with several other people in the park and heard defendant and Anderson arguing over someone having urinated on Bullock's cousin's car. Bullock heard a gunshot and then saw Anderson run by the car in which he was sitting and fall to the ground.

Joe Bullock, III, Jonathan Bullock's cousin, testified that he had been a classmate of Anderson and had known Anderson all his life. He also testified that he believed he was related to defendant. Earlier in the day on 15 November 1992, he had played basketball with defendant and some others. Afterwards, the group went to the park. Anderson arrived at the park with Randy Evans. The group talked for

approximately two hours. During this time, defendant and two others were standing by Bullock's car. Then, defendant and the others began walking up the road away from the park. Bullock approached his car to leave the park and saw what he thought was urine on the tire. Reginald Anderson came over to the car to ask for a dollar, and Bullock told him about the urine. Anderson said it was "nothing but one of those down there," referring to defendant and others, and then Anderson called to the group.

Bullock then testified that defendant and Anderson became involved in an argument that escalated into a scuffle. Both men were pushing each other, but neither was knocked off his feet. As Anderson walked towards defendant, defendant pulled a gun from his coat pocket and told Anderson something to the effect of, "Back off, I'm going to burn you." Anderson, who was approximately an arm's distance from defendant, pushed the gun away and stepped towards defendant. Defendant then raised the gun again, and Bullock heard a shot. Bullock looked up and saw Anderson grab his chest, run, and then fall down. Defendant walked away from the scene. Bullock further testified that when he asked defendant why he had shot Anderson, defendant replied, "F--- the motherf-----. Now he know I got the juice."

The testimony of Randy Evans, Ned Wayne Taste, and Darren Bullock, also witnesses to the shooting, supported that of Joe Bullock, III. In addition, Randy Evans testified that a man named Craig, whom Evans described as a "big guy," stood between Anderson and defendant and told them "not to do that." Evans testified that defendant stepped around Craig and pushed Anderson. Evans also testified that when defendant pointed the gun at Anderson the second time, he cocked it and held the gun on Anderson for a second before firing. Evans also testified that defendant fired the gun when it appeared Anderson was going to step towards him and that Anderson's hands were down, but positioned as if he were going to shove defendant or put his hands up, when defendant shot him.

Defendant testified that he thought Anderson was going to hurt him or kill him. Evidence was presented that Anderson was six feet tall and weighed 243 pounds and that defendant weighed about seventy-five pounds less than Anderson. Defendant was seventeen at the time of the shooting, while Anderson was thirty or thirty-one years old. Defendant testified that, on the day of the shooting, Anderson had told him that he was "going to kick [defendant's] ass

today." Defendant also testified that he could not run away from Anderson because Anderson was "steady coming toward [him], pushing and stuff." Defendant denied saying he was going to "burn" Anderson and denied cocking the gun. Defendant contended that he told Anderson to "back off" and that he did not remember pulling the trigger.

Defendant testified that he had never seen Anderson "get violent" and did not know Anderson to have a reputation for violence. Further, defendant testified that Anderson never gave defendant reason to believe he was armed and that defendant became mad when Anderson pushed him.

[1] Defendant argues that the trial court erred in allowing the State to introduce into evidence, over defendant's objection, cumulative and repetitious autopsy photographs.

The State introduced five photographs into evidence for illustrative purposes. State's Exhibit No. 1 was a photograph of Reginald Anderson taken at the scene of the shooting. Exhibit No. 2, a photograph of Anderson's chest area showing the bullet hole where the bullet entered the body, was taken at the hospital on the day of the shooting. Officer Starks identified Exhibit Nos. 1 and 2 and testified that the photographs showed the appearance of the victim and his chest wound. Defendant did not object to the admission of Exhibit Nos. 1 and 2.

State's Exhibit Nos. 5, 6, and 7 were 8x10 color photographs taken during the autopsy of Reginald Anderson. Dr. Brent Dwayne Hall, who performed the autopsy, testified as an expert in forensic pathology, and Exhibit Nos. 5, 6, and 7 were used to illustrate his testimony. Exhibit No. 5 was an identification photograph of the body, taken before the autopsy began. Exhibit No. 6, a distance photograph of the chest wound taken during the autopsy, was used by Dr. Hall to illustrate the location of the wound on the body. Exhibit No. 7, a close-up photograph of the wound specifically showing an abrasion collar around the wound, was used by Dr. Hall to illustrate that the chest wound was an entrance wound.

Defendant objected to the introduction of Exhibit Nos. 6 and 7 on the grounds that the photographs were repetitious of Exhibit No. 2. Defendant further contends that there was no dispute as to the cause of death or who inflicted the fatal wound, and therefore, Exhibit Nos. 6 and 7 had no probative value and were introduced for the sole

purpose of inflaming the jury. Defendant argues these photographs should have been excluded under Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1986).

The principles of law governing the admission of photographic evidence with inflammatory potential were set out by this Court in *State v. Hennis*, 323 N.C. 279, 283-85, 372 S.E.2d 523, 526-27 (1988), *quoted in State v. Robinson*, 327 N.C. 346, 356-57, 395 S.E.2d 402, 407-09 (1990). Whether photographic evidence is admissible under Rule 403 is within the sound discretion of the trial court. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Generally, photographs are competent evidence to explain or illustrate anything that is competent for the witness to describe in words. *Id.* at 283, 372 S.E.2d at 526. Properly authenticated photographs of a homicide victim may be introduced into evidence if the trial court instructs the jury that their use is limited to illustrating the witnesses' testimony. *Id.* at 283-84, 372 S.E.2d at 526. Generally, the fact that a photograph is gruesome or gory does not render it inadmissible if it is otherwise competent. *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816 (1991). "Even where . . . the cause of death and identity of the victim are uncontroverted, photographs may be exhibited showing the condition of the body and its location when found." *Id.*

This Court has recognized that "when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. However, the decision of whether photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs lies within the sound discretion of the trial court. *Id.* at 285, 372 S.E.2d at 526. Abuse of discretion occurs only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.*

We find no abuse of discretion in the admission of the photographs in the case at bar. There is no evidence that the photographs

were used excessively or solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988). Instead, the record demonstrates that each photograph related to material events and facts to which each identifying witness was testifying. Further, the testimony of each witness whose testimony the photographs illustrated related to different aspects of the case and served different purposes. Therefore, we overrule this assignment of error.

[2] Defendant next assigns error to the trial court's denial of his motion to dismiss at the conclusion of the State's case-in-chief. However, this assignment of error was waived by defendant's presentation of evidence. Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure states:

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

N.C. R. App. P. 10(b)(3). Accordingly, we overrule this assignment of error.

[3] Defendant's last assignment of error is to the overruling of his motion to dismiss at the close of all the evidence. He contends that the State's evidence failed to establish each element of murder in the first degree and that the evidence established self-defense as a matter of law.

In determining whether evidence is sufficient to survive a motion to dismiss, the evidence is considered in the light most favorable to the State. *State v. Mason*, 336 N.C. 595, 597, 144 S.E.2d 169, 169 (1994). The test for the sufficiency of the evidence in a criminal case is whether there is substantial evidence of every element of the offense charged and that defendant was the perpetrator so that any rational trier of fact could find beyond a reasonable doubt that the crime was committed and that defendant committed it. *State v. Thompson*, 306 N.C. 526, 532, 294 S.E.2d 314, 318 (1982). "Substantial evidence" is that amount of relevant evidence that a reasonable mind

might accept as adequate to support a conclusion. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

There was substantial evidence here from which reasonable jurors could conclude that defendant committed first-degree murder. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). The evidence elicited from the State's witnesses and from the defendant himself is sufficient to permit the jury to reasonably find that defendant, after premeditation and deliberation, killed Reginald Anderson. The record demonstrates that after a minor shoving match, defendant pulled out his gun, pointed it at Anderson twice, and then shot Anderson in the chest at point blank range. When viewed in the light most favorable to the State, this evidence is sufficient to support a conviction of first-degree murder.

Further, contrary to defendant's contention, the evidence is insufficient to establish self-defense as a matter of law. Perfect self-defense is justification for a homicide where the defendant establishes and the jury finds that:

> "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> "(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> "(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> "(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). The evidence presented does not unequivocally establish that the killing was in self-defense. Therefore, we overrule this assignment of error.

In defendant's trial and in the imposition of the mandatory sentence of life imprisonment, we find no error.

NO ERROR.

STATE OF NORTH CAROLINA v. KENNETH B. SIDBERRY

No. 364A93

(Filed 6 October 1994)

1. **Evidence and Witnesses § 2994 (NCI4th)— cross-examination of defendant—prior convictions—guilty pleas—prayer for judgment continued**

The trial court in a first-degree murder prosecution did not err by permitting the State to cross-examine defendant regarding prior guilty pleas to cocaine charges on which prayer for judgment had been continued pending the disposition of the murder charge where defendant was told by his attorney and by the judge during the plea hearing on the cocaine charges that the entry of guilty pleas had potential consequences in his pending murder trial and, further, that these convictions could be used to enhance punishment if he were convicted of less than first-degree murder, and the trial judge determined that defendant understood the impact of his guilty pleas and accepted the pleas after finding a factual basis for them.

Am Jur 2d, Witnesses § 570.

Permissibility of impeaching credibility of witness by showing verdict of guilty without judgment of sentence thereon. 28 ALR4th 647.

2. **Evidence and Witnesses § 930 (NCI4th)— exculpatory statement—hour after shooting—not excited utterance**

An exculpatory statement about the shooting of the victim made by defendant to the aunt with whom he lived was not admissible as an excited utterance and was properly excluded as hearsay in this first-degree murder trial where defendant first talked with his aunt on the telephone after the shooting from his grandmother's house but did not mention the shooting, and defendant waited until he went to his aunt's home an hour after the shooting to tell her what had happened, since defendant had

time to manufacture the statement and the statement lacked spontaneity. N.C.G.S. § 8C-1, Rule 803(2).

Am Jur 2d, Evidence §§ 865, 882.

When is hearsay statement an "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed 451.

3. Evidence and Witnesses § 3169 (NCI4th)— pretrial statement—admission for corroboration—significant discrepancies—harmless error

A witness's pretrial statement contained significant discrepancies from his testimony in a murder trial as to whether defendant handed the murder weapon to the killer just prior to the killing and whether the killer was responding to defendant's request when he shot the victim, and the trial court erred by admitting the statement into evidence as corroboration of the witness's trial testimony. However, this error was harmless where other witnesses testified that defendant gave the killer the gun and that defendant admitted giving the gun to the killer, and there was overwhelming evidence that the killer listened to or carried through on defendant's advice to shoot the victim.

Am Jur 2d, Witnesses §§ 641 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Parker, J., at the 1 June 1993 Criminal Session of Superior Court, Onslow County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 15 September 1994.

Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.

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

MEYER, Justice.

Defendant was indicted for first-degree murder. He was tried noncapitally to a jury and found guilty as charged. Judge Parker sentenced him to a mandatory term of life imprisonment. Defendant appeals to this Court as of right from the first-degree murder conviction.

The State's evidence showed that on 5 November 1992, defendant Kenneth Sidberry, Jarvis Mason, Rodney Arnold, Alfred Pickett, and the victim, Shammon Mattocks, were in the area of 109 Market Street in Jacksonville, North Carolina. Mason and Mattocks began arguing about $500.00 defendant and Mason believed that Mattocks had stolen from them. Mason shot Mattocks in the forehead with a .25-caliber weapon causing his death.

The State's evidence indicated that, just before Mason pulled the trigger, defendant had told Mason to "go ahead." There was also evidence that the gun used to shoot Mattocks was defendant's gun and that defendant gave it to Mason during the argument with the victim. All of the witnesses to the shooting who testified for the State either had criminal records or were in jail at the time of the trial, awaiting sentencing.

Defendant's evidence showed that defendant had been riding a motorbike behind the crime scene during the shooting and thus was not involved in the argument over money and that defendant did not own a gun. Defendant's evidence also showed that defendant heard a shot, saw the victim lying on the ground, then drove his motorbike first to his grandmother's and then to the home of his aunt, with whom he lived.

Additional facts will be addressed as necessary to an understanding of the issues.

[1] In his first assignment of error, defendant contends that the trial court erred by permitting the State to cross-examine him regarding prior guilty pleas on which prayer for judgment had been continued, thus improperly chilling his right to testify. Prior to this trial, defendant pled guilty to two unrelated charges of sale and delivery of cocaine. Prayer for judgment on these crimes was continued by the judge, pending the disposition of the murder charge. The judge explained that he continued prayer for judgment because he did not want to interfere with defendant's right to testify in the murder case. Defendant made a motion *in limine* to prohibit the State from cross-examining defendant regarding these guilty pleas if defendant chose to testify. This motion was denied. Defendant argues that this was constitutional error, chilling his constitutional right to testify and precluding the jury from directly assessing defendant's credibility.

North Carolina Rule of Evidence 609(a) provides:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

N.C.G.S. § 8C-1, Rule 609(a) (1993). Defendant argues that a prayer for judgment continued is not a final judgment and should not be treated as a conviction for purposes of Rule 609. We disagree.

Rule 609(a) allows a party, for the purpose of attacking the credibility of a witness, to elicit whether the witness has been convicted of a crime punishable by more than sixty days' confinement. The permissible scope of inquiry is restricted to the name of the crime, the time and place of conviction, and the punishment imposed. *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). "It is settled law in this State that a plea of guilty, freely, understandingly, and voluntarily entered, is equivalent to a conviction of the offense charged." *State v. Watkins*, 283 N.C. 17, 27, 194 S.E.2d 800, 808, *cert. denied*, 414 U.S. 1000, 38 L. Ed. 2d 235 (1973).

Here, defendant was told by his attorney and by the judge during the plea hearing in his case for sale and delivery of cocaine that the entry of pleas of guilty had potential consequences in his pending murder trial and further, that if he were convicted of less than first-degree murder, these convictions could be used to enhance punishment under the Fair Sentencing Act. The judge determined that defendant understood the impact of his guilty pleas and then accepted the guilty pleas after finding a factual basis for the pleas. Accordingly, we find that the trial court did not err in ruling that the State could cross-examine defendant regarding these prior guilty pleas if defendant chose to testify.

[2] In his next assignment of error, defendant contends that the trial court erred by failing to allow Mai Pickett, his aunt with whom he lived, to testify regarding an exculpatory statement made by defendant. Defendant notes that in this case, his evidence showed that he was sixteen years old; he saw the victim lying on the street, found his grandmother who lived nearby, called his aunt from his grandmother's home, and then rode his motorbike home to his aunt's. Defendant arrived at his home distraught and on the verge of tears. Defendant then recounted the events of the shooting to his aunt, who was a trusted adult and caretaker. Defendant told his aunt about the shooting within an hour of the shooting.

North Carolina Rule of Evidence 803(2) provides that testimony of a witness as to a statement made by the declarant relating to a startling event and made while the declarant was under the stress of that event is not excludable under the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2) (1993); *State v. Sneed*, 327 N.C. 266, 393 S.E.2d 531 (1990). This Court has held that for a statement to be admitted as an excited utterance, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

In this case, defendant first talked to his aunt on the telephone after the shooting from his grandmother's house. He called his aunt to tell her where he was and that he was on his way home. Defendant did not mention the shooting on the phone. Instead, he waited until after he had ridden home, an hour after the shooting, to tell her what had happened. These facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity. *See State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988) (about an hour after victim's death, defendant told police officer that victim had stabbed him; statement not admitted because defendant had time to manufacture statement and it was not made spontaneously), *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). Therefore, we find that the trial court properly excluded Mai Pickett's testimony on the grounds that it was inadmissible hearsay.

[3] In his final assignment of error, defendant contends that the trial court erred by allowing Alfred Pickett's pretrial statement into evidence as corroboration of his testimony because the statement was inconsistent with Pickett's in-court testimony. Alfred Pickett was a key witness for the State. Over defendant's objection, Police Detective Carol Lynch was permitted to read into evidence notes that she had taken during an interrogation of Pickett prior to trial, as corroboration of Pickett's testimony. Defendant argues that Lynch should not have been allowed to read these notes because they included significant contradictions and a material noncorroborative addition to the testimony.

In support of this argument, defendant relies on this Court's decision in *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988). In *Burton*, we held that " 'prior statements as to facts not referred to in

his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's *prior contradictory statements may not be admitted under the guise of corroborating* his testimony.' " *Id.* at 450, 368 S.E.2d at 632 (quoting *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986)) (emphasis in original).

Defendant maintains that there were two discrepancies between Pickett's testimony and his pretrial statement to Officer Lynch. The first concerned whether defendant handed Mason the murder weapon just prior to the shooting. During direct examination and cross-examination, Pickett testified that he did not see defendant give Mason the gun prior to the shooting. However, Lynch's notes, read at trial, indicated that Pickett stated Mason got the gun from defendant, that defendant had the gun in his pants and then gave it to Mason.

The second discrepancy concerned a comment made during an argument among Mason, Pickett, and defendant on the day following the shooting. Pickett testified that on 6 November 1992, he accused defendant of acting wrongly on the previous day by telling Mason what to do. Pickett did not testify that Mason had said anything to defendant on that date. However, Lynch's notes indicated that Mason had said, "I shouldn't have listened to you [defendant]." Defendant argues that this was significant because Pickett's testimony at trial did not indicate that Mason had listened or responded to defendant, but the pretrial statement indicates that Mason was responding to defendant's request when shooting the victim.

We agree with defendant that Alfred Pickett's pretrial statement contained significant discrepancies from his testimony at trial and should not have been admitted as corroborative evidence. However, we find that the error was harmless. Prior to Pickett's corroborative statement being read to the jury, Rodney Arnold had testified that he saw defendant give Mason the gun during the argument. Anthony Winchip, a witness for the State, had also testified that defendant admitted giving the gun to Mason. As to the second discrepancy complained of, there is overwhelming evidence that Mason listened to or carried through on defendant's advice to shoot Shammon Mattocks. Therefore, we conclude that there is no reasonable possibility that, had the error not occurred, a different result would have been reached at trial.

In conclusion, we hold that there was no prejudicial error in defendant's conviction for first-degree murder and in the imposition of the mandatory sentence of life imprisonment.

NO ERROR.

WILLIAM D. MARTIN, EMPLOYEE-PLAINTIFF, RESPONDENT v. PIEDMONT ASPHALT & PAVING, EMPLOYER-DEFENDANT, AND THE PMA GROUP, CARRIER-DEFENDANT, PETITIONERS

No. 6PA94

(Filed 6 October 1994)

Workers' Compensation § 438 (NCI4th)— order by deputy commissioner—allowance of writ of certiorari—no genuine controversy—authority exceeded

The Court of Appeals exceeded its proper authority under N.C.G.S. § 7A-29(a) by allowing plaintiff's petition for a writ of certiorari to review a workers' compensation order entered by a deputy commissioner and by rendering a decision on the statutory and constitutional validity of the procedures ordinarily employed to stop compensation under Form 24 and Rule 404 of the Industrial Commission since (1) no final order or award had been entered by the Commission itself, and (2) plaintiff, having received the benefit of an opinion and award by a deputy commissioner ordering that disability payments to the plaintiff be resumed from the date of the last payment he had received, no longer had any legally cognizable interest in the Commission's procedures under Form 24 and Rule 404, and there was thus no genuine controversy between the parties.

Am Jur 2d, Workers' Compensation §§ 688, 696.

On discretionary review of a decision of the Court of Appeals, 113 N.C. App. 121, 437 S.E.2d 696 (1993). Heard in the Supreme Court on 14 September 1994.

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

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo and Paige E. Williams, for defendants-appellants Piedmont Asphalt & Paving Company and The PMA Group.

Michael F. Easley, Attorney General, by Elisha H. Bunting, Jr., Special Deputy Attorney General, for the intervenor defendant-appellant North Carolina Industrial Commission.

Bailey and Dixon, by J. Ruffin Bailey, David M. Britt and Alan J. Miles, for the American Insurance Association, amicus curiae.

Maupin Taylor Ellis & Adams, P.A., by Richard M. Lewis and Julie A. Alagna, for the North Carolina Association of Defense Attorneys, amicus curiae.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier, III, for the North Carolina Association of Self-Insurers, amicus curiae.

PER CURIAM.

Plaintiff William D. Martin suffered an injury by accident on 13 September 1989 while working for the defendant Piedmont Asphalt & Paving Company. The parties executed an "Industrial Commission Form 21 Agreement for Compensation for Disability" which was approved by the North Carolina Industrial Commission on 1 November 1989. Defendant insurance carrier, The PMA Group, filed an "Industrial Commission Form 24 Application to Stop Payment of Compensation" with the Commission on 7 August 1990 and stopped payments of compensation to plaintiff on that date. A copy of this form was mailed to plaintiff, as required by Rule 404 of the Workers' Compensation Rules of the North Carolina Industrial Commission entitled "Termination of Compensation." The Form 24 application was approved on 23 August 1990 by Ms. Martha Barr, Chief Claims Examiner of the Commission, thereby administratively suspending plaintiff's temporary total disability compensation benefits.

On 3 July 1991, plaintiff requested a hearing to contest the suspension of his benefits. The requested hearing was held in part before Deputy Commissioner Tamara Nance on 5 November 1991. Deputy Commissioner Nance entered an Opinion and Award on 3 June 1992 holding that plaintiff was entitled to temporary total disability compensation from 7 August 1990, when such payments had been stopped pursuant to approval of the Form 24 application. Deputy Commissioner Nance held in abeyance any decision on plaintiff's constitutional and statutory challenges to Form 24 and the procedures

employed thereunder and made no ruling on plaintiff's motion for a penalty and attorney fees.

Plaintiff filed a Notice of Application for Review on 16 June 1992 seeking review by the Industrial Commission of the statutory and constitutional validity of the Commission's Form 24 procedures and Rule 404. Prior to any such review by the Commission, however, the plaintiff filed a Notice of Appeal to the Court of Appeals on 28 October 1992 purporting to appeal as a matter of right *inter alia* from the Opinion and Award of Deputy Commissioner Nance. He served a proposed Record on Appeal on defendants on 19 November 1992. Before defendants were required to serve objections, amendments, or a proposed alternative Record on Appeal pursuant to Rule 18(d) of the Rules of Appellate Procedure, the Commission entered an order on 24 November 1992 dismissing plaintiff's appeal to the Court of Appeals. Relying on this order, defendants did not file objections, amendments, or a proposed alternative Record on Appeal.

On 23 December 1992, plaintiff filed a renewed Notice of Appeal to the Court of Appeals and a petition to that court for writ of certiorari. He also submitted a Record on Appeal to the Court of Appeals. Defendants moved that the Court of Appeals dismiss plaintiff's appeal. In its opinion filed on 21 December 1993, the Court of Appeals recognized that plaintiff's purported appeal was from an order of a deputy commissioner rather than from the Industrial Commission and, therefore, was not a proper appeal. The Court of Appeals nevertheless stated that since the case involved matters of important public policy, it deemed it appropriate to issue its writ of certiorari to review the actions and proceedings of the Commission revealed in the record. The Court of Appeals then went on to conclude that no statutory authority existed to support the Commission's Rule 404 and Form 24 procedures and that the Commission had exceeded its authority in adopting and applying them. The Court of Appeals held that its decision in that regard was to have prospective effect only. The Court of Appeals held that Form 24 proceedings pending before the Commission must be terminated and Form 24 applications received thereafter must be rejected.

The Commission filed a petition with this Court for writ of supersedeas and a motion for temporary stay of the judgment of the Court of Appeals. On 11 January 1994, this Court allowed the motion for temporary stay. On 3 March 1994, this Court allowed petitions for discretionary review of the decision of the Court of Appeals filed by the

Commission and by defendants Piedmont Asphalt & Paving Company and The PMA Group.

As the Court of Appeals recognized in its opinion, it had no authority to hear an appeal by the plaintiff in the present case, since no "final order or decision" had been entered by the North Carolina Industrial Commission. N.C.G.S. § 7A-29(a) (1989). Therefore, the Court of Appeals chose to issue a writ of certiorari pursuant to the powers vested in it by N.C.G.S. § 7A-32(c) to "supervise and control the proceedings of . . . the Industrial Commission." We conclude that the Court of Appeals exceeded its proper authority under that statute in the present case.

The only orders which had been entered in the plaintiff's case were orders entered by a claims examiner and by a deputy commissioner; no final order or award had been entered by the Commission itself. Therefore, the Commission had taken no action in this case for the Court of Appeals to review.

Further, the Court of Appeals failed to follow established precedent to the effect that the appellate courts of this state will not issue opinions where there is no genuine controversy between the parties before them. Plaintiff, having received the benefit of an opinion and award by a deputy commissioner ordering that the payments to the plaintiff be resumed from the date of the last payment he had received, no longer had any legally cognizable interest in the Commission's procedures under Form 24 and Rule 404. As this Court has previously pointed out, it is not a proper function of courts "to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Adams v. North Carolina Department of Natural and Economic Resources*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) (quoting *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931)). Here, the Court of Appeals rendered a decision on the statutory and constitutional validity of the procedures ordinarily employed under Form 24 and Rule 404 of the Commission, ruling upon those questions in the abstract and without the presence of injured parties. We conclude that the decision of the Court of Appeals exceeded that court's proper exercise of its discretionary powers and must be vacated. *See Great Southern Media v. McDowell County*, 304 N.C. 427, 284 S.E.2d 457 (1981) (refusing to consider a due process challenge to tax notices published in newspapers because the question could not be decided in the abstract without the presence of

injured parties). Therefore, the additional issues brought forward by plaintiff in his response to defendants' petitions to this Court need not be reviewed here; as to those issues, we conclude that discretionary review was improvidently allowed.

For the foregoing reasons, the decision of the Court of Appeals is vacated.

Vacated.

STATE OF NORTH CAROLINA v. WILLIAM ELMORE

No. 507A93

(Filed 6 October 1994)

Evidence and Witnesses § 1250 (NCI4th)— invocation of rights to silence and counsel--F.B.I. agent's testimony—harmless error

Assuming *arguendo* that the trial court in a first-degree murder prosecution erred by failing to sustain defendant's objection and grant his motion to strike testimony by an F.B.I. agent who arrested defendant for unlawful flight to avoid prosecution that he asked defendant "if he was willing to make a statement, at which time he said he wanted to consult with an attorney before talking about the arresting matter," this error was harmless beyond a reasonable doubt where (1) any violation of defendant's rights was *de minimis* because the testimony was not solicited by the prosecutor, was offered by the F.B.I. agent simply to explain why he discontinued questioning of the defendant, and was not further emphasized by additional questions or comments; (2) the State did not refer in closing arguments to defendant's exercise of his rights to remain silent and to request counsel during interrogation, defendant was not cross-examined on the matter, and no other witness made any reference to defendant's invocation of his rights; and (3) the evidence against defendant was overwhelming, and the record reveals that the sources of defendant's credibility problems were his flight from this state, his efforts to conceal his identity from police, and the fact that his testimony that he shot the victim in defense of himself and another person was contradicted by all other evidence in the case,

including testimony by the person in whose defense defendant testified that he acted.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 749 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Allen (J.B., Jr.), J., on 20 May 1993 in Superior Court, Wake County, upon a jury verdict finding the defendant guilty of murder in the first-degree. Heard in the Supreme Court on 13 September 1994.

Michael F. Easley, Attorney General, by Mary D. Winstead, 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 William Elmore was tried noncapitally at the 17 May 1993 Criminal Session of Superior Court, Wake County, for murder in the first degree and discharging a firearm into an occupied vehicle. The jury returned a verdict finding the defendant guilty of first-degree murder based on both the theory of premeditation and deliberation and the felony murder theory. The jury also found him guilty of discharging a firearm into an occupied vehicle. The trial court imposed a mandatory sentence of life imprisonment for the first-degree murder conviction and continued prayer for judgment on the discharging a firearm conviction. The defendant does not seek to appeal his conviction for discharging a firearm into an occupied vehicle.

The State's evidence tended to show the following:

During the afternoon of 30 March 1991, Bruce Thomas and the victim, William Green, drank gin and smoked cocaine. That evening Thomas drove both of them in the victim's van to East Street in Raleigh, where they intended to trade the victim's shotgun for more cocaine.

When Thomas stopped on East Street, the defendant and Travis Porter approached the van. The victim and Thomas told the defendant and Porter that they wanted cocaine. The defendant replied that he had cocaine and, after some discussion, he gave the two a sample

to smoke. The victim and Thomas asked whether the defendant had anything better and the defendant replied that he did. The victim showed the defendant the shotgun he wanted to trade for the cocaine. The defendant asked if they had any pistols and they responded that they did not. The defendant then left, presumably to get the other cocaine. Porter remained at the van during the ten minutes or so that the defendant was gone.

When the defendant reappeared across the street from the van, he was carrying a gun wrapped in a towel. He dropped the towel and shouted to the victim and Thomas to open the door and drop all their money and belongings out of the van. The defendant shot once or twice as he walked toward the van and then shot two or three times into the van once he reached it. The defendant and others at the scene fled. The victim Green died from a gunshot wound to the neck.

In the days following the shooting, the defendant learned that the victim had died and that the police were looking for him. He left North Carolina for Atlanta, Georgia, where his mother lived. He moved five or six times after arriving in Atlanta. He also obtained false identification and lived under the alias Robert Winslow because he knew the police were looking for him.

The F.B.I. became involved in the search for the defendant because a federal warrant for the defendant charging him with unlawful flight to avoid prosecution had been issued. On 12 May 1992, Agent Green of the F.B.I. arrested the defendant in Atlanta. Upon his arrest the defendant gave a false name but shortly afterwards confessed his true identity. Agent Green processed the defendant in Atlanta and subsequently had him transported back to Raleigh.

The defendant testified on his own behalf and stated that he fired the gun in defense of himself and Travis Porter. Much of his testimony coincided with the State's evidence except for his testimony regarding the events immediately surrounding the shooting. He testified that he left the area where the van was parked and got a gun after Porter got into an argument with the victim and Thomas. When he approached the van on his return, he saw the shotgun pointed first at Porter and then at him. In fear, he responded by shooting several times in the direction of the van. The other witnesses, including Porter, contradicted his account.

In his only assignment of error, the defendant contends that the trial court erred by failing to sustain his objection and grant his

motion to strike certain testimony by Agent Green. At trial, Agent Green testified regarding his apprehension and processing of the defendant in Atlanta on the unlawful flight charge. The following portion of his testimony is at issue:

> PROSECUTOR: What happened—when did you next see the Defendant?
>
> AGENT GREEN: The next morning we picked him up from the Douglas County Correctional Facility, at which time we took him to our office, processed him, which includes fingerprinting and photographing him.
>
> On our transportation to the office, I again advised him of his Constitutional rights, *asked him if he was willing to make a statement, at which time he said he wanted to consult with an attorney before talking about the arresting matter.*

The defendant argues that the trial court's error allowed the jury to impermissibly consider as evidence against him the fact that he would not give his exculpatory version of events to police when he was first arrested. The defendant contends that the challenged testimony violated his Fifth Amendment rights to silence and to counsel. The State responds that there was no error because the defendant invoked his rights only as to the federal unlawful flight charge, which was not a charge for which he was on trial. Alternatively, the State argues that any error was harmless beyond a reasonable doubt.

The defendant correctly points out that a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial. *See State v. Ladd*, 308 N.C. 272, 283-84, 302 S.E.2d 164, 171-72 (1983). However, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1993). Assuming *arguendo* that the trial court erred by failing to sustain the defendant's objection and strike the objected-to portion of Agent Green's testimony, we conclude that the error was harmless beyond a reasonable doubt.

First, any violation of the defendant's rights was *de minimis*. The challenged testimony came in response to a question that requested a chronology of the events surrounding the defendant's arrest and processing in Atlanta. The reference to the defendant invoking his rights went beyond the information sought by the prosecutor's innocuous question. The reference was not further emphasized by additional

questions or comments during Green's testimony. The record indicates that the testimony at issue was not solicited by the prosecutor and the remark apparently was offered by Agent Green simply to explain why he discontinued his questioning of the defendant. In light of the context in which this arose and the single brief mention by one witness of this matter, this was a *de minimis* violation.

Second, the record does not show that in closing arguments the State referred to the defendant's exercise of his constitutional rights. Neither does the record show that the defendant was cross-examined on the matter or that any other witness made reference to the defendant invoking his rights. These facts distinguish this case from other cases where this Court has found error when the prosecutor directly commented on a defendant's failure to testify or when a defendant was cross-examined about his invocation of his rights. *See, e.g., State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993).

Finally, the evidence against the defendant was overwhelming. The defendant argues that his credibility was damaged by the revelation that he invoked his rights to silence and to counsel. However, the record reveals that the sources of the defendant's credibility problem were his flight from this state, his efforts to conceal his identity from police, and the fact that the critical part of his testimony was contradicted by all other evidence in the case. The defendant fled the jurisdiction following the shooting. He hid in Atlanta for over a year, where he lived under an alias using false identification. His testimony was the only evidence that, if believed, would have made his story that he was engaged in self-defense and defense of Porter plausible. Five other eyewitnesses contradicted his testimony, including Porter in whose defense the defendant testified that he had acted.

For the foregoing reasons, we conclude that the trial court's error, if any, was harmless beyond a reasonable doubt.

No error.

FRANK NEWCOMBE BOWDEN, ADMINISTRATOR OF THE ESTATE OF DONNA ELLYN BROOKY v. WILLIAM DUDLEY LATTA, JR., AND WILLIAM DUDLEY LATTA, SR., D/B/A W.D. LATTA & SONS TRUCKING

No. 541PA93

(Filed 6 October 1994)

Appeal and Error § 139 (NCI4th)— judgment n.o.v. on contributory negligence issue—new trial on damages issue—order immediately appealable

In a wrongful death action arising from defendant driver's alleged negligence in the operation of a motor vehicle, the trial court's interlocutory order granting plaintiff's motion for judgment notwithstanding the verdict on the issue of decedent's contributory negligence and ordering a new trial on the issue of damages affected a substantial right of the defendants under N.C.G.S. §§ 1-277(a) and 7A-27(d) and was immediately appealable to the Court of Appeals.

Am Jur 2d, Appeal and Error §§ 47 et seq., 123 et seq.

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. 543, 436 S.E.2d 416 (1993), dismissing defendants' appeal as premature. Heard in the Supreme Court 14 September 1994.

Maxwell, Freeman & Beason, P.A., by Robert A. Beason and Monica Umstaedt Rossman, for plaintiff-appellee.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., and John R. Kincaid, for defendant-appellants.

PER CURIAM.

This is one of those rare cases where both sides agree. In their briefs, plaintiff and defendants urge us to reverse the decision of the Court of Appeals, which dismissed defendants' appeal as premature, and remand for determination of the merits of the underlying appeal. For the reasons which follow, we grant the relief requested.

This is a wrongful death action in which plaintiff alleged the decedent died as a result of defendant William Dudley Latta, Jr.'s neg-

ligent operation of a motor vehicle owned by defendant Latta, Sr., d/b/a W.D. Latta & Sons Trucking.

Following the presentation of evidence, four issues were submitted to the jury: (1) the negligence of defendants, (2) the contributory negligence of the decedent, (3) the gross negligence of defendant Latta, Jr., and (4) the amount of damages recoverable by plaintiff. The jury returned a verdict finding negligence on the part of both the decedent and defendants and no gross negligence on the part of defendant, Latta, Jr. Accordingly, the jury awarded no damages to plaintiff. On 10 December 1992 judgment was entered in accordance with the jury verdict.

On 11 December 1992, plaintiff filed a motion for judgment notwithstanding the verdict and a motion for a new trial on the issue of damages. By order entered 31 December 1992, the trial court (1) set aside the jury verdict and judgment entered thereon as to the decedent's contributory negligence, (2) entered judgment for the plaintiff upon the issue of contributory negligence, and (3) ordered a new trial on the issue of damages. From this order defendants appealed to the Court of Appeals, contending that the trial court erred as a matter of law in granting plaintiff's motion for judgment notwithstanding the verdict and motion for new trial on the issue of damages and in allowing plaintiff to put on rebuttal evidence regarding decedent's contributory negligence. Treating the appeal as one only from an order granting a new trial on the issue of damages, the Court of Appeals, relying on *Unigard Carolina Ins. Co. v. Dickens*, 41 N.C. App. 184, 254 S.E.2d 197 (1979), held that the order appealed from was interlocutory and no substantial right was affected thereby. Accordingly, the appeal was dismissed as premature. We granted defendants' petition for discretionary review on 27 January 1994, and we now reverse and remand for consideration of the substantive appeal.

Unigard does not control the instant case. In *Unigard*, the jury found that (1) the plaintiff was subrogated to the rights of the insureds, (2) the insureds were damaged by the negligence of defendants, and (3) the insureds were damaged in the amount of two hundred dollars. The trial court accepted the verdict on the first two issues, but set aside the verdict on the issue of damages and granted plaintiff's motion for a new trial limited to that issue. The Court of Appeals, relying on this Court's decision in *Industries Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979), dismissed the appeal as

being interlocutory and not affecting a substantial right. The posture of the case was stated by Judge Frank Parker as follows: "By this appeal the defendants attempt to obtain immediate appellate review of an interlocutory order of the trial court which accepted the jury's verdict fixing liability and directed there be a new trial solely on the issue of damages. We find the appeal premature and order it dismissed." *Unigard*, 41 N.C. App. at 186, 254 S.E.2d at 198.

Plaintiff and defendants contend, and we agree, that the instant case is similar to *LaFalce v. Wolcott*, 76 N.C. App. 565, 334 S.E.2d 236 (1985). In *LaFalce*, the plaintiffs sued for damages allegedly resulting from the defendant's negligent operation of a motor vehicle. The defendant counterclaimed, alleging negligence on the part of the plaintiffs, and offered the defense of contributory negligence. The trial court directed a verdict against the plaintiffs, sending only defendant's counterclaim to the jury. The jury found plaintiffs negligent, but awarded defendant no damages. The trial court allowed defendant's motion to set aside the verdict and granted a new trial on defendant's counterclaim, but denied plaintiffs' motion for a new trial. In allowing plaintiffs' appeal, the Court of Appeals noted:

> We believe this affects a substantial right of the plaintiffs. Plaintiffs have already completed one trial, and if this appeal is not allowed, they will undergo a second trial on defendant's counterclaim. Then, if plaintiffs' exceptions are meritorious, they will undergo a *third* trial to relitigate plaintiffs' original action because the second trial will not include the issues of the extent and amount of plaintiffs' injuries or property damages.

LaFalce, 76 N.C. App. at 569-70, 334 S.E.2d at 239.

Notwithstanding its interlocutory nature, an appellate court may entertain an appeal if it affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d). *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976). In *Bailey v. Gooding* we said:

> While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment. . . .
>
> These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.

Bailey v. Gooding, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (citations omitted).

In the instant case, the parties agree that the only way judicial economy can be served is by a determination of the underlying substantive appeal at this time. Such a determination will not fragment the case. To the contrary, it will significantly shorten the process and clear the path toward finality for all concerned. If the appellate court upholds the judge's ruling as to contributory negligence, the necessity of going to trial on damages becomes immediately clear. On the other hand, if the court rules in favor of the defendant on the issue of contributory negligence, reinstating the jury verdict as to that issue, a trial on damages and the appeal that could follow would be avoided entirely. Regardless of whether an appellate court undertakes a substantive appeal now or after the parties have gone through a trial on damages, the issue of whether the trial judge was correct in overturning the jury verdict on contributory negligence remains central and will, in any event, need to be addressed. Deciding the matter now would streamline the process by delineating, as well as limiting, the remaining issues that could be litigated and appealed.

We hold that this appeal affects a substantial right of the defendants under N.C.G.S. §§ 1-277(a) and 7A-27(d). Accordingly, we reverse the decision of the Court of Appeals and remand to that court for consideration of the substantive appeal.

REVERSED AND REMANDED.

CHESAPEAKE MICROFILM, INC. v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 435A93

(Filed 6 October 1994)

Appeal by Chesapeake Microfilm, Inc., 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. 737, 434 S.E.2d 218 (1993), reversing the judgment entered by Hairston, J., at the 7 October 1991 Civil Session of Superior Court, Forsyth County, which vacated the final agency decision of the Environmental Management Commission, and remanding for reinstatement of the penalty assessed by the Commission. Heard in the Supreme Court 12 September 1994.

Moore and Brown, by B. Ervin Brown, II, and David B. Puryear, Jr., for petitioner-appellant.

Michael F. Easley, Attorney General, by Francis W. Crawley and Daniel F. McLawhorn, Special Deputy Attorneys General, for respondent-appellee.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

AFFIRMED.

CONNIE S. TRUE AND DAVID R. TRUE, SR. v. T & W TEXTILE MACHINERY, INC. AND WALTER REUBIN PITTS

No. 524PA93

(Filed 6 October 1994)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 358, 435 S.E.2d 551 (1993), affirming the final judgment and the order entered by Burroughs, J., 9 April 1992 in Superior Court, Mecklenburg County. Heard in the Supreme Court 13 September 1994.

Richard F. Harris, III, for plaintiff-appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr., and Kent C. Ford, for defendant-appellees.

PER CURIAM.

AFFIRMED.

STATE v. CROTTS

[337 N.C. 799 (1994)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MARK ELLIOT CROTTS	)	

No. 257A93

(Filed 5 October 1994)

The Court has received, pursuant to its order dated 2 December 1993, the order entered 31 August 1994 by Weeks, J., wherein Judge Weeks ruled on defendant's Motion for Appropriate Relief, filed 4 November 1993, and, based on findings of fact, concluded that defendant's "right to due process, a fair trial and the effective assistance of counsel were violated at the trial of this matter" and allowed defendant's motion as to certain issues. Having carefully reviewed the trial court's findings and conclusions and the supporting materials, this Court is of the opinion that defendant is entitled to a new trial.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, pursuant to N.C.G.S. § 15A-1418(c), that defendant's appeal be, and hereby is, terminated and the case is remanded to the Superior Court, Alamance County, for a new trial.

By order of the Court in Conference, this 5th day of October, 1994.

s/ Parker J.
For the Court

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

No. 401PA94

Case below: 115 N.C.App. 439

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

BROWING v. CAROLINA POWER & LIGHT CO.

No. 225A94

Case below: 114 N.C.App. 229

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 October 1994.

COASTAL READY-MIX CONCRETE CO. v. N.C. COASTAL RES. COMM.

No. 451P94

Case below: 116 N.C.App. 119

Petition by defendant for temporary stay allowed 22 September 1994. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994. Petition by Attorney General for writ of supersedeas denied and stay dissolved 5 October 1994.

DAVIS v. JOYCE

No. 418P94

Case below: 115 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

DUBLIN v. UCR, INC.

No. 361P94

Case below: 115 N.C.App. 209

Motion by plaintiffs to dismiss the appeal by defendant (U-Can Rent, Inc. II) and third-party defendant (Voyager Property and Casualty Ins. Co.) for lack of substantial constitutional question allowed 5 October 1994. Petitions by defendant (U-Can Rent, Inc. II) and third-party defendant (Voyager Property and Casualty Ins. Co.) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

FREEMAN v. FREEMAN

No. 393P94

Case below: 115 N.C.App. 565

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

IN RE DENNIS v. DUKE POWER CO.

No. 246PA94

Case below: 114 N.C.App. 272

Petition by respondents (Duke Power, Nantahala & Public Staff) for writ of certiorari to review the decision of the North Carolina Court of Appeals allowed 5 October 1994.

IN RE GERTZMAN

No. 463P94

Case below: 115 N.C.App. 634

Petition by petitioners for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

LEONARD v. ENGLAND

No. 417PA94

Case below: 115 N.C.App. 103

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

MARTIN v. PIEDMONT ASPHALT & PAVING CO.

No. 6PA94

Case below: 113 N.C.App. 121

Petition by Industrial Commission for writ of supersedeas dismissed 6 October 1994.

MAYO v. DUKE UNIVERSITY

No. 387P94

Case below: 115 N.C.App. 567

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

MEDFORD v. HAYWOOD COUNTY HOSPITAL FOUNDATION

No. 392PA94

Case below: 115 N.C.App. 474

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

MOOSE v. J. COBURN, INC.

No. 419P94

Case below: 115 N.C.App. 568

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

NATIONWIDE MUTUAL INS. CO. v. MABE

No. 312PA94

Case below: 115 N.C.App. 193

Petition by third-party defendant (NC Farm Bureau) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994. Petition by defendants (Mabe, et al) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994. Petition by third-party plaintiff (Jesse Willard Scott) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

N.C. RAILROAD CO. v. FERGUSON BUILDERS SUPPLY

No. 309P94

Case below: 114 N.C.App. 819

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

NEWTON v. NEW HANOVER COUNTY BD. OF EDUCATION

No. 280A94

Case below: 114 N.C.App. 719

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 5 October 1994.

PATTERSON v. PIERCE

No. 353P94

Case below: 115 N.C.App. 142

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

PEAL v. SMITH

No. 398PA94

Case below: 115 N.C.App. 225

Petition by defendants (Cianbro Corporation and Williams Brothers Construction) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

SHIELDS v. EVANS

No. 358P94

Case below: 115 N.C.App. 398

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

SMITH v. CITY OF KANNAPOLIS

No. 400P94

Case below: 115 N.C.App. 565

Motion by plaintiffs to withdraw petition for writ of certiorari to review decision of the North Carolina Court of Appeals allowed 26 September 1994.

STATE v. JENKINS

No. 365P94

Case below: 115 N.C.App. 520

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994. Petition by Attorney General for writ of supersedeas denied and stay dissolved 5 October 1994.

STATE v. JENNINGS

No. 555A90-2

Case below: Superior Court 81CRS1400
81CRS1441

Motion by defendant for appointment of post-conviction counsel denied 5 October 1994 without prejudice to defendant's right to file the motion in superior court.

STATE v. LANE

No. 343P94

Case below: 115 N.C.App. 25

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. McEACHERN

No. 416PA94

Case below: 115 N.C.App. 569

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1994.

STATE v. PARKER

No. 363P94

Case below: 115 N.C.App. 399

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. PRIDDY

No. 407P94

Case below: 115 N.C.App. 547

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. QUICK

No. 459A94

Case below: 116 N.C.App. 362

Petition by Attorney General for temporary stay allowed 26 September 1994.

STATE v. SCALES

No. 293P94

Case below: 106 N.C.App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. STREETER

No. 386P94

Case below: 115 N.C.App. 566

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. TAYLOR

No. 405P94

Case below: 115 N.C.App. 732

Notice of appeal by defendant pursuant to G.S. 7A-30 (substantial constitution question) dismissed 5 October 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE v. WHITE

No. 475P94

Case below: 116 N.C.App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 5 October 1994 without prejudice to defendant's right to refile on proper forms.

STATE v. YOUNG

No. 388P94

Case below: 115 N.C.App. 566

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

STATE AUTO. MUT. INS. CO. v. UNIVERSAL UNDERWRITERS INS. CO.

No. 342P94

Case below: 115 N.C.App. 174

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

THOMPSON CADILLAC-OLDSMOBILE v. OLDSMOBILE DIV. OF GEN. MOTORS

No. 378P94

Case below: 115 N.C.App. 566

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

TRANSYLVANIA COUNTY DSS v. CONNOLLY

No. 415P94

Case below: 115 N.C.App. 34

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

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

VULCAN MATERIALS CO. v. GUILFORD COUNTY BD. OF COMRS.

No. 364P94

Case below: 115 N.C.App. 319

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1994.

PETITIONS TO REHEAR

CAPITAL OUTDOOR ADVERTISING v. CITY OF RALEIGH

No. 136PA93

Case below: 337 N.C. 150

Petition by plaintiff to rehear pursuant to Rule 31 denied 5 October 1994.

PHELPS v. PHELPS

No. 144PA93

Case below: 337 N.C. 344

Petition by plaintiff to rehear pursuant to Rule 31 denied 5 October 1994.

APPENDIXES

PRESENTATION OF JUSTICE VALENTINE PORTRAIT

ORDER ADOPTING AMENDMENT TO RULES
OF APPEALLATE PROCEDURE

AMENDMENTS TO THE RULES AND REGULATIONS OF
THE NORTH CAROLINA STATE BAR REGARDING
DISCIPLINE & DISABILITY

AMENDMENT TO THE RULES AND REGULATIONS OF
THE NORTH CAROLINA STATE BAR CONCERNING
THE ISSUANCE OF ADVISORY OPINIONS
REGARDING MATTERS OF UNAUTHORIZED PRACTICE

AMENDMENT TO THE RULES OF
PROFESSIONAL CONDUCT OF
THE NORTH CAROLINA STATE BAR REGARDING
BANK DIRECTIVES

PRESENTATION OF THE PORTRAIT

OF

ITIMOUS THADDEOUS VALENTINE

Associate Justice
SUPREME COURT OF NORTH CAROLINA
1951-1952

December 5, 1994

RECOGNITION OF STEPHEN VALENTINE
BY
CHIEF JUSTICE JAMES G. EXUM, JR.

Chief Justice James G. Exum, Jr. welcomed official and personal guests of the Court. The invocation was pronounced by Honorable Rachel M. Horner, Clerk of Superior Court, Nash County. The Chief Justice then recognized the Valentine family and Stephen Valentine, who would make the presentation address to the Court:

I am pleased to welcome on behalf of the Court former Justice Itimous Thaddeous Valentine's large family. The court especially welcomes Mrs. Hazel A. Valentine, who today is 99 years old. We understand this ceremony was planned on the part of the family as a 99th birthday gift to Mrs. Valentine, the widow of the former justice. And what an appropriate gift it is. We also welcome the children of the former justice, Congressman Tim Valentine and his wife Barbara, Jim Valentine and his wife Kay, and Justice Valentine's daughter, Mary Hobbs McIntyre. We welcome a number of his grandchildren, Susan Greene, Myra Robertson, Walter Jessup, David McIntyre, and those grandchildren who bear his surname, Stephen, Mark, Phillip, Beth, Jay, Timberly, Craig, Thad, and Meredith. We welcome his great-grandchildren and two great-great-grandchildren, and others that may be more distantly related to the Valentine family and all of the family's loved ones and friends who honor us with their presence

It is now our pleasure to introduce Stephen Valentine, the grandson of Associate Justice Valentine and the son of Congressman Tim Valentine. Stephen is a graduate of the University of North Carolina at Chapel Hill and the Wake Forest University Law School. He practiced law with his father in Nashville for two years and after, as he says, "getting a little restless," he joined the United States Air Force as a member of the Judge Advocate General's Corps, where he served eight years before reentering private practice in 1991 with Claud Wheatly and the Beaufort Law firm of Wheatly, Wheatly, Nobles and Weeks. Stephen is the County Attorney for Carteret County. He practices Domestic, Criminal and Personal Injury law. He was married in 1992 and has a five and one-half month old baby, Matthew Armstrong Valentine, who is here today.

PRESENTATION ADDRESS

BY

STEPHEN VALENTINE

If it please the court:

I am honored to have been asked by my grandmother, who today celebrates her 99th birthday, to present to the Court this portrait of former Justice Itimous Thaddeous Valentine. It is a rare privilege for a young lawyer to have this opportunity regarding his grandfather and I am truly thankful. I also wish to express my appreciation and that of my family to Mr. Ned Bittenger, the fine artist who created the portrait, and to the North Carolina Supreme Court Historical Society which made this presentation possible.

While many of the people in this room knew my grandfather, many did not. I hope that my remarks will bring him to life for those of you who did not know him. During a life that stretched from 1887 to 1970 he was a soldier, a patriot, an advocate, a civil servant, a scholar and a devoted husband and father. He loved his country, he loved his profession and he loved his family. All three institutions benefited immeasurably as a result.

To some people he was "Mr. Valentine"; to others he was "Justice Valentine"; to most he was simply "Itimous"; but to me and most of our family in this chamber he was and always will be—"granddaddy." Of course, my earliest memories include granddaddy usually at Christmas or a birthday or frolicking around the rambling home in Nashville that he shared with grandmother for nearly 40 years. Three photographs of me playing in granddaddy's lap when I was about my own son's age hang in a prominent location in our home in Carteret County.

Granddaddy was born in Nash County, North Carolina on November 14, 1887. He attended school at Castalia Boarding School in Nash County and obtained his higher education in bits and pieces as opportunities presented themselves. He graduated from Guilford College in 1917. He studied law under Dr. Gulley at Wake Forest University and was admitted to the Bar in 1917 before his graduation from college.

At Guilford he was President of the Senior Class and Editor-in-Chief of the Guilfordian, the student publication, in his senior year. While at Guilford, he crossed paths with many students and faculty members, but two of those individuals had an extraordinary impact

on his life. One was Hazel Armstrong who eventually became his wife. The other was Kerr Scott—future governor of this state. Much as president Abraham Lincoln became good friends with an individual he once beat in an wrestling match, granddaddy became lifelong friends with Kerr Scott after besting him in a debating contest in which Kerr Scott represented North Carolina State University. I say that granddaddy won because that is the version of the story told in our family! That relationship with the future governor eventually brought granddaddy to this Court.

After graduation from Guilford, he volunteered for service in the United States Army, then engaged in World War I, and served from December 15, 1917 until March 29, 1919. He served with North Carolina's own 30th Division with the American Expeditionary Force in France and saw action in five major engagements in France and Germany including the fierce battle of the Argonne Forest. He once told me that he, along with other American soldiers, was responsible for capturing several of the German "Big Bertha" artillery pieces. They found many silk bags of gun powder which they split open and dumped in one place while running a trail of gun powder a safe distance back from the bulk of the gun powder. They then set fire to the trail of gun powder. The fire ran back to the dumped gun powder which erupted with a flash of fire and heat. Granddaddy then sent several of the silk bags back to his family in America where his mother created shirts, pants and other articles of clothing out of them. While that story always fascinated me, a more accurate gauge of his feelings about the war and his mission are revealed in a letter that he wrote to his uncle Albert May on the 22nd of August 1919, a copy of which is here today and available for your review. The following excerpts from that letter reveal much about my grandfather and provide a glimpse of the eloquence which was to serve him so well for the next fifty years:

> *I may not reach the mark of some but you may bet that I am doing my best to serve faithfully the people and country I love better than life. I think I thoroughly realize the gravity of the situation and its probable results. Yet the vision of America's future, spreading as it will, democracy's wholesome influence to the uttermost parts of the earth lends courage that will not be daunted.*

He then goes on to make reference to his perception that the Germans were about to launch an invasion of this country near the city of Wilmington:

Just imagine the scene such as they tried to pull off on Wilmington and couple it with the mass barbaric records of ancient history and you have a fair conception of their purpose. How can humanity submit to it? Are my mother, father, sisters and all who are dear to me safe while such are allowed to infect the world? They are not safe, but it is my purpose as it is of my comrades to see that Prussianism with all its attendant vices is forever driven from our midst. What is the ulterior motive of Prussianism? Belgium, France and Serbia are solemn sentinels to answer such an inquiry and they, not alone, reeking in blood shall be aided by all who profess the love of human rights. I mean to fight them to the last ditch and as long as my ammo holds out. I believe I am coming back but if I don't you may always know that I died like a soldier with my face toward the enemy trying to preserve a decent place for my people and their children yet unborn.

Fortunately, granddaddy did not have to die to preserve a decent place for his people and their unborn children. He and his comrades accomplished the purposes described in that letter and he was discharged to return to his beloved Nash County. Upon his return, he established a law practice first in Spring Hope and later in Nashville —a practice to which he devoted, with notable exceptions, the next fifty years of his life.

In 1924, he married the former Hazel Armstrong of Hobgood. They enjoyed a long and happy marriage and she bore him 5 children, the second of which is my father. In addition to 5 children, that union produced 14 grandchildren, 9 great grandchildren and, at last count, 2 great-great grandchildren.

In addition to attending to his law practice and his growing family in the years after WWI, granddaddy was quite involved in assisting veterans of that war. As I have described, he believed very strongly in the righteousness of the American cause in WWI. This feeling was transferred into his concern for and work with veterans of that war. A campaign flyer compiled by prominent attorneys who supported him in his re-election bid for this Court in 1952 contained the following reference:

For years after WWI, he devoted his entire time on each Saturday to the work of veteran's affairs and aided thousands in the transition from military to civilian life and other pressing problems. For this service he received no compensation from the veterans or the government and he personally bore the necessary

expenses of this service, including stenographic hire and postage. For himself, he asked nothing.

He never spoke of these things and never sought any special recognition or credit. He was and always remained the epitome of the motto of this great state—Esse Quam Videri—To Be Rather Than To Seem.

He served as Prosecuting Attorney of the Nash County Recorder's Court from 1922 until 1934. He served on the governing board of the Town of Nashville from 1937 until 1941. From 1940 until 1943, he served on the North Carolina Board of Charities and Public Welfare.

Though in his mid 50's when America entered the Second World War, an abiding sense of duty and patriotism compelled him to join the war effort. On March 9, 1943 he accepted a commission as a Major in the Judge Advocate General's Department, Army of the United States. He was 56 years of age and the maximum age requirement had to be waived for him to serve. Following a course of instruction at the University of Michigan in Ann Arbor, he was assigned overseas to the China-Burma-India Theater where he served with distinction for two years. He was promoted to the rank of Lieutenant Colonel and served on the Board of Review (a military appellate court) in India reviewing Courts-Martial from units in that theater of operations.

For meritorious achievement, he was awarded the Bronze Star medal and, after serving in the office of the Under Secretary of War in Washington, he was discharged with the rank of Colonel on October 16, 1947.

I believe his experience, during WWII profoundly affected him because he told me many stories about India when I was a child. He described in vivid detail the suffocating heat he encountered upon stepping off the airplane in India the first time. He had pictures of bird hunts and numerous souvenirs and mementos from his travels in India. Much to my delight, he had a detailed answer to my urgent question as a 5-6 year old child as to which animal would win in a fight between a lion and a tiger. I was convinced that one of the finest possessions in all the world must be a lamp granddaddy brought back from India whose base was a carved elephant pushing against a tree trunk which held the light fixture and lamp shade.

After his discharge from the army in 1947 granddaddy again returned to Nash County where he resumed the practice of law. He

was always very active in politics and campaigned and worked for Democratic candidates at both the state and local level. It is my understanding that the dinner table conversation in the Valentine household almost always involved politics. Granddaddy supported his college debating opponent, Kerr Scott, when Scott ran for governor and was elected in 1948. When Chief Justice Walter Parker Stacy died in office, Governor Scott appointed granddaddy to complete the unexpired term on this Court of the justice who moved up to replace Chief Justice Stacy. My father traveled with him to Raleigh to make the necessary arrangements to assume his seat on the Court. During the completion of the paperwork, granddaddy was so excited, he forgot the names of all his children. However, that lapse proved to be a minor inconvenience and he assumed his seat on the Court. His opinions written for this Court, as with his work in the JAG Corps, were models of clarity and judicial reasoning. You can all appreciate the pride I felt as an undergraduate at the University of North Carolina when a North Carolina Supreme Court opinion written by my grandfather was passed out to a business law class I was taking. He served this Court faithfully but, as has been recently demonstrated, politics can be difficult and unforgiving. In 1952, the political winds changed direction and granddaddy did not gain his party's nomination for his seat on the Court. Once again, as he had at the end of his previous periods of public service, granddaddy returned to his law practice in Nashville where he was shortly joined by his son who is my father.

His years in Nashville after his service on this Court were happy and productive. His keen intellect and populist appeal combined to make him very successful. He was never overly impressed with rank and privilege and was equally comfortable and at ease whether hosting a family reunion or meeting with the governor or other dignitaries. He was, to paraphrase Kipling, able to "Walk with Kings but not lose the common touch. All men counted with him but none too much."

He was truly a man of the people. When his doctor prescribed goat's milk he bought a goat and milked it himself until his children were old enough to assume that chore. He raised Togenburg goats and was quite found of the milk they produced. He also kept bees in hives behind his home in Nashville. He took the honey himself and to his everlasting credit never delegated that chore to anyone! He was an accomplished wood worker, advancing that craft to the level of actually producing violins my grandmother still owns. I am told, how-

ever, that he was a better violin maker than a violin player. He also built the revolving book cases that for many years held the law books in his office.

He was a passionate advocate with a nearly scholarly command of Latin. My father has told me that he *never* asked granddaddy to define a word he was unable to define. I have a vague, long ago and distant memory of going into the Superior Court Room in Nashville with my mother to watch a portion of the Mimms trial, a will contest —the largest in Nash County's history up to that time—in which granddaddy and my father participated. I was six years old at the time and remember seeing the two of them up beyond the large, ornate bar in the courtroom working to defend the will. They succeeded. The entire county watched or kept up with the trial and I proudly reported to my first grade teacher who asked me the result of the trial the following day—"We won!!"

He kept the verses of many favorite poems in his head. His favorite was "I Have A Rendezvous With Death" no doubt because of his experiences in WWI. He often said that of all the things he accomplished in life he was most proud of his service in both world wars—the times when his country and countrymen needed him most. Fortunately, granddaddy's own rendezvous with death did not occur until 1970 when he passed on to his reward at the age of 82. Chaplain Ben Lacy, with whom he fought in the First World War and who later became president of Union Theological Seminary in Richmond, delivered the eulogy. I recall a story he told about their war experience. It seems that Reverend Lacy and granddaddy had been taken into the home of a French farmer that was very happy to make the acquaintance of the American soldiers. The Frenchman presented his daughter to the Reverend Lacy and granddaddy and proudly asked her to speak for the Americans the English she had learned. The girl gleefully responded by saying to the soldiers—"Keesse me queek!" the only English she knew which had no doubt been taught her by other Americans.

Another of granddaddy's favorite poems is called The Bridge Builder by William Allen Droomgole. I am certain this poem has significance to all his descendants but it has always had special meaning to me since I followed both granddaddy and my father into the practice of law.

An old man going a lone highway,
Came in the evening, dark and gray,
To a chasm, vast and deep and wide,
The old man crossed in the twilight dim—
The sullen stream held no fear for him;
But he stopped when safe on the other side,
And built a bridge to span the tide.

"Old man," said a pilgrim near,
"You are wasting your strength with building here.
Your journey will end with the ending day;
You never again will pass this way.
You've crossed the chasm, deep and wide,
Why build you this bridge at evening tide?"

The builder lifted his old gray head.
"Good friend, in the path I have come," he said,
"There followeth after me today
A youth whose feet must pass this way.
This chasm which has been as naught to me
To that fair-haired youth might a pitfall be.
He too, must cross in the twilight dim;
Good friend, I am building the bridge for *him*.

Thank you very much for this opportunity to speak with you about my grandfather. I believe grandmother will now present the portrait to the Court.

(Chief Justice Exum introduces Mrs. Valentine at this time.)

ACCEPTANCE OF JUSTICE VALENTINE'S PORTRAIT BY CHIEF JUSTICE EXUM

The Court gratefully accepts the portrait of former Associate Justice I.T. Valentine, and we thank the family for its thoughtfulness and generosity in making this gift to the Court and this occasion possible. The proceedings here will be spread upon the minutes of the Court, and the portrait will be hung in the hallway on the building's third floor with other portraits of former associate justices. There it will remind us of the man, the lawyer, and the judge, his many accomplishments and his contributions to the ongoing work of this Court.

This is the last time the Court as it now exists will publicly convene. Associate Justice Meyer and I will be soon departing. It is fitting that a ceremonial session such as this should mark our last public appearance on this bench. To all who remain, let me take this opportunity, for the two of us, to say a public "thank you" for the collegiality and good spirit with which we have been able to work together as we have helped shape the law of our state. We wish all of you well and Godspeed as you continue the work our predecessors, such as Justice Valentine, began and have continued through these last two centuries.

ORDER ADOPTING AMENDMENT
TO RULES OF APPELLATE PROCEDURE

RULE 3. APPEAL IN CIVIL CASES—
HOW AND WHEN TAKEN

(c) Time for Taking Appeal. Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties for the duration of any period of noncompliance with the service requirement of Rule 58 of the Rules of Civil Procedure, and by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions:

(1) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial;

(2) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion under Rule 59 to alter or amend a judgment;

(4) a motion under Rule 59 for a new trial.

If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR REGARDING DISCIPLINE & DISABILITY

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 13, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 N.C.A.C. 1B .0100, be amended by adding new Rules .0105(a)(17), .0105(a)(18), .0111(d), .0111(e), .0112(d), and .0125(a)(4)(D), by renumbering existing Rules .0112(e) through .0112(i) as Rules .0112(f) through .0112(j), by amending renumbered Rule .0112(h), by amending Rules .0112(c), .0125(a)(3)(K) and .0129(c), by deleting Rules .0125(a)(4)(B)(v) and .0125(a)(4)(B)(vii) and by renumbering Rule .0125(a)(B)(vi) as .0125(a)(B)(v) as follows (additions in bold type, deletions interlined):

.0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the grievance committee will have the power and duty

. . .

(17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e).

.0111 Grievances: Form and Filing

. . .

(d) The N.C. State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 1.3 of the Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the N.C. State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where

such disclosure is required by law, or by considerations of due process or where identification of the reporting attorney or judge is essential to preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the N.C. State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the N.C. State Bar counsel, whichever is later.

.0112 Investigations: Initial Determination

. . .

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within fifteen days of receipt of the letter of notice. Such response will be a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct. **The counsel will provide the respondent with a copy of the grievance upon request, except where the complainant requests to remain anonymous pursuant to Rule .0111(d) of this subchapter.**

. . .

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

~~(d)~~ **(e)** After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

~~(e)~~ **(f)** For reasonable cause, the chairperson of the grievance committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the grievance committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator or any members of the grievance committee des-

ignated by the chairperson may examine any such witness under oath or otherwise.

~~(f)~~ **(g)** As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the grievance committee to consider the grievance.

~~(g)~~ **(h)** The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement, compromise or restitution. **The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct.**

. . .

[Existing sections (h) and (i) will be renumbered as (i) and (j), respectively]

.0125 Reinstatement

(a) After disbarment

. . .

(3) The petitioner will have the burden of proving by clear, cogent and convincing evidence that . . .

. . .

(K) the petitioner understands the current Rules of Professional Conduct;. **Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;**

(4) Petitions filed less than seven years after disbarment

. . .

(B) Factors which may be considered in deciding the issue of competency include

. . .

~~(v). Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date;~~

~~(vi)~~ **(v)** certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

~~(vii). The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner.~~

. . .

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

.0129 Confidentiality

. . .

(c) This provision will not be construed **to prohibit the N.C. State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or** to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or law enforcement agencies investigating qualifications for government employment or allegations of criminal conduct by attorneys. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 13, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the second day of February, 1995.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of February, 1995.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, 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 20th day of February, 1995.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF
THE NORTH CAROLINA STATE BAR CONCERNING
THE ISSUANCE OF ADVISORY OPINIONS
REGARDING MATTERS OF UNAUTHORIZED PRACTICE

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 13, 1995.

BE IT RESOLVED that the Rules and Regulations of the North Carolina State Bar governing the Consumer Protection Committee, as particularly set forth in 27 N.C.A.C. 1D .0206, be amended by adding a new subsection as follows (new material in bold):

The Consumer Protection Committee shall have the power and duty:

. . . . . .

(5) to issue advisory opinions in accordance with procedures adopted by the Council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of 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 amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 13, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the second day of February, 1995.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of February, 1995.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 20th day of February, 1995.

s/Orr, J.
For the Court

AMENDMENT TO THE RULES OF
PROFESSIONAL CONDUCT OF
THE NORTH CAROLINA STATE BAR REGARDING
BANK DIRECTIVES

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 13, 1995.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2 10.2(f), be amended by striking the words, "returned for", and substituting in lieu thereof the words, "presented for payment against", in the first sentence so that the entire rule reads as follows (additions in bold type, deletions interlined):

> Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the Executive Director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is ~~returned for~~ **presented for payment against** insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 13, 1995.

Given over my hand and the Seal of the North Carolina State Bar, this the second day of February, 1995.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of February, 1995.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 20th day of February, 1995.

s/Orr, 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 as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 30 (NCI4th). Adjudication of "contested case" generally

The North Carolina Administrative Procedures Act confers upon any "person aggrieved" the right to commence an administrative hearing to resolve a dispute with an agency involving the person's rights, duties, or privileges. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 569.

The administrative hearing provisions of the NCAPA apply to respondent DEHNR and to the pollution control permit proceeding, and the third party petitioner is entitled to an administrative hearing pursuant to G.S. 150B-23 unless he is not a person aggrieved by the permitting decision of the DEHNR or the organic statute, G.S. 143-215.108(e), amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder. **Ibid.**

The air pollution control administrative review provisions in G.S. 143-215.108(e) do not by implication amend, repeal, or make an exception to the NCAPA so as to exclude the third party petitioner from those entitled to an administrative hearing thereunder, and petitioner is entitled to commence an administrative hearing in the OAH to determine his right under the Air Pollution Control Act to have DEHNR issue or deny air quality permits to respondent power company in accordance therewith. **Ibid.**

§ 55 (NCI4th). Administrative Procedure Act; who are "aggrieved" persons entitled to judicial review

Petitioner is a "person aggrieved" as defined by the NCAPA within the meaning of the Air Pollution Control Act where he alleged that DEHNR issued an air quality permit to respondent power company for sixteen electric generating units in violation of certain of its statutory and regulatory duties, and that, as the owner of property immediately adjacent to and downwind of the site of the proposed generating units, he will suffer from the adverse environmental consequences of pollutants from the units. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 569.

APPEAL AND ERROR

§ 44 (NCI4th). Supervisory power of Court of Appeals generally; power of Court of Appeals to issue remedial writs

Although an issue concerning the trial judge's comments on her duty to consider the testimony of a child as related by adult witnesses was not addressed by either party on appeal to the Court of Appeals, the Court of Appeals could consider the effect of the comments as a matter of appellate grace. **Phelps v. Phelps**, 344.

§ 139 (NCI4th). Appealability of order setting aside verdicts and judgments

The trial court's interlocutory order granting plaintiff's motion for judgment notwithstanding the verdict on the issue of decedent's contributory negligence and ordering a new trial on the issue of damages affected a substantial right of the defendants and was immediately appealable. **Bowden v. Latta**, 794.

§ 451 (NCI4th). Supreme Court review of Court of Appeals

The issue of whether there was sufficient evidence to accept a plea of no contest to a perjury charge was not properly before the Supreme Court where it was not presented as an assignment of error in the Court of Appeals. **State v. Brooks**, 132.

ARREST AND BAIL

§ 135 (NCI4th). Right of arrested person to communicate with friends or counsel generally

There was no plain error in a first-degree murder prosecution from the introduction of a letter defendant wrote to the governor after he was arrested in which he stated that he was not crazy and that what he did was premeditated. **State v. Daniels,** 243.

ASSAULT AND BATTERY

§ 16 (NCI4th). Assault with deadly weapon; indictment and warrant

An indictment alleging that defendant assaulted the victim "with his fists, a deadly weapon, by hitting [the victim] over the body with his fists and slamming his head against the cell bars and floor" and that this assault resulted in the victim's broken neck and paralysis was sufficient to allege that the cell bars and floor were deadly weapons. **State v. Brinson,** 764.

§ 21 (NCI4th). Assault with intent to kill or inflicting serious injury; generally

The evidence of defendant Cunningham's intent to kill Corey Hill was sufficient to withstand his motion to dismiss considering the nature of the assault, the weapon used, and the circumstances. **State v. Alexander,** 182.

§ 22 (NCI4th). Assault with intent to kill or inflicting serious injury; what constitutes "serious injury"

There was sufficient evidence of injury presented at trial to withstand defendants' motion to dismiss charges of assault with a deadly weapon with intent to kill inflicting serious injury. **State v. Alexander,** 182.

§ 31 (NCI4th). Instruction; definition of "intent to kill"

The trial court's instruction on transferred intent as it related to a charge of assault with a deadly weapon with intent to kill inflicting serious injury did not permit the jury to apply an unconstitutional presumption against defendant. **State v. Carson,** 407.

§ 116 (NCI4th). Particular circumstances not requiring submission of lesser offenses

In a prosecution of defendant for assault of his wife with a deadly weapon with intent to kill, defendant's testimony that he was unaware that his wife was in the car at the time he shot into the vehicle did not require the trial court to instruct on the lesser included offense of misdemeanor assault with a deadly weapon where defendant's intent to kill was shown by uncontradicted evidence. **State v. Barlowe,** 371.

ATTORNEYS AT LAW

§ 2 (NCI4th). Control of license and admission to practice generally

The past behavior of a Bar applicant may be considered by the Board of Law Examiners in determining the applicant's current moral character. **In re Legg,** 628.

A Bar applicant was given sufficient notice that the Board of Law Examiners would consider not only his current moral character but also his 1986 application containing certain omissions in a hearing on the applicant's petition for reconsideration of his application based on newly discovered evidence. **Ibid.**

ance with the statute did not constitute an unlawful classification in violation of plaintiff's equal protection rights. **Phelps v. Phelps**, 344.

Assuming that a parent's right to the custody of a child was fundamental, the trial court's consideration of a parent's age in determining custody between two natural parents did not violate equal protection. **Ibid.**

§ 161 (NCI4th). Rights of person accused of crime generally

Defendant's argument that dismissal of murder charges against an accomplice required that his conviction be vacated on due process and equal protection grounds was rejected. **State v. Taylor**, 597.

§ 184 (NCI4th). Former jeopardy; multiple violations of controlled substance laws

Defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine, based on the same contraband, do not violate the principles of double jeopardy because an examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately. **State v. Pipkins**, 431.

§ 230 (NCI4th). New trial after appeal or post-conviction attack; capital crimes

The prosecutor did not act in bad faith in a third capital sentencing proceeding by his comments to the prospective jury panel and in his opening statement that the State intended to rely on the especially heinous, atrocious, or cruel aggravating circumstance when he knew that this circumstance had not been submitted to the jury in the second sentencing proceeding. **State v. Payne**, 505.

§ 231 (NCI4th). New trial after appeal or post-conviction attack; reversal for insufficiency of evidence or trial error

Where defendant was charged with two first-degree murders and kidnappings and convicted of kidnapping and first-degree murder based on premeditation and deliberation and felony murder, but there was error in the instruction on first-degree murder based on premeditation and deliberation, the convictions for first-degree murder based on premeditation and deliberation were vacated; the felony murder convictions, which were not affected by the error, were upheld; and the kidnapping convictions, as the underlying felony, were arrested. It was unnecessary, if not a violation of double jeopardy, to retry defendant on the theory affected by the error. **State v. Blankenship**, 543.

§ 251 (NCI4th). Identity of confidential informant

Defendant inmates were not prejudiced in their murder trial by the trial court's refusal to compel the State to reveal the name of a confidential informant who was an eyewitness where the State furnished the name of the informant to defendants when it gave them a list of the witnesses it would call, and defendants could have determined the identity of the informant by interviewing the State's witnesses. **State v. Leazer**, 454.

§ 248 (NCI4th). Discovery; production of witnesses' statements or reports

The State's failure to specifically disclose, pursuant to defendant's discovery request, a witness's failure to identify a knife found on a murder victim's body as belonging to defendant three hours after the murder by shooting did not constitute prejudicial error and thus did not violate defendant's due process rights where defend-

ant anticipated the prosecutorial theory that the knife found at the scene was a "plant" placed on the victim's body by defendant to support his self-defense claim. **State v. Smith**, 658.

§ 249 (NCI4th). Discovery; evidence of witnesses' prior misconduct or crimes

Defendant's due process rights were not violated by the trial court's denial of defendant's motion for the discovery of impeaching information, including any information about any internal affairs investigation of the chief investigating officer and information as to whether a State's witness suffered from any mental defect or had a history of substance abuse. **State v. Smith**, 658.

§ 280 (NCI4th). Right to appear pro se generally

The trial court in a murder and kidnapping prosecution did not abuse its discretion by denying a pro se defendant's request to reinstate his trial counsel. **State v. Blankenship,** 543.

§ 313 (NCI4th). Effective assistance of counsel prior to and during trial; miscellaneous

The State's introduction of a portion of defense counsel's tape-recorded interview with the State's principal witness in which defense counsel stated, following a discussion of threats to the witness and a statement by the witness that his going home made his mother and grandmother nervous, that "I'm going to be nervous being in court with you" did not reflect upon the substantive aspects of defendant's case and would not necessarily portray defendant's attorney's representation of him as unworthy of serious consideration by the jury. **State v. Mason**, 165.

Defense counsel did not forecast a defense not supported by the evidence and thus deny defendant the effective assistance of counsel by her opening statement that defendant was a "scapegoat." **Ibid.**

§ 314 (NCI4th). What constitutes denial of effective assistance of counsel during sentencing hearing generally

Defense counsel was not unreasonable and ineffective in a resentencing for first-degree murder where the defense presented videotaped depositions from defendant's former friends and neighbors that contained explicit or implicit references to parole. **State v. Bacon**, 66.

Defense counsel did not provide ineffective representation in a resentencing for first-degree murder where counsel mentioned in defendant's closing argument that his mother had to hear the judge impose a death sentence at the first hearing. **Ibid.**

§ 318 (NCI4th). What constitutes denial of effective assistance of counsel; on appeal generally

Defense counsel in a noncapital first-degree murder prosecution complied with the requirements of *Anders v. California*, 386 U.S. 738, where counsel found no errors in the trial but submitted a brief referring to defendant's contention that the signing and entry of the judgment against him was in error, a contention which "might arguably support the appeal"; counsel provided defendant with the State's brief, defendant's brief, and the record on appeal; and defendant was notified that he could file a brief on his own behalf raising any arguments he wished to make, but he chose not to do so. **State v. Dobson**, 464.

CONSTITUTIONAL LAW—Continued

§ 323 (NCI4th). Speedy trial; waiver of right

Defendant's failure to assert her speedy trial claim sooner in the process did not foreclose the claim, but weighed against it. **State v. Webster,** 674.

§ 325 (NCI4th). What constitutes a violation of speedy trial right generally

A delay of sixteen months from arrest to trial in a second-degree murder prosecution was not in itself enough to conclude that a constitutional speedy trial violation had occurred, but was clearly enough to cause concern and to trigger examination of other factors. **State v. Webster,** 674.

There was no violation of defendant's constitutional right to a speedy trial where defendant suffered prejudice from a delay of sixteen months between arrest and trial in that she suffered anxiety, her employment was disrupted, her financial resources drained, her association with people in the community curtailed, and her liberty impaired, but she conceded that she suffered no impairment of her ability to defend and she was released from jail on bond only five days after her arrest and remained free from that time until her sentence. **Ibid.**

§ 326 (NCI4th). What constitutes a violation of speedy trial right; requirement that delay be negligent or willful and prejudicial

A delay of sixteen months from arrest to trial in a second-degree murder prosecution was due largely to the operation of neutral factors and there was no showing that the prosecution willfully or through neglect or improper purposes delayed defendant's trial. **State v. Webster,** 674.

§ 342 (NCI4th). Presence of defendant at proceedings generally

Defendant failed to demonstrate that his state or federal constitutional rights were violated at a resentencing hearing for first-degree murder where the court had granted an amended defense motion to record conferences or discussions in chambers when the defense indicated that it was necessary and the judge conducted numerous bench conferences with counsel in which defendant did not participate. **State v. Bacon,** 66.

§ 343 (NCI4th). Presence of defendant at proceedings; pretrial proceedings

There was no error in a capital prosecution for first-degree murder, and, assuming error, there was no prejudice, where the trial judge heard arguments on a suppression motion on a Friday, indicated that she would make her ruling before opening statements and would telephone counsel to give them her ruling, and made separate telephone calls to counsel to announce her ruling on Sunday, the conversations were not recorded, and defendant was not present. **State v. Daniels,** 243.

There was no prejudicial error in a first-degree murder prosecution where a prospective juror stated during voir dire that she had an airline ticket for a vacation and did not know whether it was refundable but could still render a fair decision; she discovered that her ticket was nonrefundable and could not be used for another feasible flight and that her vacation accommodations were likewise nonrefundable after being selected as a juror; in a discussion on the record, she said the financial loss that would result from her jury service would prevent her from being fair and impartial; the trial judge asked to see counsel for an in-chambers conference; and the juror was ultimately excused. **Ibid.**

CRIMINAL LAW—Continued

§ 109 (NCI4th). Information subject to disclosure by defendant; reports of examinations and tests

The trial court did not err by requiring a defense psychiatrist to compile a written report of his evaluation of defendant and submit it to the district attorney where the order provided no more than the reciprocal discovery requirements under G.S. 15A-905(b). **State v. Bacon**, 66.

§ 395 (NCI4th). Expression of opinion on evidence during trial; statements made during jury selection

The trial judge did not act impartially in favor of the State in determining challenges for cause of prospective jurors in a capital trial based on their capital punishment beliefs by the manner in which he questioned a juror who gave equivocal answers about her beliefs or by asking jurors being questioned by defendant if they could follow the law as given to them. **State v. Skipper**, 1.

§ 412 (NCI4th). Argument of counsel; opening statements

The prosecutor did not act in bad faith in a third capital sentencing proceeding by his comments to the prospective jury panel and in his opening statement that the State intended to rely on the especially heinous, atrocious, or cruel aggravating circumstance when he knew that this circumstance had not been submitted to the jury in the second sentencing proceeding. **State v. Payne**, 505.

§ 414 (NCI4th). Argument of counsel; right to conclude argument

The trial court did not coerce defendant into introducing evidence so that he lost his right to open and close the final argument when the court sustained the prosecutor's objection to defendant's use of a photograph to illustrate a witness's testimony during cross-examination unless it was introduced into evidence. **State v. Skipper**, 1.

§ 425 (NCI4th). Argument of counsel; comment on defendant's failure to call particular witness or offer particular evidence

There was no error in a first-degree murder resentencing where the prosecutor properly drew the jurors' attention to the failure to establish any membership qualifications for the organizations to which defendant's expert belonged. **State v. Bacon**, 66.

§ 427 (NCI4th). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's remark during voir dire of potential jurors that the jury would be hearing from witnesses who were at a party, "both from the State and I would suspect also from the defendant," did not constitute an improper comment directed toward defendant's assertion of his right not to testify. **State v. Mason**, 165.

There was no plain error in a noncapital first-degree murder prosecution where the prosecutor stated in his closing argument that "Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything" and later said, when arguing that there was no logical explanation as to why the defendant's vehicle was found near a ravine, "The defendant has got to explain something to you. But what he has explained is absurd." **State v. Taylor**, 597.

§ 429 (NCI4th). Argument of counsel; comment on defendant's silence, generally; curative instructions

Any possible error created by the prosecutor's jury argument references to defendant's failure to testify was cured by the trial court's actions and instructions. **State v. Skipper**, 1.

CRIMINAL LAW—Continued

§ 433 (NCI4th). Argument of counsel; defendant as professional criminal, outlaw, or bad person

There was no plain error in a first-degree murder sentencing hearing where the prosecutor referred to defendant as a predator. **State v. Reeves,** 700.

§ 434 (NCI4th). Argument of counsel; defendant's prior convictions or criminal conduct

There was no prejudice in the prosecutor's argument regarding the serial number of the gun used by defendant in a prosecution for first-degree murder, second-degree murder, and assault where the prosecutor's comment clearly implies that defendant knowingly purchased a stolen handgun. **State v. Terry,** 615.

§ 436 (NCI4th). Argument of counsel; defendant's callousness, lack or remorse, or potential for future crime

There was no error in a resentencing for first-degree murder where the prosecutor argued the brutal nature of the killing and that defendant is dangerous despite the fact that the especially heinous, atrocious, or cruel aggravating circumstance could not be considered because it had been submitted and not found by the jury at the first trial. **State v. Bacon,** 66.

§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witness generally

There was no prejudicial error in the district attorney's argument concerning defendant's psychiatric testimony in a first-degree murder resentencing where the error, if it was error, was harmless in light of the trial court's instruction that counsel's statements were not evidence. **State v. Bacon,** 66.

§ 441 (NCI4th). Argument of counsel; comment on character and credibility of expert witnesses

The trial court did not err in a resentencing hearing in a first-degree murder case by allowing the district attorney to argue that the jury should view a defense psychiatrist's testimony with caution because of his financial arrangement with the defense. **State v. Bacon,** 66.

§ 442 (NCI4th). Argument of counsel; comment on jury's duty

There was no prejudicial error in the prosecutor's argument in a noncapital first-degree murder prosecution where defendant contended that the prosecutor argued that it was the jury's duty to avenge the victim's death. **State v. Bryant,** 298.

§ 447 (NCI4th). Argument of counsel; comment on rights of victim and victim's family

A prosecutor's closing argument in a resentencing for first-degree murder was not grossly improper where the prosecutor argued that only one side of the story had been told and that the jury should consider what the victim would have said if he had been able to testify. **State v. Bacon,** 66.

§ 452 (NCI4th). Argument of counsel; comment on aggravating or mitigating factors

There was no error in a resentencing hearing for first-degree murder where defendant contended that the district attorney improperly suggested that the jury weigh the aggravating circumstance against the mitigating circumstances one on one rather than as a group, but the prosecutor's approach was to argue each mitigating cir-

CRIMINAL LAW—Continued

cumstance separately, the prosecutor explained that viewing the aggravating and mitigating circumstances is not a counting process, and the court correctly charged the jury. **State v. Bacon**, 66.

The prosecutor did not improperly urge the jury in a capital resentencing hearing to reject voluntary gasoline inhalation as mitigating because it does not qualify as an excuse for the crime when he stated in his closing argument, "He goes and voluntarily does that, and voluntary intoxication of any kind is no excuse for any crime in this State. If it was, he would have been found guilty by reason of insanity," where these statements were directed to the weight the jury should give the impaired capacity mitigating circumstance. **State v. Payne**, 505.

§ 454 (NCI4th). Argument of counsel; comment on sentence or punishment; capital cases generally

A prosecutor's closing argument in a first-degree murder resentencing was not so grossly improper as to require the trial judge to intervene ex mero motu where the prosecutor asked the jurors whether defendant deserved the same thing he had imposed on the victim. **State v. Bacon**, 66.

There was no error in a resentencing hearing for first-degree murder where the district attorney argued that the jury should not find the impaired capacity mitigating circumstance. **Ibid.**

Any impropriety in a prosecutor's closing argument in a sentencing hearing for first-degree murder was not so gross that the trial court should have intervened ex mero motu where defendant contended that the prosecutor erroneously diminished the jury's responsibility. **State v. Daniels**, 243.

Biblical references in the prosecutor's argument in a first-degree murder sentencing hearing were not so grossly improper as to require intervention of the trial court ex mero motu where the Supreme Court did not perceive prejudice and in light of defense counsel's use of the Bible in his closing argument. **Ibid.**

There was no plain error in a first-degree murder prosecution from the prosecutor's argument that defendant had written his own death warrant when he brutalized and killed the victim. **State v. Reeves**, 700.

§ 455 (NCI4th). Argument of counsel; deterrent effect of death penalty

The trial court did not err in a resentencing hearing for a first-degree murder by allowing the prosecutor to make a specific deterrence argument. **State v. Bacon**, 66.

The prosecutor's jury argument in a capital resentencing hearing that the only way to be sure that defendant never did this again is to give him the death penalty did not suggest to the jury that defendant might be released on parole if sentenced to life and was not improper. **State v. Payne**, 505.

§ 458 NCI4th). Argument of counsel; possibility of parole

Since defendant would have been eligible for parole had he been sentenced to life imprisonment in North Carolina and that life sentence made to commence at the expiration of a life sentence defendant had received in Virginia, the decision of *Simmons v. South Carolina* was inapplicable even though the State did argue defendant's future dangerousness as a reason for imposing the death penalty, and the trial court did not err under *Simmons* by refusing to permit defense counsel to argue to the jury anything about parole. **State v. Price**, 756.

CRIMINAL LAW—Continued

§ 461 (NCI4th). Argument of counsel; comment on matters not in evidence

There was no plain error in a first-degree murder sentencing hearing where the prosecutor argued that the victim's daughter, who was two-and-one-half years old and present in the home when the killing occurred, would probably begin to remember more of the events. **State v. Reeves,** 700.

There was no plain error in a first-degree murder sentencing hearing in the prosecutor's argument concerning balancing aggravating and mitigating circumstances where defendant contended that it was error for the prosecutor to argue that the jury could consider other factors than the aggravating and mitigating circumstances found in determining whether the aggravator outweighed the mitigating circumstances. **Ibid.**

§ 463 (NCI4th). Argument of counsel; comments supported by evidence

The trial court did not err in a prosecution for first-degree murder, second-degree murder, and assault in which defendant claimed self-defense by overruling defendant's objection to the prosecutor's closing argument that the victim could not have been a threat where the medical examiner had testified that the victim was shot once in the abdomen and twice in the back. **State v. Terry,** 615.

There was no error in a first-degree murder sentencing hearing where the prosecutor argued that defendant's sexual disorder had not come up until he was in his twenties when he was caught in Virginia for abducting a park worker where there was testimony that defendant's disorder was first revealed in a forensic evaluation when he was arrested in Virginia. **State v. Reeves,** 700.

§ 464 (NCI4th). Argument of counsel; misstatement of evidence

There was no gross impropriety in the closing argument of a resentencing hearing for first-degree murder where the prosecutor stated that there was no evidence to support the mitigating circumstance that defendant had admitted his involvement at an early stage of the proceedings or had cooperated with law enforcement officers when defendant made an inculpatory statement following the killing. **State v. Bacon,** 66.

There was no prejudice in a resentencing hearing for first-degree murder where the prosecutor argued that the jury should refrain from finding that defendant had no history of violent behavior by referring to a defense psychiatrist's testimony. The trial court cautioned the jurors to consider that evidence only for the purpose of explaining or supporting the psychiatrist's opinion; moreover, the jury found the mitigating circumstance. **Ibid.**

§ 468 (NCI4th). Argument of counsel; miscellaneous comments

There was no plain error in a first-degree murder sentencing hearing where defendant contended that it was error for the prosecutor to argue prior rape and kidnapping convictions as reasons for imposing the death penalty when the court had ruled that these were not to be considered as substantive evidence but only as factors on which a medical expert based his opinion. **State v. Reeves,** 700.

There was no plain error in a first-degree murder sentencing hearing where the prosecutor argued that defendant, if sentenced to life, would lead a comfortable life in prison. **Ibid.**

§ 477 (NCI4th). Statements and misconduct of prospective jurors

There was no prejudicial error in a resentencing hearing for a first-degree murder where a prospective juror was allowed to enter the jury room at a time when it could still have been occupied by other prospective jurors. **State v. Bacon,** 66.

CRIMINAL LAW—Continued

§ 478 (NCI4th). Communications with jurors generally; admonitions by court

There was no prejudicial error in a first-degree murder sentencing hearing where the foreperson returned to the courtroom late in the day after deliberations had begun and indicated that the jury would like to deliberate at least another hour and, when the judge indicated that dinner could be brought in, requested drinks and something light. **State v. Reeves,** 700.

§ 483 (NCI4th). Communication of jurors with bailiff or clerk

There was no error in a resentencing for first-degree murder where the court ordered the bailiff to engage in unrecorded communications with the prospective jurors and the trial jury, the clerk also communicated with the jury, but the challenged communications were of an administrative nature, did not relate to the consideration of defendant's guilt, defendant's confrontation rights were not implicated, and defendant's presence would not bear a reasonably substantial relation to his opportunity to defend. **State v. Bacon**, 66.

§ 584 (NCI4th). Collateral estoppel

The trial court did not err in a cocaine prosecution by denying defendant's motion to suppress physical evidence on the ground that the same evidence had been suppressed in an earlier case against him in federal court where the state of North Carolina was not a party to the federal criminal proceeding, nor was any showing made that the State was in privity with the federal government in prosecuting the defendant on the federal drug charges. **State v. Brooks,** 132.

§ 648 (NCI4th). Waiver of right to make motion to dismiss for insufficiency of evidence

Defendant's assignment of error to the denial of his motion to dismiss at the conclusion of the State's evidence was waived by defendant's presentation of evidence. **State v. Gray**, 772.

§ 680 (NCI4th). Peremptory instructions involving mitigating circumstances in capital cases generally

Where defendant requested that peremptory instructions be given only for the mitigating circumstances dealing with mental and emotional impairment, the trial court did not err in failing to give peremptory instructions as to other uncontroverted statutory and nonstatutory mitigating circumstances. **State v. Skipper**, 1.

§ 732 (NCI4th). Opinion of court on evidence; framing of summary of evidence

The trial court did not express an opinion on the evidence by instructing the jury in a first-degree murder case that "[t]here is evidence in this case which tends to show the defendant has admitted facts relating to the crime charged in this case" where defendant testified that he pulled out his gun and shot the victim. **State v. Shuford**, 641.

§ 762 (NCI4th). Reasonable doubt; instruction omitting or including phrase "to a moral certainty"

There was no error in a noncapital first-degree murder trial under *Cage v. Louisiana*, 498 U.S. 39, from the use of the phrase "honest substantial misgiving" in defining reasonable doubt. **State v. Bryant,** 298.

CRIMINAL LAW—Continued

§ 1038 (NCI4th). Effect, form, and requisites of judgment or sentence; generally

A case was remanded for amendment of the judgment sheet where the judgment sheet for first-degree murder also listed a conviction for discharging a firearm into occupied property and imposed a sentence of life imprisonment with no further reference to the firearm charge. **State v. Alexander,** 182.

§ 1042 (NCI4th). Effect, form, and requisites of judgment or sentence; conformity to verdict or plea

A defendant was entitled to a new sentencing for three assault convictions where the indictments included the felony of assault with a deadly weapon inflicting serious injury, the jury found defendant guilty of the lesser charge of assault with a deadly weapon, a misdemeanor, and the judgment and commitment sheet indicate that the judge sentenced defendant on the basis of the felony. **State v. Daniels,** 243.

§ 1056 (NCI4th). Sentencing procedures; statement by defendant

There was no error in a first-degree murder sentencing hearing where defendant was allowed to address the jury, but the court moved the podium from before the jury box, where the attorneys made their arguments, to a place in front of the defendant's table. **State v. Reeves,** 700.

§ 1067 (NCI4th). Evidence at sentencing hearing; evidence of victim

There was no error in a first-degree murder sentencing hearing where a witness testified that the victim was a good wife and mother, a good person who always went to church and would do anything for anyone, and who died not knowing what happened to her two-and-a-half-year-old child. **State v. Reeves,** 700.

§ 1068 (NCI4th). Evidence at sentencing hearing; incompetent or hearsay evidence

Defendant's due process rights were not violated when the trial court in a capital sentencing proceeding refused to permit defendant to ask a witness on redirect (1) if he was telling the truth, and (2) for what church he was a minister. **State v. Skipper,** 1.

§ 1098 (NCI4th). Aggravating factors; prohibiting same evidence to support more than one aggravating factor

The trial court did not improperly aggravate defendant's sentence for assault with a deadly weapon inflicting serious injury with evidence necessary to prove the serious injury element of the crime by finding as a nonstatutory aggravating factor that the victim sustained "extremely severe and permanent" injuries where evidence that the victim sustained a broken neck was sufficient to establish the serious injury element of the crime and the court's finding that the victim suffered "extremely severe and permanent" injuries was based solely on evidence of the victim's paralysis. **State v. Brinson,** 764.

§ 1120 (NCI4th). Nonstatutory aggravating factors; impact of crime on victim

The trial court did not improperly aggravate defendant's sentence for assault with a deadly weapon inflicting serious injury with evidence necessary to prove the serious injury element of the crime by finding as a nonstatutory aggravating factor that the victim sustained "extremely severe and permanent" injuries where evidence that the victim sustained a broken neck was sufficient to establish the serious injury element of

CRIMINAL LAW—Continued

The trial court did not err in a resentencing hearing for first-degree murder by not instructing the jury concerning parole eligibility where defendant argued that the instruction should have been given because of the reference to parole in questions directed to character witnesses. **State v. Bacon**, 66.

§ 1323 (NCI4th). Capital sentencing; instructions; aggravating and mitigating circumstances generally

The statement in the trial court's instructions on the statutory mitigating circumstance of age that "the mitigating effect of the age of the defendant is for you to determine" did not allow the jury to refuse to consider the evidence about age as a mitigating circumstance in violation of a U.S. Supreme Court decision. **State v. Skipper**, 1.

The trial court's instructions which permitted the jury to consider whether nonstatutory mitigating circumstances in fact had mitigating value were not erroneous. **Ibid.**

The trial court did not err by failing to instruct the jury that once one juror finds a mitigating circumstance to exist, all jurors must consider that circumstance when reaching their sentencing decision. **Ibid.**

The trial court's instruction that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances did not allow some jurors to disregard relevant mitigating evidence they had earlier found to exist. **Ibid.**

There was no prejudicial error in a resentencing hearing for a first-degree murder where the court instructed the jury that it must find a nonstatutory mitigating circumstance to have mitigating value before finding the existence of that circumstance. **State v. Bacon**, 66.

The trial court did not commit error when resentencing defendant for a first-degree murder in its instructions concerning the jury's duty to weigh the aggravating and mitigating circumstances. **Ibid.**

The trial court did not err by instructing the jury that it could consider nonstatutory mitigating circumstances if it found that such circumstances existed and that such circumstances had mitigating value. **State v. Payne**, 505.

The definition of aggravating circumstance created by G.S. 15A-2000(e) is not vague and overbroad. **State v. Keel**, 469.

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it could refuse to find any nonstatutory mitigating circumstance which it found did not have mitigating value. **State v. Reeves**, 700.

§ 1325 (NCI4th). Unanimous decision as to mitigating circumstances

The trial court did not err in a capital sentencing hearing by instructing the jury that each juror "may" consider mitigating circumstances that juror found to exist when weighing the aggravating and mitigating circumstances. **State v. Daniels**, 243.

§ 1326 (NCI4th). Instructions; aggravating and mitigating circumstances; burden of proof

The trial court did not err by instructing the jury in a capital sentencing proceeding that defendant had the burden of proving the mitigating circumstances by a preponderance of the evidence. **State v. Skipper**, 1.

The trial court's failure to define "preponderance of the evidence" of its own accord in its instructions on defendant's burden of proof for mitigating circumstances

CRIMINAL LAW—Continued

was not plain error; nor was there plain error in the trial court's explanation that "preponderance of the evidence" requires that the evidence "satisfy" the juror that the circumstance exists. **State v. Payne**, 505.

§ 1327 (NCI4th). Instructions; duty to recommend death sentence

The Pattern Jury Instruction imposing a duty upon the jury to return death if the mitigating circumstances are insufficient to outweigh the aggravating circumstances is not unconstitutional. **State v. Skipper**, 1.

§ 1328 (NCI4th). Sentence recommendation by jury generally

There was no violation of the Eighth Amendment in a first-degree murder sentencing hearing where the jury failed to find five nonstatutory mitigating circumstances. **State v. Reeves,** 700.

The Supreme Court did not find error in a first-degree murder sentencing hearing where defendant contended that the verdict was imposed under the influence of passion, prejudice, and arbitrary factors because the jury failed to find any mitigating circumstances. **Ibid.**

§ 1333 (NCI4th). Consideration of aggravating circumstances generally

The trial court's use of the issues and recommendation sheet in a capital sentencing proceeding did not violate the cruel and unusual punishment clause in the Eighth Amendment and deny defendant due process. **State v. Keel,** 469.

§ 1337 (NCI4th). Particular aggravating circumstances; previous conviction for felony involving violence

The trial court did not err in a capital sentencing procedure by allowing the jury to consider defendant's previous conviction for involuntary manslaughter as the basis for the sole aggravating factor of a previous conviction of a felony involving the use or threat of violence to a person even though defendant argued that involuntary manslaughter is by definition an unintentional killing. **State v. Keel,** 469.

The trial court did not err at a capital sentencing proceeding by declining to give defendant's requested instruction on the aggravating circumstance of a prior felony involving violence that ". . . violence is the use of extreme force with the intent to inflict harm or destruction." **Ibid.**

The trial court did not err in a first-degree murder sentencing hearing by charging the jury that it could find the aggravating circumstance of a prior felony involving violence if it found that defendant had been convicted of second-degree rape and assault with a deadly weapon inflicting serious injury. **State v. Reeves,** 700.

§ 1338 (NCI4th). Particular aggravating circumstances; avoiding arrest or effecting escape

There was no plain error in a first-degree murder sentencing hearing where defendant contended that the prosecutor travelled outside the record to argue that the killing was done to eliminate a witness, but the prosecutor did not explicitly refer to witness elimination in the language of the aggravating circumstance. **State v. Reeves,** 700.

§ 1341 (NCI4th). Particular aggravating circumstances; pecuniary gain

The trial court did not err at a resentencing for first-degree murder by submitting the aggravating circumstance of pecuniary gain where the evidence was sufficient to show that defendant knew of insurance covering the victim's life. **State v. Bacon**, 66.

CRIMINAL LAW—Continued

The trial court did not commit plain error in a first-degree murder resentencing hearing in its instruction on the aggravating circumstance of pecuniary gain where the instruction given was in accordance with the Pattern Jury Instruction except for the sentence "the defendant expected to share in the life insurance proceeds on the life of the victim." **Ibid.**

The trial court did not err in a resentencing for first-degree murder by submitting the aggravating circumstance of pecuniary gain. **Ibid.**

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance of pecuniary gain. **State v. Daniels,** 243.

§ 1347 (NCI4th). Particular aggravating circumstances; murder as course of conduct

The trial court properly submitted the course of conduct aggravating circumstance to the jury in a capital sentencing proceeding for two murders where the evidence showed that defendant pulled a semiautomatic rifle from under the seat of his truck and fired multiple shots at the female victim, said "you too," and then shot the male victim. **State v. Skipper,** 1.

§ 1348 (NCI4th). Mitigating circumstances; definition

The trial court's instructions defining mitigating circumstances in a capital sentencing proceeding did not restrict the jury from considering any evidence that may have lessened defendant's sentence, whether it was evidence that was directly based on defendant's character or evidence that related to the actual murders. **State v. Skipper,** 1.

The trial court did not err when resentencing defendant for first-degree murder by refusing to instruct the jury on sympathy. **State v. Bacon,** 66.

The trial court did not err in a capital sentencing proceeding by failing to give defendant's requested instruction defining mitigating circumstances and directing the jurors that they could properly base their sentencing recommendation upon any sympathy they might have for defendant. **State v. Keel,** 469.

§ 1349 (NCI4th). Mitigating circumstances; submission of circumstance

The trial court did not err in a first-degree murder prosecution by not specifically instructing the jury that the statutory mitigating circumstances have mitigating value where defendant contended that the jurors would have become confused based on the fact that they were told to determine whether nonstatutory mitigating circumstances had mitigating value. **State v. Daniels,** 243.

The trial court did not err in a capital sentencing proceeding in the issues contained on the Issues and Recommendation as to Punishment Form. **State v. Keel,** 469.

§ 1351 (NCI4th). Mitigating circumstances; burden of proof

A defendant in a capital sentencing proceeding was not deprived of his right to be free from cruel and unusual punishment where the court instructed the jury that the defendant had the burden of proving mitigating circumstances by a preponderance of the evidence. **State v. Keel,** 469.

§ 1355 (NCI4th). Mitigating circumstances; lack of prior criminal activity

The trial court erred by failing to instruct the jury in a capital sentencing hearing on the statutory mitigating circumstance that defendant had no significant history of prior criminal activity where evidence presented by the State revealed that defendant had used drugs illegally and had been convicted of larceny, receiving stolen goods and

forgery, since the jury should have been allowed to consider whether this history was insignificant. **State v. Quick**, 359.

There was no error in a first-degree murder prosecution in the instructions on the mitigating circumstance of no significant history of prior criminal conduct where the instruction on the circumstance limited it to the previous ten years as defendant had done when he presented the evidence; the trial court instructed the jury in the only way supported by the evidence. **State v. Daniels,** 243.

The trial court did not err by failing to submit the mitigating circumstance that defendant had no significant history of prior criminal activity where the State presented evidence that defendant had been convicted of assault with a deadly weapon inflicting serious bodily injury in 1978, 1982, and 1984. **State v. Skipper**, 1.

The trial court's use of the phrase "little, if any" prior criminal activity in its instruction on the no significant history of criminal activity mitigating circumstance was not plain error when considered in context where the instruction correctly informed the jury that, in determining the significance of defendant's criminal history, it should consider the nature and quality of defendant's activity rather than focus solely on the number of acts. **State v. Payne**, 505.

§ 1357 (NCI4th). Mitigating circumstances; mental or emotional disturbance; instructions

The trial court did not commit plain error during a resentencing hearing for a first-degree murder in its instructions on mental or emotional disturbance where defendant contended that the trial judge should have included in its instruction a defense psychiatrist's testimony regarding defendant's psychological makeup, conjoined with the needs of the coconspirator and that of their relationship. **State v. Bacon**, 66.

The rejection by all jurors of the mental or emotional disturbance mitigating circumstance was not arbitrary and did not violate either the Eighth Amendment or G.S. 15A-2000(d)(2). **State v. Payne**, 505.

The trial court did not err by failing to include personality disorder and borderline intelligence as grounds for considering the mental or emotional disturbance mitigating circumstance in an instruction which included the effects of gasoline sniffing and alcohol consumption as evidence of this circumstance where the instruction accorded with defendant's evidence in that the jury could consider defendant's lower intellectual functioning as one of the effects of his substance abuse; furthermore, the trial court's use of the conjunctive in this instruction accorded with defendant's evidence that the effects of gasoline inhalation and alcohol intoxication interact with each other and cause a greater effect than if administered separately and was not plain error. **Ibid.**

There was no error in a first-degree murder sentencing hearing where the jury did not find the mitigating circumstance that the murder was committed under the influence of mental or emotional disturbance but the evidence was not uncontradicted. **State v. Reeves,** 700.

The trial court did not err in a first-degree murder sentencing hearing in its instructions on mental or emotional disturbance where defendant contended that the court limited the jury's consideration of disturbances but the court instructed the jury that it could consider "any other mental or emotional disturbance or personality disorder." **Ibid.**

CRIMINAL LAW—Continued

§ 1360 (NCI4th). Mitigating circumstances; impaired capacity of defendant; instructions

The trial court did not commit plain error during a resentencing hearing for a first-degree murder in its instructions on impaired capacity where defendant contended that the trial judge should have included in its instruction a defense psychiatrist's testimony regarding defendant's psychological makeup, conjoined with the needs of the coconspirator and that of their relationship. **State v. Bacon**, 66.

The trial court did not err by failing to mention defendant's personality disorder as a possible source of the impaired capacity mitigating circumstance in an instruction which included gasoline inhalation, alcohol consumption and low intelligence as possible causes of this circumstance where defendant's experts did not link defendant's personality disorders to any impairment in capacity; furthermore, the trial court's use of the conjunctive in this instruction accorded with defendant's evidence and was not plain error. **State v. Payne**, 505.

The rejection by all jurors of the impaired capacity mitigating circumstance was not arbitrary and did not violate either the Eighth Amendment or G.S. 15A-2000(d)(2). **Ibid.**

There was no error in a first-degree murder sentencing hearing where the jury did not find the mitigating circumstance of impaired capacity but the evidence was not uncontradicted. **State v. Reeves**, 700.

The trial court did not err in a first-degree murder sentencing hearing in its instructions on impaired capacity where defendant contended that the court limited the jury's consideration of sources of impairment but the court instructed the jury that they could consider "any other mental or emotional disturbance or personality disorder." **Ibid.**

§ 1361 (NCI4th). Mitigating circumstances; impaired capacity of defendant; intoxication

The trial court's statement in its instructions on the mitigating circumstance of impaired capacity in a capital sentencing proceeding that "generally voluntary intoxication is no excuse for crime" could not have misled jurors to interpret impaired capacity as excluding impairment due to voluntary gasoline or alcohol intoxication. **State v. Payne**, 505.

§ 1362 (NCI4th). Mitigating circumstances; age of defendant

The statement in the trial court's instructions on the statutory mitigating circumstance of age that "the mitigating effect of the age of the defendant is for you to determine" did not allow the jury to refuse to consider the evidence about age as a mitigating circumstance in violation of a U.S. Supreme Court decision. **State v. Skipper**, 1.

§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence

The trial court did not err by failing to submit separately each nonstatutory mitigating circumstance requested in writing by defendant where some of the requested circumstances were combined by the trial court on the written recommendation form, and all of the requested circumstances were subsumed by the circumstances submitted. **State v. Skipper**, 1.

The trial court did not err in a resentencing hearing for first-degree murder by refusing to submit the mitigating circumstance that defendant aided in the apprehension of another capital felon, even though the case had been remanded for failure to

submit this circumstance, because the State introduced less testimony than at the first hearing and defendant decided not to include additional evidence that might have required submission of this circumstance. **State v. Bacon**, 66.

The trial court did not err in a first-degree murder prosecution by instructing the jury that it could refuse to consider nonstatutory mitigating evidence if it deemed that the evidence had no mitigating value. **State v. Daniels**, 243.

The trial court did not err under *Simmons v. South Carolina* by refusing to submit to the jury in a capital sentencing proceeding defendant's Virginia life sentence as a nonstatutory mitigating circumstance. **State v. Price**, 756.

The trial court did not err in a first-degree murder sentencing hearing by excluding from the evidence a certified copy of defendant's Virginia convictions and sentences and precluding his arguing that they were mitigating evidence. **State v. Reeves,** 700.

§ 1372 (NCI4th). Proportionality review; pool of cases

The composition of the "proportionality pool" used in reviewing death sentences reflects post-conviction relief. **State v. Bacon,** 66.

§ 1373 (NCI4th). Proportionality review; death penalty held not excessive or disproportionate

A death sentence was not disproportionate where there was only one aggravating circumstance, pecuniary gain. **State v. Bacon,** 66.

Sentences of death imposed upon defendant for two first-degree murders are not excessive or disproportionate where defendant, without provocation, shot the two victims numerous times with a semiautomatic rifle containing fragmentation bullets, left them lying on the ground, and never attempted to get them any help. **State v. Skipper**, 1.

A death penalty was not disproportionate. **State v. Daniels,** 243.

A sentence of death for first-degree murder was not disproportionate. **State v. Keel,** 469.

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate where defendant broke into the victim's home and brutally killed her by sixteen blows with a hatchet, defendant raped the victim while she was still alive, and defendant showed not remorse for the crime. **State v. Payne**, 505.

A sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the record supports the finding of the aggravating circumstance on which the death penalty was based, and the sentence was not excessive or disproportionate. **State v. Reeves,** 700.

DIVORCE AND SEPARATION

§ 337 (NCI4th). Child custody; basis of determination

The trial judge's comments about the father's age in her oral statement explaining her decision to grant child custody to defendant mother and her mention of the ages of both parents in her written order did not create a presumption in favor of the younger mother in violation of G.S. 50-13.2(a). **Phelps v. Phelps**, 344.

DIVORCE AND SEPARATION—Continued

§ 350 (NCI4th). Particular considerations in awarding child custody; miscellaneous circumstances

The trial judge's brief references to the ages of the parties in an oral statement and in her written order did not indicate that plaintiff father's age was a "fundamental" basis of her decision awarding custody of a child to defendant mother. **Phelps v. Phelps**, 344.

The statute the trial court follows in determining child custody does not classify an older parent either on its face or in its application, and the trial court's passing comments about plaintiff father's age when determining the child's best interest in accordance with the statute did not constitute an unlawful classification in violation of plaintiff's equal protection rights. **Ibid.**

Assuming that a parent's right to the custody of a child was fundamental, the trial court's consideration of a parent's age in determining custody between two natural parents did not violate equal protection. **Ibid.**

§ 352 (NCI4th). Child custody; child's right to testify; court's discretion as to method of testifying

The trial judge in a child custody case did not err by indicating that she found it "dangerous" to allow into evidence statements of parents relating what a child has said and by giving such statements limited weight where the judge admitted such hearsay statements under Rule 803 and acknowledged the admission of such evidence in her written findings of fact. **Phelps v. Phelps**, 344.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 63 (NCI4th). Air pollution; permit requirements

The administrative hearing provisions of the NCAPA apply to respondent DEHNR and to the pollution control permit proceeding, and the third party petitioner is entitled to an administrative hearing pursuant to G.S. 150B-23 unless he is not a person aggrieved by the permitting decision of the DEHNR or the organic statute, G.S. 143-215.108(e), amends, repeals or makes an exception to the NCAPA so as to exclude him from those expressly entitled to appeal thereunder. **Empire Power Co. v. N.C. Dept. of E.H.N.R.**, 569.

Petitioner is a "person aggrieved" as defined by the NCAPA within the meaning of the Air Pollution Control Act where he alleged that DEHNR issued an air quality permit to respondent power company for sixteen electric generating units in violation of certain of its statutory and regulatory duties, and that, as the owner of property immediately adjacent to and downwind of the site of the proposed generating units, he will suffer from the adverse environmental consequences of pollutants from the units. **Ibid.**

The air pollution control administrative review provisions in G.S. 143-215.108(e) do not by implication amend, repeal, or make an exception to the NCAPA so as to exclude the third party petitioner from those entitled to an administrative hearing thereunder, and petitioner is entitled to commence an administrative hearing in the OAH to determine his right under the Air Pollution Control Act to have DEHNR issue or deny air quality permits to respondent power company in accordance therewith. **Ibid.**

There was no merit to respondents' contention that a third party should have no right to appeal to the OAH from the decision of the DEHNR to grant an air pollution control permit to a power company because DEHNR's review of applications for such

EVIDENCE AND WITNESSES—Continued

§ 284 (NCI4th). Methods of proving character; specific acts of victim to prove self-defense

In a prosecution of defendant inmates for the murder of a fellow inmate wherein defendants contended that another inmate killed the victim because he was afraid the victim would kill him, evidence that the victim had twice been convicted of murder was not admissible under Rule 404(a)(2) as a pertinent character trait of the victim since neither defendant relied on self-defense or any other justifiable homicide which would have made the victim's character pertinent. **State v. Leazer**, 454.

§ 285 (NCI4th). Specific acts of victim to prove self-defense; requirement that defendant be present or have knowledge of acts

The trial court in a murder prosecution did not err by denying defendant's motion to permit defendant to introduce prior convictions of the victim for assault with a deadly weapon and burglary, forensic evaluation records pertaining to the assault conviction, and prison records of the victim's disciplinary infractions where there was no evidence that defendant was aware of the victim's criminal past at the time of the killing, and defendant's purpose for offering the evidence was to show that the victim was the aggressor. **State v. Smith**, 658.

§ 293 (NCI4th). Other crimes, wrongs, or acts; dropping of charges for previous offenses; acquittal

The trial court did not err in a first-degree murder prosecution by admitting testimony by the victim's twelve-year-old son that he had awakened at 5:00 a.m. on a morning prior to the day of the murder when he heard defendant in the house; that he had recognized defendant as the intruder, climbed out a window and gone to the home of a neighbor, who called the police; that defendant had been charged with felonious breaking or entering; and that a district court judge had found no probable cause. **State v. Lynch**, 415.

§ 339 (NCI4th). Other crimes, wrongs, or acts; to show malice, premeditation, or deliberation

The trial court did not err in a noncapital first-degree murder prosecution by allowing a prosecution witness to testify concerning other alleged acts of violence and threats of violence by defendant where the testimony was corroborative of other testimony, was corroborated by other testimony, and tended to show malice, an essential element of first-degree murder. **State v. Bryant**, 298.

§ 542 (NCI4th). Relevancy and competency requirements; homicide and like offenses

The trial court did not err in a first-degree murder sentencing hearing by admitting the testimony of the victim's five-year-old daughter, who was in another room of their home when the victim was killed, because the testimony as to the circumstances of the victim's death did "throw light" on the crime. **State v. Reeves**, 700.

§ 694 (NCI4th). Offer of proof; record of excluded evidence; necessity for making record

There was no error in a first-degree murder prosecution where defendant twice attempted to ask a deputy on cross-examination whether the initial report in a domestic investigation is sometimes not true, objections were sustained, and defendant then asked if that was because people are nervous and upset and afraid, sometimes because they are not telling the truth, to which the deputy answered "It's possible." **State v. Lynch**, 415.

EVIDENCE AND WITNESSES—Continued

§ 931 (NCI4th). Exceptions to hearsay rule; excited utterances; testimony as to statement made by bystander

The trial court did not err in a first-degree murder sentencing hearing by allowing the victim's mother-in-law to testify that on the morning of the murder she went to the victim's home, where the victim's two-and-a-half-year-old daughter came to the door and said, "Mama is asleep. Mama is dead." **State v. Reeves,** 700.

§ 1009 (NCI4th). Residual exception to hearsay rule; equivalent guarantees of trustworthiness

The trial court did not err by finding that hearsay statements made to an officer by an unavailable witness who refused to testify possessed sufficient guarantees of trustworthiness to be constitutionally admissible in a murder trial under Rule 804(b)(5). **State v. Peterson,** 384.

§ 1077 (NCI4th). Propriety of permitting cross-examination of defendant regarding admission by silence

The trial court erred by permitting the State to cross-examine defendant about his silence in the face of an SBI agent's accusation of murder during interrogation after defendant had been advised of his Miranda rights and had been informed that he was under arrest. **State v. Quick,** 359.

§ 1079 (NCI4th). Silence of defendant as implied admission; instructions to jury

There was no prejudicial error in a first-degree murder prosecution from the trial court's denial of defendant's request for an instruction where defendant specifically argued that the tendered instruction was necessary because of the State's repeated references to his exercise of his right to counsel and his refusal to submit to a polygraph test or to undergo hypnosis. **State v. Jones,** 198.

§ 1082 (NCI4th). Effect of testimony that defendant asserted constitutional rights

There was no prejudicial error in an assault and murder prosecution where the trial court admitted testimony concerning defendant's exercise of his right to remain silent. **State v. Alexander,** 182.

§ 1087 (NCI4th). Silence as implied admission; effect of accusation, lack of accusation, or other statements or conduct by law enforcement officer

The trial court in a capital resentencing hearing erred by permitting the State to elicit testimony from an SBI agent that, during interrogation after defendant had been advised of his Miranda rights and had been informed that he was under arrest, defendant had remained silent when faced with the agent's accusation that he murdered the victim. **State v. Quick,** 359.

§ 1250 (NCI4th). Invocation of right to counsel generally; absence of counsel

Assuming that the trial court in a first-degree murder prosecution erred by failing to sustain defendant's objection and grant his motion to strike testimony by an F.B.I. agent who arrested defendant for unlawful flight to avoid prosecution that he asked defendant "if he was willing to make a statement, at which time he said he wanted to consult with an attorney before talking about the arresting matter," this error was harmless beyond a reasonable doubt. **State v. Elmore,** 789.

EVIDENCE AND WITNESSES—Continued

§ 2071 (NCI4th). Opinion testimony by lay persons; description of wound, incision, or inserted object

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and murder by allowing an officer to testify that a photograph showed small openings that appeared to be buckshot in the assault victim's arm or by allowing the assault victim to testify that photographs of the vehicle he was driving on the night of the murder showed gunshot holes in the vehicle. **State v. Alexander,** 182.

§ 2101 (NCI4th). Competency generally; to waive rights

The trial court did not err in a first-degree murder prosecution by excluding portions of the testimony of a law enforcement officer regarding defendant's mental state following his confession. **State v. Daniels,** 243.

§ 2124 (NCI4th). Lay testimony; appearance, condition, or behavior of firearms

The trial court did not abuse its discretion by refusing to admit opinion testimony of an emergency medical technician concerning the distance from which the victim was shot without some showing by defendant that the witness was qualified to testify about gunshot wounds, either as a lay witness or as an expert. **State v. Shuford,** 641.

§ 2171 (NCI4th). Basis or predicate for expert's opinion; necessity to disclose facts underlying conclusion; request to state

The trial court did not abuse its discretion in a sentencing hearing for first-degree murder by allowing the State to ask a psychiatrist questions on cross-examination which revealed rapes and assaults by defendant in Virginia and Tennessee. **State v. Reeves,** 700.

§ 2227 (NCI4th). Particular subjects of expert testimony; testimony as to bullet, shot, or projectile

The trial court did not abuse its discretion in a noncapital first-degree murder prosecution by admitting a witness to testify as an expert in the field of bullet lead composition. **State v. Jones,** 198.

§ 2296 (NCI4th). Assessment of mental health or state of mind; conclusion based on interviews or examinations conducted by others

The trial court did not err in a first-degree murder prosecution by overruling defendant's objection to testimony by the State's psychiatric expert where the expert had not personally interviewed defendant. **State v. Daniels,** 243.

§ 2477 (NCI4th). Exclusion or sequestration of witnesses generally

There was no abuse of discretion in a noncapital first-degree murder prosecution where the State requested that defendant's witnesses be sequestered, defendant contended that sequestration should be universal if ordered, and the State was granted an exception for its lead officer under G.S. 8C-1, Rule 615(3). **State v. Jones,** 198.

§ 2522 (NCI4th). Qualifications of witnesses; psychiatric examination of witness

The trial court erred in a prosecution for the sexual assault of a nineteen-year-old mentally handicapped female by appointing a licensed psychologist to examine the victim and directing the psychologist to testify if called as a witness. **State v. Horn,** 449.

EVIDENCE AND WITNESSES—Continued

§ 2538 (NCI4th). Qualifications of witnesses; children generally; test of competency

There was no error in a first-degree murder sentencing hearing where the prosecutor requested that the victim's daughter, five years old at the time of the hearing, be allowed to testify while sitting on her stepmother's lap; the court warned the stepmother that she must not intimate in any way to the child how she should testify; and the court put in the record after the testimony was complete that the stepmother had followed the court's instructions. **State v. Reeves,** 700.

§ 2539 (NCI4th). Qualifications of witnesses; children; ability to express herself

There was no error in a first-degree murder sentencing hearing in the admission of the testimony of the victim's daughter, who was two-and-a-half years old at the time of the killing and five years old at the time of the hearing. **State v. Reeves,** 700.

§ 2540 (NCI4th). Qualifications of witnesses; children; understanding of duty to tell the truth

The trial court did not err in a first-degree murder sentencing hearing by admitting the testimony of the victim's two-and-a-half-year-old daughter, who was five at the time of the hearing, where the daughter testified in effect that a person could be punished for not telling the truth. **State v. Reeves,** 700.

§ 2542 (NCI4th). Qualifications of witnesses; children; age of child

There was no error in a first-degree murder sentencing hearing in the admission of the testimony of the victim's daughter, who was two-and-a-half years old at the time of the killing and five years old at the time of the hearing. **State v. Reeves,** 700.

§ 2593 (NCI4th). Qualifications of witnesses; other particular persons; attorney, generally

The trial court did not err in a first-degree murder prosecution by excluding the testimony of the public defender, in whose office one of defendant's attorneys worked, or by denying that attorney's motion to withdraw. **State v. Daniels,** 243.

§ 2791 (NCI4th). Question calling for witness's comment as to credibility

The trial court did not err by refusing to permit defendant to ask a witness on redirect examination in a capital sentencing proceeding whether he was "telling this jury the truth." **State v. Skipper,** 1.

§ 2793 (NCI4th). Questions calling for speculative answer

Any error by the trial court in a murder trial in permitting the State to cross-examine two witnesses already sentenced for the victim's murder regarding the actual amount of time they would serve in prison did not constitute plain error. **State v. Peterson,** 384.

§ 2840 (NCI4th). Refreshing memory by writings or other objects generally

There was no prejudicial error in a first-degree murder prosecution where defendant asked a police officer on cross-examination whether he had told another officer that defendant was "all coked up"; the officer had responded that he did not recall making that statement; and the trial court refused to allow defendant to refresh the officer's memory with a transcript of a tape recording of a telephonic transmission. **State v. Daniels,** 243.

EVIDENCE AND WITNESSES—Continued

§ 2859 (NCI4th). Writing or object used during testimony; introduction into evidence

Rule 612 does not provide for the admission into evidence of writings used to refresh a witness's memory but entitles defendant only to have such writings produced at trial, the admissibility of these writings being subject to the same rules of admissibility that apply to any evidence. **State v. Shuford**, 641.

§ 2873 (NCI4th). Scope and extent of cross-examination generally; relevant matters

The trial court did not err during a resentencing hearing in a first-degree murder prosecution by allowing the district attorney to cross-examine defendant's expert witness as to whether defendant was dangerous where the cross-examination plainly rebutted the evidence in support of the nonstatutory mitigating circumstance concerning the likelihood that defendant would not commit another crime. **State v. Bacon**, 66.

§ 2891 (NCI4th). Cross-examination as to particular matters; sexual behavior

The trial court did not err in a first-degree murder prosecution by excluding testimony on cross-examination that a witness to whom defendant confessed had sexual relations with defendant after the confession. **State v. Bryant**, 298.

§ 2899 (NCI4th). Cross-examination as to particular matters; imprisonment

There was no error in a first-degree murder sentencing hearing where a psychiatrist who had examined defendant testified that defendant had functioned well for more than a year in jail and that with medication and treatment "would be safe" in a prison setting, and the State was allowed to ask the witness on cross-examination whether it would affect his opinion if he had heard that defendant had attempted to escape from prison in Virginia. **State v. Reeves**, 700.

§ 2906 (NCI4th). Redirect examination; examination as to new issue

The trial court properly excluded a question defendant asked a witness on redirect as to the name of the church for which he was the minister where this question went beyond the scope of cross-examination. **State v. Skipper**, 1.

§ 2954 (NCI4th). Basis for impeachment; payment of witness for testifying

The trial court did not err during a resentencing hearing in a first-degree murder case by allowing the district attorney to cross-examine a defense psychiatrist concerning his compensation. **State v. Bacon**, 66.

§ 2983 (NCI4th). Basis for impeachment; conviction of crime generally

Any error by the trial court in a murder trial in permitting the State, without object by defendant, to cross-examine two witnesses already sentenced for the victim's murder regarding the actual amount of time they would serve in prison did not constitute plain error. **State v. Peterson**, 384.

§ 2993 (NCI4th). Basis for impeachment; generally; requirement of valid conviction

The trial court did not err in a first-degree murder prosecution by denying defendant the use of an assault conviction to impeach a State's witness where defendant's attorney asked the witness if he had been convicted of assault, the witness answered that he had not been convicted but had been found not guilty, and defend-

HOMICIDE—Continued

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence that defendant was the perpetrator of the offense. **State v. Taylor,** 597.

§ 232 (NCI4th). Sufficiency of evidence of first-degree murder; eyewitness and other corroborative evidence

The evidence in a first-degree murder trial, including testimony that an eyewitness saw defendant holding a gun to the victim's head just before she heard one gunshot, was sufficient to withstand defendant's motion for a directed verdict at the close of the evidence. **State v. Peterson,** 384.

The evidence was sufficient to support defendant's conviction of first-degree murder based on premeditation and deliberation and failed to establish self-defense as a matter of law. **State v. Gray,** 772.

§ 244 (NCI4th). Sufficiency of evidence; first-degree murder; malice, premeditation, and deliberation; intent to kill generally

There was sufficient evidence in a noncapital first-degree murder prosecution where premeditation and deliberation could be inferred from the number of wounds, the brutal manner in which they were inflicted, and defendant's attempt to cover up his actions in his statements to the police. **State v. Taylor,** 597.

§ 262 (NCI4th). Sufficiency of evidence; what constitutes murder in the perpetration of felony; unbroken chain of events

The trial court did not err in submitting first-degree felony murder to the jury where defendant argued that there was an insufficient connection between the murder and the underlying felony of felonious assault, but an interrelationship clearly existed between this felonious assault and the homicide in that the assault of one victim and the killing of another were part of an unbroken chain of events all of which occurred within two seconds. **State v. Terry,** 615.

§ 271 (NCI4th). Effect of not having formed intent to kill at time of robbery

There was no error in submitting the felony murder theory with the predicate felony of common law robbery where defendant admitted in his confession that he intended to and did ask the victim for money; when she responded that she was going to call his mother, defendant punched her, strangled her, and took $70.00 to $80.00 from her wallet; defendant stated that he was having financial problems and that he could lose his house; and defendant said, "Bills set me off." **State v. Daniels,** 243.

§ 280 (NCI4th). Sufficiency of evidence; felony murder; discharge of firearm into occupied residence or vehicle

The State presented sufficient evidence for the jury to conclude that defendant personally fired the shot that inflicted the fatal wound upon the victim so as to support defendant's conviction of first-degree felony murder based upon the predicate felony of firing into an occupied vehicle. **State v. Carson,** 407.

§ 445 (NCI4th). Presumption or inference of unlawfulness and malice; effect of admission by defendant of intentional killing

The trial court did not err by instructing the jury in a murder trial that it could infer malice and unlawfulness if the State proved or "if it is admitted" that defendant intentionally used a deadly weapon where defendant testified at trial that he pulled out his gun and shot the victim. **State v. Shuford,** 641.

HOMICIDE—Continued

§ 478 (NCI4th). Instructions on transferred intent

The trial court's instruction on transferred intent as it related to a charge of assault with a deadly weapon with intent to kill inflicting serious injury did not permit the jury to apply an unconstitutional presumption against defendant. **State v. Carson**, 407.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

The trial court's instruction that the jury could infer premeditation and deliberation from circumstances such as "lack of provocation" could not have confused the jury because it did not explain the difference between legal and ordinary provocation. **State v. Skipper**, 1.

The trial court's instruction that "threats" of the defendant may support an inference of premeditation and deliberation, if unsupported by the evidence, was not plain error. **Ibid.**

§ 550 (NCI4th). Instructions; lesser included offenses generally

When there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment and supported by the evidence must be submitted to the jury. **State v. Camacho**, 224.

The Due Process Clause of the Fourteenth Amendment and North Carolina law require that all lesser included offenses charged in the bill of indictment and supported by the evidence be submitted to the jury, and the trial court's erroneous failure in a first-degree murder prosecution to submit the lesser offenses of second-degree murder and voluntary manslaughter entitled defendant to a new trial. **Ibid.**

§ 552 (NCI4th). Instructions; second-degree murder as lesser included offense of premeditated and deliberated murder; lack of evidence of lesser crime

The evidence of premeditation and deliberation was not equivocal in a prosecution of defendant for two first-degree murders so as to require the trial court to instruct the jury on second-degree murder, the evidence did not indicate the lack of a bad relationship between the female victim and defendant which would support an instruction on second-degree murder, and evidence of defendant's intoxication was insufficient to support an instruction on second-degree murder. **State v. Skipper**, 1.

§ 557 (NCI4th). Instructions; second-degree murder as lesser included offense of murder by poisoning, lying in wait, starvation, or torture

There was a conflict in the evidence as to whether defendant committed a murder by lying in wait where the State's evidence tended to show that defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, but defendant testified that he was in the victim's room only to retrieve some personal belongings, that he was trying to pick up some tools he had dropped when the victim entered the room and attacked him with a knife, and that during the struggle with the victim he struck her with a hammer. **State v. Camacho**, 224.

In a prosecution for first-degree murder wherein the evidence was conflicting as to whether defendant committed the offense by lying in wait, the trial court should have submitted the lesser offense of second-degree murder to the jury where defendant's evidence tended to show that after the victim assaulted him with a knife, he intentionally beat her with a hammer but did not intend to kill her. **Ibid.**

HOMICIDE—Continued

JURY—Continued

§ 183 (NCI4th). Challenges for cause generally

The trial court did not err in a first-degree murder prosecution by sustaining the challenge of prospective jurors for cause. **State v. Bacon,** 66.

§ 194 (NCI4th). Grounds for challenge and disqualification generally

The trial judge did not act impartially in favor of the State in determining challenges for cause of prospective jurors in a capital trial based on their capital punishment beliefs by the manner in which he questioned a juror who gave equivocal answers about her beliefs or by asking jurors being questioned by defendant if they could follow the law as given to them. **State v. Skipper,** 1.

§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors

The trial court did not err by refusing to permit defendant to attempt to rehabilitate a juror who gave equivocal answers about her death penalty views and then, following the prosecutor's explanation about the procedure that must be followed in determining a sentence of death, affirmatively responded three times that she would be substantially impaired in following the law because of her beliefs. **State v. Skipper,** 1.

The trial court did not err during a resentencing hearing for a first-degree murder by not allowing defense counsel to rehabilitate prospective jurors. **State v. Bacon,** 66.

The trial court not err in a first-degree murder prosecution by allowing the State's challenges for cause of prospective jurors on the basis of their opposition to capital punishment without first giving the defendant an opportunity to attempt to rehabilitate. **State v. Keel,** 469.

There was no error in a first-degree murder sentencing hearing where the trial court refused to allow defendant to rehabilitate a juror whom the State challenged for cause. **State v. Reeves,** 700.

§ 227 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; effect of equivocal, uncertain, or conflicting answers.

While a prospective juror's answers about her death penalty views were not entirely unequivocal, the trial court did not err by excusing the juror for cause where her responses revealed that her views on the death penalty would substantially impair her ability to follow the instructions of the court as they related to her duty as a juror. **State v. Skipper,** 1.

§ 243 (NCI4th). Peremptory challenges; capital cases

The trial court did not err in a first-degree murder prosecution by sustaining the peremptory challenge of a prospective juror. **State v. Bacon,** 66.

§ 261 (NCI4th). Peremptory challenges; use to exclude on basis of beliefs about capital punishment generally

It was not unconstitutional to permit the prosecutor in a capital case to peremptorily challenge jurors who expressed reservations about the death penalty. **State v. Skipper,** 1.

§ 262 (NCI4th). Use of peremptory challenges to remove jurors ambivalent about imposing death penalty

The trial court did not err in a resentencing hearing for first-degree murder by allowing the State to peremptorily challenge jurors who were not subject to a chal-

PARENT AND CHILD—Continued

tinuously attempted to set aside her consent; that the male defendant is the biological father and had attempted to legitimate his son on several occasions; a Michigan home study reflects that defendants are fit and appropriate persons to have custody of their son; the son was not eligible for adoption and the rights of his parents have not been terminated; and there was no finding that defendants had neglected their child's welfare in any way. **Petersen v. Rogers,** 397.

§ 28 (NCI4th). Right to visitation

The trial court did not err when revoking an adoption and awarding custody of the child to the biological parents by including a conclusion that there should be no visitation with plaintiffs (the adoptive parents) except as may be consented to and approved by defendants. **Petersen v. Rogers,** 397.

ROBBERY

§ 18 (NCI4th). Lesser offenses of robbery with dangerous weapon

The trial court did not err in failing to instruct on common-law robbery in an armed robbery prosecution where defendant argued that there was no evidence that anyone threatened the life of the victim, but, under the circumstances, a pry bar would be perceived by a four-foot, eleven-inch-tall woman as a dangerous, life-threatening weapon. **State v. Johnson,** 212.

§ 118 (NCI4th). What constitutes dangerous weapon

The trial court did not err in an armed robbery prosecution by denying defendant's request for an instruction on common-law robbery where the victim testified that he was awakened by a man holding what appeared to be a crowbar and threatening to kill him and other evidence showed that the man was defendant and that he possessed a lug wrench. **State v. Johnson,** 212.

SEARCHES AND SEIZURES

§ 49 (NCI4th). Search of area within arrestee's control; vehicle

All of the physical evidence discovered during a search of defendant's car was admissible against defendant in a cocaine prosecution where an SBI agent approached the defendant's car and looked into the interior, using his flashlight; upon viewing an empty holster next to the defendant, the agent asked the defendant where his gun was; defendant told the agent that he was sitting on the gun; and the agent then had probable cause to arrest the defendant for carrying a concealed weapon and, having the requisite probable cause to arrest the defendant, was fully justified in searching the entire interior of the defendant's car during a search incident to that arrest. **State v. Brooks,** 132.

§ 80 (NCI4th). Investigatory stops; reasonable suspicion of criminal activity

An SBI agent's initial encounter with a defendant who was eventually indicted on cocaine charges did not violate the defendant's Fourth Amendment right against unreasonable searches and seizures where the evidence before the trial court tended to show that the agent approached the defendant's vehicle and offered a greeting; no one is protected by the Constitution against the mere approach of police officers in a public place. **State v. Brooks,** 132.

An officer had a reasonable suspicion of criminal activity to justify an investigatory stop of defendant's vehicle where the officer observed a car moving with its lights off at 3:00 a.m. in the parking lot of a business in a generally rural area. **State v. Watkins,** 437.

SEARCHES AND SEIZURES—Continued

§ 82 (NCI4th). Stop and frisk procedures; reasonable suspicion that person may be armed

An SBI agent was not required to give a defendant eventually indicted on cocaine charges Miranda warnings before asking the location of a gun where the agent did not "stop" the defendant, but merely walked up to the defendant, who was sitting in his vehicle, shined a light into the interior, and, upon seeing the empty holster on the seat beside the defendant, acted quite reasonably and properly in asking the defendant about the location of defendant's gun. **State v. Brooks,** 132.

SECURITIES AND INVESTMENT REGULATIONS

§ 119 (NCI4th). Actions involving commodity transactions

The pervasive federal regulatory scheme for futures trading permits the liquidation of a customer's under-margined account without prior demand or notice, and defendant merchant acted properly in liquidating plaintiffs' under-margined stock index futures contracts without notice to plaintiffs where plaintiffs had failed to meet a previous margin call and another margin call was imminent. **Moss v. J.C. Bradford and Co.,** 315.

UTILITIES

§ 286 (NCI4th). Sufficiency of findings or conclusions

In an order of the Utilities Commission establishing a natural gas expansion fund, findings concerning economic development and the benefits to existing customers in unserved areas were supported by the evidence. Although there may have been contrary evidence before the Commission, substantial evidence is not uncontradicted evidence. **State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.,** 236.

WORKERS' COMPENSATION

§ 438 (NCI4th). Right of judicial review of Industrial Commission's final decision; issuance of prerogative writs

The Court of Appeals exceeded its proper authority under G.S. 7A-29(a) by allowing plaintiff's petition for a writ of certiorari to review a workers' compensation order entered by a deputy commissioner and by rendering a decision on the statutory and constitutional validity of the procedures ordinarily employed to stop compensation under Form 24 and Rule 404 of the Industrial Commission. **Martin v. Piedmont Asphalt & Paving,** 785.

ZONING

§ 24 (NCI4th). Validity of regulation of outdoor advertising and billboards

Plaintiff billboard companies' 42 U.S.C. § 1983 claim contesting the constitutionality of a city's outdoor advertising sign ordinance accrued on the effective date of the ordinance, and plaintiffs' action filed five and one-half years after the effective date was barred by both the nine-month statute of limitations for an action contesting the validity of any zoning ordinance contained in G.S. 1-54.1 and 160A-314.1, and by the three-year personal injury statute of limitations set forth in G.S. 1-52(5). **Capital Outdoor Advertising v. City of Raleigh,** 236.

WORD AND PHRASE INDEX